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VOLUME 228

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1912

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1913

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE, Chief Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.
HORACE HARMON LURTON, Associate Justice.
CHARLES EVANS HUGHES, Associate Justice.
WILLIS VAN DEVANTER, Associate Justice.
JOSEPH RUCKER LAMAR, Associate Justice.
MAHLON PITNEY, Associate Justice.

GEORGE WOODWARD WICKERSHAM, Attorney General.[2]
JAMES C. McREYNOLDS, Attorney General.[3]
WILLIAM MARSHALL BULLITT, Solicitor General.[4]
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] Resigned March 4, 1913.

[3] On March 5, 1913, President Wilson nominated James C. McReynolds of Tennessee as Attorney General to succeed George W. Wickersham, resigned. He was confirmed by the Senate the same day. His commission was filed March 10, 1913.

[4] Resigned March 11, 1913. The office of Solicitor General was not filled until after the publication of this volume.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, MARCH 18, 1912.[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, 1912.

ABILENE NATIONAL BANK *v.* DOLLEY, BANK COMMISSIONER OF THE STATE OF KANSAS.

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

No. 175. Submitted March 5, 1913.—Decided March 17, 1913.

The Kansas Bank Depositors' Guaranty Act is not unconstitutional as against national banks either because it discriminates against them in favor of state banks, impairs the obligation of existing contracts, or deprives them of their property without due process of law.

The statutes of the United States where they do not prohibit competition with national banks do not forbid competitors to succeed.

Contracts made after a law is in force are made subject to it, and impose only such obligations and create only such property as the law permits.

The constitutionality of this statute has already been upheld as to state banks in *Assaria State Bank* v. *Dolley*, 219 U. S. 121.

179 Fed. Rep. 461, affirmed.

THE facts, which involve the constitutionality of the Kansas Bank Depositors' Guaranty Act, are stated in the opinion.

Mr. John Lee Webster, Mr. B. P. Waggener, Mr. Chester I. Long, Mr. J. W. Gleed and *Mr. John L. Hunt* for appellants:

The Kansas Bank Depositors' Guaranty Act discrimi-

nates against national banks as instrumentalities of the public service, and destroys their business success and efficiency. *Farmers' Natl. Bank* v. *Dearing*, 91 U. S. 29, 33; *Mercantile Bank* v. *New York*, 121 U. S. 138, 155; *Van Allen* v. *Assessors*, 3 Wall. 573.

The Kansas statute gives preference to private depositors in state banks to exclusion of national banks as creditors and results in unequal distribution of the assets of an insolvent state bank to the disadvantage of national banks. *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283.

The Kansas statute was intended to and does injuriously affect and unlawfully discriminate against national banks. *Davis* v. *Elmira Savings Bank*, 161 U. S. 275; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1.

The law will presume that the legislature knew national banks could not accept of the guaranty provisions and that the legislature intended to discriminate against them and induce them to reorganize as state banks. *Henderson* v. *New York*, 92 U. S. 259; *Easton* v. *Iowa*, 188 U. S. 220, 238; *Bailey* v. *People*, 190 Illinois, 28, 36; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Minnesota* v. *Barber*, 136 U. S. 313, 319; *Galveston &c. Ry. Co.* v. *Texas*, 210 U. S. 217, 227; *Crutcher* v. *Kentucky*, 141 U. S. 47; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1.

Bank guaranty laws are all conducive to improvident banking and are destructive to national banks.

National banks by reason of the effect of the guaranty act upon them have a right to challenge its constitutionality. *Chicago* v. *Collins*, 175 Illinois, 445; *Hutchinson* v. *Beckham*, 118 Fed. Rep. 399; *Old Colony Trust Co.* v. *Atlanta*, 83 Fed. Rep. 39; *S. C.*, 88 Fed. Rep. 859; *Cicero Lumber Co.* v. *Cicero*, 176 Illinois, 1; *Merchants' Exchange* v. *Knott*, 212 Missouri, 616.

The national banks as taxpayers have a right to maintain this suit.

The features of the bank guaranty law which make it

obnoxious to national banks are so connected with other sections of the act as to make this statute unconstitutional. *Employers' Liability Cases*, 207 U. S. 463, 501; *Ill. Cent. R. R. Co.* v. *McKendree*, 203 U. S. 514; *Trademark Cases*, 100 U. S. 82; *Baldwin* v. *Franks*, 120 U. S. 678, 685; *Warren* v. *Mayor*, 2 Gray, 84; *West. Un. Tel. Co.* v. *Austin*, 67 Kansas, 208.

Mr. John S. Dawson, Attorney General of Kansas, *Mr. Fred S. Jackson* and *Mr. G. H. Buckman* for appellees:

Complainants do not show an interest, the nature of which entitles them to question the constitutionality of the statute attacked by them. *Marbury* v. *Madison*, 1 Cr. 137; 8 Cyc. Law & Proc. 787; *State* v. *Smiley*, 65 Kansas, 240; *S. C.*, 196 U. S. 447; *Clarke* v. *Kansas City*, 176 U. S. 114; *Albany Co.* v. *Stanley*, 105 U. S. 305; *Pittsburg* v. *Montgomery*, 152 Indiana, 1; *Tyler* v. *Justices*, 179 U. S. 405; *National Bank* v. *Mayor*, 100 Fed. Rep. 29; *Easton* v. *Iowa*, 188 U. S. 234; *Commonwealth* v. *Merchants' Bk.*, 168 Pa. St. 309; *Hamilton* v. *Vicksburg S. P. R. Co.*, 119 U. S. 280; *Turpin* v. *Lemon*, 187 U. S. 51.

The real question involved in this case is whether or not a State has the right to pass a law controlling its own corporate creatures. *Dolley* v. *Abilene National Bank*, 179 Fed. Rep. 463; *Heath & Milligan Mfg. Co.* v. *Worst*, 207 U. S. 354; *Ozan Lumber Co.* v. *Union Nat. Bk.*, 207 U. S. 256; *People* v. *Naglee*, 1 California, 232; *A., T. & S. F. Ry. Co.* v. *Matthews*, 174 U. S. 106; *Insurance Co.* v. *Daggs*, 172 U. S. 562; *Mutual Life Ins. Co.* v. *Mettler*, 185 U. S. 325.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to restrain the putting into operation of the Kansas Bank Depositors' Guaranty Act (March 6, 1909, Sess. Laws 1909, c. 61), and to have it declared un-

constitutional. It seems to have been filed at about the same time as the bill in *Assaria State Bank* v. *Dolley*, 219 U. S. 121, in which case the law was upheld. The main difference between the two suits is that the other was brought by state banks, and this by national banks. The Circuit Court of Appeals held the bill bad on demurrer, 179 Fed. Rep. 461; 102 C. C. A. 607; and it was dismissed. A writ of certiorari was denied by this court. 218 U. S. 673. In view of the decisions in 219 U. S. and in this case below we shall add comparatively few words.

The ground peculiar to this case is an alleged discrimination against national banks. Allegations in the bill as to the purpose and intent of the statute of course are immaterial. They introduce no new facts, and leave the question as it would be without them, namely, whether anything can be discerned in the terms or effect of the act that infringes the plaintiffs' constitutional rights. A good deal of the argument seems to be that the statute will make state banks so attractive to the public that the national banks will suffer. It is replied that experience has not justified the prophecy. But even if it had, there is nothing to hinder the States from permitting a competing business and doing what Kansas has done with intent to make it popular and safe. The national banks are free to come into the scheme. The suggestion that they could not come in and remain national banks, is simply a statement of the situation of all competitors. They cannot retain the advantages of their adverse situation and share those of the parties with whom they contend. The statutes of the United States when they do not attempt to prohibit competition with national banks do not forbid competitors to succeed.

The specific discrimination pointed out is that under the Kansas statutes the national banks do not share equally with depositors in the assets of an insolvent state bank. The bill alleges that the plaintiffs necessarily have

and make deposits with state banks, and that banks necessarily borrow money from other banks and rediscount paper in other banks, and that the obligation of their contracts will be impaired and they will be deprived of their property without due process of law, contrary to Art. I, § 10, and the Fourteenth Amendment of the Constitution. The section of the statute specified as having this effect is § 4, which contemplates the primary application of the assets of the bank and the double liability of stockholders to depositors. It is replied that the word depositors obviously was used by mistake for creditors and that the statute was amended by substituting the latter word in 1911. (March 13, 1911, Sess. Laws 1911, c. 62, p. 103, § 1.) But further the language of the bill and the argument show that the complaint refers to future transactions, not to past. There is nothing sufficient to raise a question as to dealings before the law went into effect. Contracts made after the law was in force of course are made subject to it, and impose only such obligations and create only such property as the law permits. *Denny* v. *Bennett*, 128 U. S. 489, 494. *Cross Lake Shooting & Fishing Club* v. *Louisiana*, 224 U. S. 632, 638, 639.

The greater part of the bill is taken up with objections to the scheme of the statute in which the plaintiffs have no concern and that have been disposed of by the former decision of this court upon the Kansas act. There is nothing in it that calls for further remark.

Decree affirmed.

UNITED STATES EX REL. KNIGHT *v.* LANE, SECRETARY OF THE INTERIOR.[1]

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 163. Argued March 5, 6, 1913.—Decided March 17, 1913.

Until the legal title to public land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the Land Department. *Brown* v. *Hitchcock*, 173 U. S. 473.

Until the matter is closed by final action the proceedings of an officer of a department are as much open to review or reversal by himself or his successor as are the interlocutory decrees of a court open to review upon the final hearing. *New Orleans* v. *Paine*, 147 U. S. 261.

A decision of the Secretary of the Interior revoking his prior approval of an adjustment between contestants, one of whom is a minor, and which is not arbitrary or capricious, but given after a hearing and in the exercise of the discretion confided to him by law, cannot be reviewed, nor can he be compelled to retract it, by mandamus. *Ness* v. *Fisher*, 223 U. S. 683.

The power given by the act of July 1, 1902, providing for allotment of Cherokee lands in severalty, to the Secretary of the Interior to decide between contestants, is not exhausted by a decision approving a settlement and directing deeds to be submitted to him for approval. Such a decision is interlocutory and not final and power still remained to reconsider and revoke.

35 App. D. C. 429, affirmed.

THE facts, which involve the construction of the act of Congress allotting Cherokee lands in severalty and the power of the Secretary of the Interior thereunder to determine contests and to reconsider his decisions thereon, are stated in the opinion.

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[1] Original docket title United States ex rel. Knight *v.* Richard A. Ballinger, Secretary of the Interior, subsequently changed to Same *v.* Walter L. Fisher, Secretary &c. and subsequently changed to Same *v.* Franklin K. Lane, Secretary &c.

Mr. Frederic D. McKenney, with whom *Mr. James W. Zeverly*, *Mr. James M. Givens* and *Mr. Richard Wm. Stoutz* were on the brief, for plaintiff in error:

The execution by the principal chief of the Cherokee Nation of the patent in favor of Knight, under the circumstances of this case, rendered the issuance of an allotment certificate unnecessary. The patent itself contained within its four corners all pertinent recitals of such a certificate and in addition the appropriate words of grant and conveyance necessary to vest in the patentee title to the lands described. The patent being at least equal in legal potency to and certainly of greater dignity than an allotment certificate, the execution and delivery of the former by the principal chief materially advanced the mutation of title to the lands described therein beyond the point usually indicated by the issuance of the latter. In the absence of fraud or mistake, and neither is shown to have had existence in these proceedings, the rights of the patentee in and to the land became fixed and vested, and thereafter the Secretary of the Interior had but the ministerial power and duty of effecting the recordation and delivery of the patent, "a duty which, within all the definitions, can be enforced by the writ of mandamus." *Ballinger* v. *Frost*, 216 U. S. 240.

As in *Frost's Case* so in the case at bar, the authorities especially and exclusively empowered by the pertinent acts of Congress had executed under the great seal of the Cherokee Nation a patent for the lands embraced therein to Knight.

As in *Frost's Case* so in the case at bar nothing remained to be done by the Secretary but the purely perfunctory and ministerial duty of noting his "approval" thereon and seeing that it was duly delivered to the patentee. See *Garfield* v. *Goldsby*, 211 U. S. 249; *Roberts* v. *United States*, 176 U. S. 221; *Noble* v. *Union River Logging Co.*, 147 U. S. 165; *Frasher* v. *O'Connor*, 115 U. S. 112; *Butter-*

worth v. *Hoe*, 112 U. S. 50; *United States* v. *Schurz*, 102 U. S. 378; *Barney* v. *Dolph*, 97 U. S. 652.

In view of the circumstances and particularly in view of the large sums of money paid to and remaining in the possession of the Commission to the Five Civilized Tribes for the benefit of the minor, and the other large sums expended upon the strength of the Secretary's decision, and his telegram of instructions in improving and developing the lands by erecting derricks and drilling for oil, the present case, while equally as strong in point of law as any one of the cases above cited, excels them in all that strength which equity and good faith add.

Mr. Assistant Attorney General Cobb, with whom *Mr. Solicitor General Bullitt* was on the brief, for defendant in error.

Mr. Justice Van Devanter delivered the opinion of the court.

This writ of error brings up for review a judgment of the Court of Appeals of the District of Columbia (35 App. D. C. 429) affirming a judgment of the Supreme Court of the District refusing a writ of mandamus commanding the Secretary of the Interior to deliver to the relator a patent for a tract of land claimed by the latter as a Cherokee allotment. The facts upon which the decision must turn are these:

On August 21, 1907, a parcel of allottable land containing 50 acres, in the Cherokee Nation, was selected as an allotment for Eva Waters, a minor Cherokee child belonging to the class whose rights to participate in the distribution and allotment of the tribal funds and lands were sustained in the recent decision in *Gritts* v. *Fisher*, 224 U. S. 640. A week later William Twist and the relator, Herman Knight, enrolled Cherokees, respectively selected the westerly 20 acres and the easterly 30 acres of the same

tract as allotments for themselves, and in furtherance of their selections instituted contests against that of Eva Waters. A hearing on Twist's contest resulted in a decision in his favor by the Commissioner to the Five Civilized Tribes. On an appeal to the Commissioner of Indian Affairs that decision was reversed, and a further appeal carried the contest before the Secretary of the Interior. Knight's contest was held in abeyance, before the Commissioner to the Five Civilized Tribes, awaiting the outcome of Twist's. In this situation negotiations were had between representatives of Twist and Knight and the parents of Eva Waters, acting in her behalf, looking to a withdrawal of her selection, subject to the approval of the Secretary of the Interior, in order that there might be no obstacle to the allowance of the later selections of Twist and Knight. The negotiations resulted in an application to the Secretary for permission to effect such an adjustment of the two contests on the payment, for the use of the minor, of an adequate consideration for her potential interest in the land. After a hearing on this application the Secretary, on May 10, 1909, rendered a decision approving the proposed adjustment on condition that there be paid, for the use of the minor, $10,000 for her claim to the 20 acres in Twist's contest and $15,000 for her claim to the 30 acres in Knight's. The Secretary then sent to the Commissioner to the Five Civilized Tribes the following telegram: "Lands in Twist and Knight cases against Waters will be awarded to Twist and Knight respectively upon payment of twenty-five thousand dollars for use of minor Waters, contestants given including fifteenth to make payment. . . . Prepare deeds to respective contestants and have them executed and forwarded here for approval. Report promptly by wire." Within the time named the $25,000 was paid to the Commissioner, for the use of the minor, and thereupon patents to Twist and Knight were executed by the principal chief

of the Cherokee Nation and were forwarded by the Commissioner to the Secretary for his approval.

Under the regulations governing the institution and disposition of contests over allotments a party was accorded thirty days after a decision by the Secretary within which to apply for a rehearing. Within this period the parents of Eva Waters, acting in her behalf, applied to the Secretary for a rehearing of the matter covered by his decision of May 10, 1909, it being asserted in that connection that her potential interest was worth much more than the sum named in the decision, and that her parents' consent to the adjustment had been grounded on inaccurate and misleading information. The application was entertained, and, after a hearing thereon in which Twist and Knight participated, the Secretary rendered a further decision vacating the former one and disapproving the proposed adjustment, on the ground that the consideration which the minor was to receive was not at all adequate. The Secretary also ruled that both contests should be considered and disposed of on their merits and that the $25,000 should be returned. The money was not actually repaid, but this may have been because those who paid it were as yet unwilling to take it back. In consequence of his later decision the Secretary declined to approve the patents executed by the principal chief, or to permit them to be recorded or delivered.

On July 16, 1909, Knight's contest was called for hearing before the Commissioner to the Five Civilized Tribes in pursuance of the Secretary's direction that it be considered and disposed of on its merits, and Knight then appeared and protested against any further steps therein, insisting that in virtue of the matters here recited he had acquired a fixed and absolute right to the patent and that the administrative officers were without authority to proceed with the contest. The protest was disregarded, and on the same day he applied to the Supreme

Court of the District of Columbia for a writ of mandamus, as before indicated, to compel the Secretary of the Interior to deliver to him the patent for the 30 acres and to perform any other acts necessary to clothe him with the full legal title.

The question for decision is, whether in the circumstances the Secretary was without authority to reconsider and vacate his decision of May 10, 1909, approving the proposed adjustment of the relator's contest, whereby the minor, Eva Waters, was to withdraw her selection in consideration of the payment by the relator of $15,000 for her use. It is frankly conceded by counsel for the relator, and rightly so, that the adjustment could not have been made without the Secretary's approval, which means that he possessed a power of decision in the matter. The act of July 1, 1902, 32 Stat. 725, c. 1375, under which the Cherokee lands were being allotted in severalty, shows that Congress was solicitous not only that every member of the tribe should receive an allotment (§§ 11, 16), but that the rights of minors should be specially asserted and conserved (§ 70). And that it was intended to clothe the Secretary with comprehensive powers is shown in the provisions that all matters relating to allotments should be determined under his direction (§ 22) and that all things necessary to carry into effect the provisions of the act, not otherwise therein specifically provided for, should be done under his authority and direction (§ 65). The question therefore is reduced to this: Was his power of decision exhausted when on May 10, 1909, he approved the proposed adjustment? To this there can be only a negative answer. That decision was not final, but interlocutory. In terms it shows that the patent was not to be effective or delivered until he approved it, and the act of 1902 declared that it must have his approval (§ 59). Not only so, but, no statutory provision opposing, effect was to be given to the regulation providing for rehearings

and allowing thirty days within which to apply therefor. Thus, it was as if the decision itself had made provision for a rehearing. Proper regard must also be had for the fact that the act of April 26, 1906, 34 Stat. 137, c. 1876, § 5, expressly contemplated that the title should not pass until the patent was recorded in the office of the Commissioner to the Five Civilized Tribes. In such a case we perceive no reason for departing from the rule applicable to kindred proceedings in the Land Department, which is well stated in the following excerpts from the opinion in *Brown* v. *Hitchcock*, 173 U. S. 473, 476–478:

"Until the legal title to public land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the land department. In *United States* v. *Schurz*, 102 U. S. 378, 396, which was an application for a mandamus to compel the delivery of a patent, it was said: 'Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizen. This court has, with a strong hand, upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.'

* * * * * * * *

"We do not mean to say that cases may not arise in which a party is justified in coming into the courts of the District to assert his rights as against a proceeding in the land department or when the department refuses to act at all. *United States* v. *Schurz, supra*, and *Noble* v. *Union River Logging Railroad Co.*, 147 U. S. 165, are illustrative of these exceptional cases.

"Neither do we affirm that the administrative right of the departments in reference to proceedings before them justifies action without notice to parties interested, any

more than the power of a court to determine legal and equitable rights permits action without notice to parties interested.

* * * * * * * *

"But what we do affirm and reiterate is that power is vested in the Departments to determine all questions of equitable right or title, upon proper notice to the parties interested, and that the courts must, as a general rule, be resorted to only when the legal title has passed from the Government."

As entirely apposite, we repeat the statement in *New Orleans* v. *Paine*, 147 U. S. 261, 266: "Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing."

Inasmuch as the decision of the Secretary revoking his prior approval of the proposed adjustment was not arbitrary or capricious, but was given after a hearing and in the exercise of a judgment and discretion confided to him by law, it cannot be reviewed, or he be compelled to retract it, by mandamus. *Ness* v. *Fisher*, 223 U. S. 683.

The decisions in *Garfield* v. *Goldsby*, 211 U. S. 249, and *Ballinger* v. *Frost*, 216 U. S. 240, are not in conflict with the views here expressed. In the former the writ was awarded to compel the respondent to erase and disregard an entry which he arbitrarily and without notice had caused to be made upon a public record, thereby beclouding the relator's right to an Indian allotment. In the latter the writ was awarded to compel the delivery of a patent which was withheld solely through the unauthorized action of the Secretary in entertaining and sustaining a proceeding in the nature of a contest after the expiration of the time limited by statute for instituting such a proceeding.

Judgment affirmed.

UNITED STATES *v.* GEORGE.

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

No. 442. Argued February 26, 1913.—Decided March 24, 1913.

Quære: whether the Criminal Appeals Act of March 2, 1907, does not require an explicit declaration of the law upon which the indictment is based and a ruling on its validity and construction; and whether on an appeal taken under that act the Government can seek to sustain the indictment as valid under other statutes than those relied upon in the trial court.

An indictment for perjury under § 5392, Rev. Stat., cannot be based on an affidavit not authorized or required by any law of the United States.

Sections 161, 441, 453, 2246 and 2478, Rev. Stat., confer administrative power only on the Secretary of the Interior and the officers of the Land Department. They do not confer legislative power.

There is a distinction between legislative and administrative functions, and under a statutory power to make regulations an administrative officer cannot abridge or enlarge the conditions imposed by statute.

Section 2291, Rev. Stat., prescribes what a homestead claimant and the witnesses are required to make oath to and the Secretary of the Interior has no power to enlarge these requirements.

A charge of crime against the United States must have clear legislative basis.

A homestead claimant making an affidavit not required by § 2291, Rev. Stat., is not guilty of perjury under § 5392, Rev. Stat., although the affidavit was demanded by the Land Office in pursuance of a regulation made by the Secretary of the Interior.

THE facts, which involve the construction of § 5392, Rev. Stat., and the validity of an indictment thereunder for perjury, are stated in the opinion.

Mr. Solicitor General Bullitt for the United States:

Sworn testimony from a homestead claimant himself as to residence and cultivation is authorized by law within

the meaning of Rev. Stat., § 5392, so that perjury may be predicated on the falsity of the testimony.

The indictment is based on a regulation of the General Land Office. See Circular of Commissioner of General Land Office, dated July 17, 1878. *Caha* v. *United States*, 152 U. S. 211, 222.

The regulation of the General Land Office was fully authorized by statute. Rev. Stat., §§ 161, 441, 453, 2246, 2478, 2289 *et seq.*

The regulation is appropriate and in pursuance of the enforcement of Rev. Stat., § 2291. See letter of Secretary of Interior to Commissioner of General Land Office, January 28, 1878.

There is no delegation of legislative power. *United States* v. *Grimaud*, 220 U. S. 506; *Williamson* v. *United States*, 207 U. S. 425; *Caha* v. *United States*, 152 U. S. 211; *United States* v. *Bailey*, 9 Pet. 238.

This court has jurisdiction to consider the view of the case herein advanced.

Mr. J. J. Halligan, with whom *Mr. H. C. Brome* and *Mr. W. T. Wilcox* were on the brief, for defendant in error:

The act of Congress especially provides what the entryman shall make affidavit to in making his final proof, and the Secretary of the Interior has no authority to enlarge the act of Congress, and require the entryman to swear to facts which the act provides shall be proven by two credible witnesses, and perjury cannot be based upon the oath of the entryman to facts which Congress did not require him to make affidavit, but proof of which was required to be made by two other credible witnesses. *Williamson* v. *United States*, 207 U. S. 425; *Robnett* v. *United States*, 169 Fed. Rep. 178; *Dwire* v. *United States*, 170 Fed. Rep. 160; *Patterson* v. *United States*, 181 Fed. Rep. 970; *United States* v. *Howard*, 37 Fed. Rep. 369; *United States* v. *Bed-*

good, 49 Fed. Rep. 54; *Silver* v. *State*, 17 Ohio, 369; *United States* v. *Maid*, 116 Fed. Rep. 650; *United States* v. *Eaton*, 144 U. S. 678.

The case at bar is not to be confounded with those cases wherein Congress has expressly authorized executive departments to make rules to carry out the specific provisions of various acts, and which rules were not provided by Congress itself. Conspicuous examples of those cases are: *United States* v. *Grimaud*, 220 U. S. 506; *United States* v. *Nelson*, 199 Fed. Rep. 464.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Indictment for perjury,[1] by which defendant in error (herein referred to as defendant) is charged with falsely and corruptly taking his solemn oath in a proceeding wherein a law of the United States authorized an oath to be administered before the register of the United States land office at North Platte, Nebraska, the proceeding being the making of proof and final entry of a homestead claim of certain described lands.

The indictment charges that defendant took an oath and subscribed the same and deposed thereby that he built a house and other improvements on the land, which he described and stated their value to be $300.00, and established his residence thereon in April, 1901. The dimensions of the house and other improvements were stated. He further deposed that he had continuously

[1] Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished, etc.

resided on the land after he had established his residence thereon, and his family after his marriage in 1902, with the exception of certain absences which were stated.

These facts, it is alleged in the indictment, were matters of material inquiry of the good faith of the defendant in perfecting his homestead entry. The indictment explicitly negatived the facts so deposed by defendant and charged that he "was not acting in good faith in making said entry and final proof as a home for himself, but in fact to defraud the United States out of the use, title, and possession of said land."

Defendant demurred to the indictment and stated as grounds thereof (1) that it failed to state or charge any crime under the laws of the United States. (2) That there was no law of the United States which required defendant, as claimant, in making his homestead proof, to testify with reference to the matters and things set forth in the indictment, the law of the United States requiring that the facts be proved by two credible witnesses other than the claimant, and did not authorize the claimant to testify in his own behalf with reference thereto.

The demurrer was sustained, and the case was then brought here under the Criminal Appeals Act.

It will be observed that the indictment charges that the oath was taken in a proceeding wherein a law of the United States authorized an oath to be administered. Whether it was is the question in the case; and we are brought to the inquiry as to what law of the United States authorized the oath. To this inquiry the record discloses divergent answers on the part of the Government. In the District Court it was the view and contention of the Government that the indictment was founded on § 5392 of the Revised Statutes and § 2291, as amended by the act of March 3, 1877, c. 122, 19 Stat. 403. The record not disclosing this, and that it might appear, a bill of exceptions was tendered to and authenticated by the district judge.

The bill of exceptions recites that the court in sustaining the demurrer based its decision upon those sections as the law upon which the indictment was founded "and held that there is no law of the United States which required the defendant, as claimant, in making his homestead proof, to testify with reference to the matters and things set forth in the indictment; the law of the United States requiring that said facts be proved by two credible witnesses other than the claimant, and not authorizing the claimant to testify in his own behalf with reference thereto." And so far as the assignment of errors is specific it states § 2291 as the applicable law and assails its construction.

This view of the applicable law of the indictment is now abandoned. Indeed, it is distinctly rejected. The Government in its brief here says: "The present indictment was *not* based on § 2291, for it seems probable that the 'two credible witnesses' there provided for mean two persons *other* than the claimant himself. Therefore, we must seek elsewhere for the authority in law for the claimant to make the oath as to his residence on, and cultivation of, the land he seeks to homestead." And, going elsewhere, the Government finds the law, as it contends, in certain regulations made by the Interior Department.

There is ground for a contention that if this court should be put to a choice between these views of the applicable law of the indictment we should have to select that urged and passed upon by the trial court, and a query might then occur—has this court jurisdiction under the Criminal Appeals Act? That act allows a direct appeal to this court "from a decision or judgment . . . sustaining a demurrer to any indictment . . . where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded." Act of March 2, 1907, c. 2564, 34 Stat. 1246.

This statute seems to require an explicit declaration of the law upon which an indictment is based and a ruling on its validity or construction. To contend for one law as applicable in the trial court and another law in the appellate court would seem not only to be opposed to the requirement of the statute but to be inconsistent with orderly procedure and to confound the relation of trial and appellate tribunals.

But, accepting the case as properly here, we pass to the consideration of the present contention of the Government. Section 2291 is certainly a necessary if not a determinative element in that consideration. It provides as follows: " . . . If . . . the person making such entry . . . proves by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years . . . and makes affidavit that no part of such land has been alienated . . . and that he, she or they will bear true allegiance to the Government of the United States; then, in such case, he, she or they . . . shall be entitled to a patent." It will be observed that the facts required to be proved are stated, by what means proved, and the manner of proof and its quantum. The facts to be proved are (1) cultivation of and residence upon the land and (2) non-alienation and allegiance; the means of proof of the first being two credible witnesses; of the second, affidavit of the claimant. In other words, the section is not only explicit as to what is to be proved but in what manner proved; and what is required of the claimant himself, to-wit, an affidavit, is distinguished from what he must establish by others, to-wit, two credible witnesses. Such, then, are the conditions seemingly legislatively made the exact measure of the obligation of the homestead claimant. It certainly will not be asserted that they can be detracted from. It is asserted that they may be added to, and have been added to by virtue of certain sections of the Revised

Statutes. We insert the sections in the margin.[1] It will be seen that they confer administrative power only. This is indubitably so as to §§ 161, 441, 453 and 2478; and certainly under the guise of regulation legislation cannot be exercised. *United States* v. *United Verde Copper Co.*, 196 U. S. 207. Especial stress, however, is put upon § 2246. By that section the register or receiver is authorized and it is made his "duty to administer any oath required by law or the instructions of the General Land Office in connection with the entry or purchase of any tract of land." These sections, it is contended, as we have seen, were the law of the indictment.

Acting under the authority presumed to be given by § 2246 and the other sections, a regulation was promulgated which prescribed forms of taking preëmption and

[1] Sec. 161. The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

* * * * * * * *

Second. The public lands . . .

Sec. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

Sec. 2246. The register or receiver is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands; but he shall not charge or receive, directly or indirectly, any compensation for administering such oath.

Sec. 2478. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for.

final homestead proof by questions and answers, and provided that "the claimant will be required to testify, as a witness, in his own behalf in the same manner." It was testimony exacted in pursuance of this regulation and in the manner directed by it which constitutes the charge of the indictment. It will be observed, therefore, that the claimant was required to testify as other witnesses. In other words, three witnesses were required; § 2291 requires two only and, as we have said, points out what proof, in addition, the claimant himself shall give. It is manifest that the regulation adds a requirement which that section does not, and which is not justified by § 2246. To so construe the latter section is to make it confer unbounded legislative powers. What, indeed, is its limitation? If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what § 2291 requires, why not other conditions, and the disposition of the public lands thus be taken from the legislative branch of the Government and given to the discretion of the Land Department? It is not an adequate answer to say that the regulation must be reasonable. The power to make it is expressed in general terms. If given at all it is as broad as its subject and may vary with the occupant of the office. This is to make conditions of title, not to regulate those constituted by the statute.

In *United States* v. *United Verde Copper Co.*, *supra*, this court considered the power of the Secretary of the Interior under an act of Congress giving the right to cut timber from the public lands for certain purposes, which were enumerated "or domestic purposes," and making the right subject to such rules and regulations as the Secretary of the Interior might prescribe "for the protection of the timber and of the undergrowth growing on such lands, and *for other purposes*." (Italics ours.) The Secretary made a regulation which provided, among other things, that no

timber should be "permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining." The justification urged for the regulation was that the word "domestic" meant household. This court rejected the contention and decided that the regulation transcended the power of the Secretary. We said, "If Rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation."

In that case the power of the Secretary of the Interior was directly associated with the right conferred. Yet it was held that such power could not qualify or limit the right. In other words, a distinction between the legislative and administrative function was recognized and enforced. And, similarly, this distinction must be recognized and enforced in the case at bar. The distinction is fundamental. Where the charge is of crime, it must have clear legislative basis. In illustration we may cite *Williamson* v. *United States*, 207 U. S. 425; *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Eaton*, 144 U. S. 677; *Morrill* v. *Jones*, 106 U. S. 466; *United States* v. *Biggs*, 211 U. S. 507; *Dwyer* v. *United States*, 170 Fed. Rep. 160.

Judgment affirmed.

THE FAIR *v.* KOHLER DIE AND SPECIALTY COMPANY.

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

No. 169. Argued March 6, 1913.—Decided March 24, 1913.

Where plaintiff relies upon infringement of his patent and nothing else, the cause, whether good or bad, is one under the laws of the United States and the Circuit Court has jurisdiction; and jurisdiction cannot be defeated by matter set up in the answer.

The party bringing the suit is master to decide what law he will rely upon.

Jurisdiction is authority to decide either way, and, if it exists as an incident to a Federal statutory cause of action, it cannot be defeated by a plea denying the merits.

Defendant specially pleading to plaintiff's bill for infringement of patent by selling below a stipulated price denied there was any infringement of the patent and set up that the cause was not one arising under the patent laws of the United States and the Federal court had no jurisdiction. The court overruled the plea and, defendant not having answered further, made a decree for plaintiff. In this court *held* that the appeal was on the question of jurisdiction alone, and as jurisdiction existed below and rested solely on the patent law, there being no diverse citizenship, the decree must be affirmed.

THE facts are stated in the opinion.

Mr. David S. Wegg, with whom *Mr. Walter H. Chamberlain* was on the brief, for appellant.

Mr. Frank T. Brown and *Mr. Francis A. Hopkins* for appellee submitted.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the appellee, an Illinois corporation, against The Fair, also an Illinois corporation, for an injunction against The Fair's making and vending certain patented gas heating devices, or selling such devices of the plaintiff's manufacture at less than one dollar and a half each; for an account and for triple damages. The bill alleges that the plaintiff has the sole and exclusive right to make and sell the devices throughout the United States and that the defendant with full notice has sold and is selling the same without license in violation of the plaintiff's right. It then goes on to allege that the plaintiff, when it sells, imposes the condition that the goods shall not be sold at less than one dollar and fifty cents, and attaches to the goods a notice to that

effect and that any sale in violation of the condition, or use of the article if so sold, will be an infringement of the patent. It further avers that the defendant obtained a stock of the devices with notice of the conditions and sold them for a dollar and a quarter each in infringement of the plaintiff's rights under the patent.

The Fair appeared specially and pleaded that all the devices in question sold by it were purchased from the plaintiff by a jobber, that the jobber paid the full price to the plaintiff, that upon these facts there was no question arising under the patent or other laws of the United States, and that the court had no jurisdiction of the case. The case was set down for hearing on the plea, so that the foregoing allegations of fact must be taken to be true. *Farley* v. *Kittson*, 120 U. S. 303, 314. The court in deference to *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. Rep. 424, maintained its jurisdiction, and as the defendant did not answer within the time allowed, took the bill as confessed and made a decree for the plaintiff. The judge stated that he did not feel at liberty to give a formal certificate but added what appears from the record, that the defendant did nothing except to file the above plea. The appeal is upon the question of jurisdiction alone. There is no uncertainty or ambiguity and we are of opinion that the case is properly here. *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487, 492.

Obviously the plaintiff sued upon the patent law, so far as the purport and intent of the bill is concerned. It was a resident of the same State as the defendant and could have had no other ground. In the earlier paragraphs of the bill it charged an infringement of its patent rights in general terms, and it sought triple damages, which it could have done only by virtue of the statute. It is true that later it set up the sale at a dollar and a quarter as an infringement and that we may guess that this is the only one, although it does not say so. But if that is the plaintiff's

only cause of action, still the plaintiff relies upon it as an infringement and nothing else—so that, good or bad, the cause of action alleged is a cause of action under the laws of the United States.

Of course the party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a 'suit arising under' the patent or other law of the United States by his declaration or bill. That question cannot depend upon the answer, and accordingly jurisdiction cannot be conferred by the defence even when anticipated and replied to in the bill. *Devine* v. *Los Angeles*, 202 U. S. 313, 334. Conversely, when the plaintiff bases his cause of action upon an act of Congress jurisdiction cannot be defeated by a plea denying the merits of the claim. It might be defeated, no doubt, in a case depending on diversity of citizenship by a plea to the citizenship of parties. *Interior Construction and Improvement Co.* v. *Gibney*, 160 U. S. 217, 219. We are speaking of a case where jurisdiction is incident to a Federal statutory cause of action. Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought upon the act, and a decision that a patent is bad, whether on the facts or the law, is as binding as one that it is good. See *Fauntleroy* v. *Lum*, 210 U. S. 230, 235. No doubt if it should appear that the plaintiff was not really relying upon the patent law for his alleged rights, or if the claim of right were frivolous, the case might be dismissed. In the former instance the suit would not really and substantially involve a controversy within the jurisdiction of the court, *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282, 287, 288, and in the latter the jurisdiction would not be denied, except possibly in form. *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 109. But if the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad.

Thus in *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 68, it was pointed out that, while the certificate inquired whether a Federal question was involved upon the pleadings, and while the counsel had argued the merits of the case, the function of this court "is restricted to the inquiry whether, upon the allegations of the bill of complaint, assuming them to be true in point of fact, a Federal question is disclosed so as to give the Circuit Court jurisdiction in a suit between citizens of the same State." For that reason the court declined to pass upon the validity of the contract the obligation of which was alleged to have been impaired. *Ibid.* 82. *S. C.*, 202 U. S. 453, 458. *Mercantile Trust & Deposit Co.* v. *Columbus*, 203 U. S. 311, 322, 323. *Knoxville Water Co.* v. *Knoxville*, 200 U. S. 22, 32.

In this case the plea though purporting to go to the jurisdiction of the court merely means that the patent law does not give a patentee a right to impose such a condition as the plaintiff attempted to impose upon second purchasers of the device. The plaintiff no doubt maintains that the law does give him that right, and that even if the alleged infringements are confined to the acts admitted by the plea they are infringements none the less. The bill hardly can be confined to that claim, but if it were, it is made in good faith and is not frivolous, it is a claim of right under the patent law and the Circuit Court properly took jurisdiction of the case. *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282, 295. *White* v. *Rankin*, 144 U. S. 628, 635, 636, 639.

Decree affirmed.

FRIEND v. TALCOTT.

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

No. 155. Argued January 30, 31, 1913.—Decided April 7, 1913.

Under the Bankruptcy Act of 1898, as amended in 1903, a creditor is not bound to elect which remedy he will pursue against the bankrupt on a contract where the right to sue in tort also exists; nor does he waive his right to sue on the tort for balance of his claim by accepting his dividend under a composition. *Crawford* v. *Burke*, 195 U. S. 176.

Under the Bankruptcy Act of 1898, as amended in 1903, there are certain classes of creditors excluded from the act altogether and others who, although included therein, are excepted from the operation of the discharge. In this respect the act of 1898 differs from that of 1841, and follows that of 1867.

To constitute *res judicata* there must be identity of cause between the two cases. That identity does not exist between the granting of a general discharge in bankruptcy and an action for the balance of a debt excepted by the act from the operation of the discharge.

A creditor, after unsuccessfully opposing a composition and a discharge in bankruptcy on the ground of fraud in creating the debt, accepted the dividend and then sued for the balance on the ground that the debt was excepted from the discharge: *Held* that there was no waiver of the right to sue on the tort by accepting the dividend, nor was the granting of the discharge *res judicata* of the claim for the balance of the debt.

179 Fed. Rep. 676, affirmed.

THE facts, which involve the right of a claimant who has accepted a dividend under a composition to recover against the bankrupt after the discharge on the ground of deceit prior to the bankruptcy, are stated in the opinion.

Mr. Chester E. Cleveland, with whom *Mr. Jacob Newman*, *Mr. Salmon O. Levinson* and *Mr. Benjamin V. Becker* were on the brief, for petitioners:

Talcott has had his day in court on the issue as to whether or not his claim is barred by the discharge of the bankrupts, and they ought not to be twice vexed with the same controversy.

The business was all partnership business; the supposed financial statement was made by the bankrupts or on behalf of them as a partnership; and their discharge in bankruptcy was as partners. *In Re Bertenshaw*, 157 Fed. Rep. 363; see dissent; *Vaccaro* v. *Security Bank*, 103 Fed. Rep. 436; *Dickas* v. *Barnes*, 140 Fed. Rep. 849; *Tumlin* v. *Bryan*, 165 Fed. Rep. 166; *Re Purley & Hays*, 138 Fed. Rep. 927; *Re Forbes*, 128 Fed. Rep. 137; *Francis* v. *McNeal*, 186 Fed. Rep. 481.

The adjudication of the Bankruptcy Court cannot be said to be binding upon one part or capacity and not binding upon the other part or capacity. 24 Am. & Eng. Ency. 735 *et seq.*; *Corcoran* v. *C. & O. Canal Co.*, 94 U. S. 741, 745; *United States* v. *California Co.*, 192 U. S. 355.

The jurisdiction of the Bankruptcy Court was invoked to hear and determine whether or not the bankrupts should be denied a discharge because they had obtained property on credit by means of a materially false statement in writing, and the creditor is bound by the adjudication on that issue. *Starbuck* v. *Starbuck*, 173 N. Y. 503; *Hewitt* v. *Northrup*, 75 N. Y. 506, 510; 11 Am. & Eng. Enc. of Law, 446, 447.

While the precise cause of action set forth in the present declaration may not have been involved in the bankruptcy proceeding, nevertheless the precise issue as to the effect upon a discharge of the facts relating to the statement to the agency was involved in the bankruptcy proceeding as well as in the present action; it is therefore such a *res judicata* as is known as an estoppel by verdict. 24 Am. & Eng. Enc. of Law, 714, 780; *Southern Pac. R. R. Co.* v. *United States*, 168 U. S. 1, 48; *Stone* v. *United States*, 64 Fed. Rep. 667, 670.

The adjudication was no less conclusive because it was upon a question of law rather than upon a question of fact. *Bissel* v. *Spring Valley*, 124 U. S. 225, 232; 24 Am. & Eng. Enc. 799; *Gould* v. *Evansville R. R. Co.*, 91 U. S. 526, 533; *Nor. Pac. R. R. Co.* v. *Slaght*, 205 U. S. 122.

The conclusive effect of the adjudication is not destroyed by the fact that the decree of the Bankruptcy Court was erroneous. *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 290; *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 510.

The record of the bankruptcy proceedings evidenced an election of remedies by respondent, which barred his suit for fraudulent representations.

By filing a claim for goods sold and thus affirming the contract, respondent waived all claims for deceit. *Tindle* v. *Birkett*, 205 U. S. 183; *Adler* v. *Fenton*, 24 How. 407; *Lincoln* v. *Claflin*, 7 Wall. 132; *Simon* v. *Goodyear Co.*, 105 Fed. Rep. 573.

The judgment of the Bankruptcy Court allowing his claim for goods sold, operated as a merger of all his causes of action.

A judgment merges not only the cause of action sued on but all concurrent remedies, even if consistent. *Barth* v. *Loeffelholtz*, 108 Wisconsin, 562; *Caylus* v. *N. Y., K. & S. R. R. Co.*, 76 N. Y. 609; *Bowen* v. *Mandeville*, 95 N. Y. 237; *Morgan* v. *Skidmore*, 3 Abb. N. Cas. (N. Y.) 92; *Brumbach* v. *Flower*, 20 Ill. App. 219.

The order of a court of bankruptcy allowing a claim is a judgment. *Kuehling* v. *Leberman*, 2 Wkly. N. C. (Pa.) 616; *Mitchell* v. *Mayo*, 16 Illinois, 83; *Wheeler* v. *Dawson*, 63 Illinois, 54. The fact that such judgment is not as efficient as another remedy might be, does not change the rule. *Karr* v. *Barstow*, 24 Illinois, * 580.

One appearing in the bankruptcy proceedings and opposing the discharge elects to treat his claim as one not excepted from the operation of the discharge.

The order confirming the composition discharged the bankrupts from Talcott's claim. Talcott's claim was provable. *Crawford* v. *Burke*, 195 U. S. 176. It is not excepted from the operation of a discharge. *Tindle* v. *Birkett*, 205 U. S. 183.

The confirmation of a composition has the same effect as a discharge. Bankruptcy Act 1898, § 14c.

Mr. Albert M. Kales, with whom *Mr. Horace Kent Tenney* and *Mr. Roger Sherman* were on the brief, for respondent:

The confirmation of the composition is no bar to the present suit.

There is no estoppel by judgment.

The two causes are not the same.

There must be identity of parties, subject-matter and cause of action. *Markley* v. *People*. 171 Illinois, 260; *Wright* v. *Griffey*, 147 Illinois, 496.

The subject-matter of the two proceedings is different. *Re Mussey*, 99 Fed. Rep. 71.

In the bankruptcy case the rights of the debtors to a discharge are involved. In the present suit, the right of Talcott to recover damages is involved.

Identity in interest of the parties is also wanting.

There is no estoppel by verdict. *Riverside Co.* v. *Townshend*, 120 Illinois, 9; *Harrison* v. *Remington Paper Co.*, 140 Fed. Rep. 385; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1.

A judgment rendered upon demurrer is sometimes conclusive of the facts confessed by the demurrer. *Bissel* v. *Spring Valley*, 124 U. S. 225.

Talcott's cause of action was therefore established in the Bankruptcy Court. *Re Thomas*, 92 Fed. Rep. 913.

The order of discharge was a mere official form. Official Form No. 62, Collier on Bankruptcy (9th ed.), p. 1160.

One who has a claim that is not dischargeable will not be heard to object to a discharge. *In re Servis*, 140 Fed. Rep. 222.

The finding of the court in the order of discharge that the bankrupts had not done any act barring a discharge, not being supported by evidence, is not binding. *Burleigh* v. *Foreman*, 12 Am. B. R. 88; 3 Cyc. 362.

The burden of proof is on him who claims an estoppel by verdict. The burden has not been sustained by the defendant. *Russell* v. *Place*, 94 U. S. 606; *Harrison* v. *Remington Paper Co.*, 140 Fed. Rep. 385, 400; *Cromwell* v. *Sac County*, 94 U. S. 351; *Southern Co.* v. *St. Paul Co.*, 55 Fed. Rep. 690; *Enfield* v. *Jordan*, 119 U. S. 680, 691.

A misrepresentation to a third person is as effectual as a basis for an action of deceit as a direct representation to the one who is deceived. *Katzenstein* v. *Reid*, 41 Tex. Civ. App. 106.

If the record leaves it uncertain whether the judgment in the first case was based on a fact essential to plaintiff's recovery in the second case, there is no estoppel. *Hudson* v. *Remington Paper Co.*, 71 Kansas, 300, 304.

Proving a claim in the Bankruptcy Court or taking judgment in assumpsit does not waive the claimant's right to sue for deceit. *Katzenstein* v. *Reid, supra; Standard Sewing Machine Co.* v. *Kattel*, 132 App. Div. (N. Y.) 539; *In re Lewensohn*, 99 Fed. Rep. 73, 74, aff'd 104 Fed. Rep. 1006; *Standard Sewing Machine Co.* v. *Alexander*, 68 S. Car. 506; *Frey* v. *Torrey*, 70 App. Div. (N. Y.) 166; *S. C.*, 175 N. Y. 501; *Mallory* v. *Leach*, 35 Vermont, 156; *Bowen* v. *Mandeville*, 95 N. Y. 237; *Sheldon* v. *Clews*, 13 Abb. (N. C.) 41; *Whittier* v. *Collins*, 15 R. I. 90; *Union Cent. Life Ins. Co.* v. *Scheidler*, 130 Indiana, 214; *Standard Sewing Machine Co.* v. *Owings*, 140 N. Car. 503; *Norton* v. *Huxley*, 13 Gray (Mass.), 285; *Brumbach* v. *Flower*, 20 Ill. App. 219, aff'd 131 Illinois, 646; *Bacon*

v. *Moody*, 117 Georgia, 207; *Drainage District* v. *Dowd*, 134 Ill. App. 499.

The same was held under the Bankruptcy Act of 1867. *Strang* v. *Bradner*, 114 U. S. 555, 560; *Stokes* v. *Mason*, 10 R. I. 261; *McBean* v. *Fox*, 1 Ill. App. 177.

The decision in the case of *Frey* v. *Torrey*, *supra*, is not affected by subsequent decisions. *Tindle* v. *Birkett*, 183 N. Y. 267; *Maxwell* v. *Martin*, 130 App. Div. (N. Y.) 80; *Crawford* v. *Burke*, 195 U. S. 176; *Tindle* v. *Birkett*, 205 U. S. 183.

There is no inconsistency between a suit in assumpsit based on a contract, and an action for deceit for false representations in inducing the making of the contract. *Bowen* v. *Mandeville*, 95 N. Y. 237; *Siltz* v. *Springer*, 236 Illinois, 276; *Mallory* v. *Leach*, 35 Vermont, 156.

Filing a claim in the Bankruptcy Court and having it allowed does not effect a merger with a claim for deceit in obtaining the property by false representations.

Those who have claims not released by a discharge, are not "parties in interest." Collier on Bankruptcy (9th ed.), p. 262; *In re Servis*, 140 Fed. Rep. 222.

The confirmation of composition did not discharge Talcott's claim for deceit.

The Bankruptcy Act expressly excepts liabilities for procuring property by false representations from the effect of a discharge. Bankruptcy Act, § 17*a* (2).

Before the amendment, the act excepted from discharges only judgments based on false representations. *Crawford* v. *Burke*, 195 U. S. 176.

A discharge does not release liabilities arising out of deceit or any tort excepted by the statute. *In re Lewensohn*, 99 Fed. Rep. 73; *Taylor* v. *Farmer*, 81 Kentucky, 458; *Turner* v. *Atwood*, 124 Massachusetts, 411; *Nelson* v. *Petterson*, 131 Ill. App. 443, 450, aff'd in 229 Illinois, 240; 82 N. E. Rep. 229; *Katzenstein* v. *Reid*, *supra*.

One holding a judgment that is not dischargeable under the act may oppose a discharge and still recover on the judgment. *Tinker* v. *Colwell*, 193 U. S. 473; *Audubon* v. *Shufeldt*, 181 U. S. 575.

The proper practice is to grant a discharge and try the question whether a given claim is barred by the discharge when a suit is commenced on such claim. Collier on Bankruptcy (9th ed.), p. 311; *In re Rhutassel*, 96 Fed. Rep. 597; *In re Thomas*, 92 Fed. Rep. 912; *In re Tinker*, 99 Fed. Rep. 79.

Sections 14 and 17 are not in conflict. Under them a creditor has two rights, first, to prevent a discharge, and, second, to recover for the fraud practiced on him.

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

On February 1, 1904, the commercial firm of Friend, Moss & Morris, and its members, were adjudicated bankrupts. As the issues here to be considered are unaffected thereby and the subject was treated as irrelevant by the courts below and no question concerning it is insisted on by the respondent, we put out of view an order subsequently made setting aside the adjudication as to the members of the firm individually.

Talcott, the respondent, was allowed a claim for $3,204.91, the unpaid price of goods sold to the firm on credit. The firm, availing of the right to make a composition with its creditors, given by §§ 12 and 13 of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, 549, asked the court to approve a proposed composition. Talcott, among others, opposed, upon the ground that the bankrupt had procured the sale on credit of the goods, the price of which formed the basis of his (Talcott's) allowed claim, by means of false reports made to a commercial agency of the financial condition of the firm. The

specification of the grounds of objection just stated is reproduced in the margin.[1]

Before a master the bankrupt contended that the objection of Talcott was insufficient because even if the facts were true they were inadequate to prevent the approval of the composition. The master, accepting that view, without taking testimony, reported in favor of approval. The report on the subject was as follows:

"As to specification No. 8 of James Talcott, referred to, I am of the opinion that a reasonable and proper construction of section 14*b* (3) would require the 'materially false statements in writing' to be made directly to the creditor in question, and I deem the allegations in this specification which are to the effect that the alleged false statement was made to a commercial agency to be in-

[1] That said bankrupts obtained from said James Talcott and from other creditors property upon credit upon a materially false statement in writing made to said creditors for the purpose of obtaining such property upon credit; that said statement was so made on or about the 21st day of January, 1903, to Woods Dry Goods Commercial Agency, which, as said bankrupts knew, was a commercial agency engaged in the business of receiving statements of the financial condition of persons applying for the purchase of goods upon credit and to be communicated to those from whom they sought such credit; that said statement was duly communicated to said James Talcott and to others by said Commercial Agency for the purpose of being acted upon by them in selling goods to said bankrupts upon credit, and that thereafter said James Talcott and others did sell and deliver goods to said bankrupts upon credit, relying upon said statement; that by the statement so made in writing by said bankrupts it was averred that they had a net surplus on January 1st, 1903, of ninety-two thousand nine hundred and eighty-eight and 95–100 dollars over and above all debts and liabilities, whereas, in truth and in fact, they had no surplus over and above their debts, but were wholly insolvent. All of which facts were well known to said bankrupts at the time said statement was made, but were not known to said James Talcott and other creditors who sold goods to said bankrupts in reliance upon said statement, until after the filing of the petition in bankruptcy herein.

sufficient, and I am of the opinion that the specification should be overruled for this reason."

This report was objected to by Talcott on the ground that the master erred in refusing to take proof as to the alleged false statements and in treating them as legally insufficient. The objections were overruled and the report was confirmed. The order of confirmation, following the requirements of paragraph *d* of § 12 (30 Stat. 550), recited that the composition was "for the best interest of the creditors," and "that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to a discharge." The result was to give the bankrupt a general discharge in virtue of subdivision *c* of § 14 (30 Stat. 550), which says: "The confirmation of the composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

In April, 1905—about a year after the composition—Talcott commenced this action to recover from the former bankrupt firm the damages suffered by him because of deceit practiced in procuring the sale of goods on credit. The deceit relied upon was the deceit which had been alleged as a basis for the opposition to the composition, that is, false reports made in writing to a commercial agency as to the financial condition of the firm, except that in one count no mention was made of the commercial agency. On the face of the declaration the sales asserted to have been made were the same sales the price of which formed the basis of the claim filed and allowed, and if not accurately, at least approximately the amount of the damage sought to be recovered was the difference between the aggregate price of such sales diminished by the extent of the distribution paid upon the composition. In addition to the general issue the defendants set up as *res judicata* the order arising from confirmation of the com-

position. The cause was heard upon the issue of former adjudication, and judgment was entered in favor of the defendants, the judgment reciting that the matters and things involved in the suit had been fully adjudicated in the bankruptcy proceedings. On reviewing the cause the Circuit Court of Appeals concluded that the act of Talcott in going into the bankruptcy proceedings and proving his claim as one on contract did not constitute an election by him to be bound by the discharge if otherwise under the Bankruptcy Act the claim was excepted from such discharge, and that the fact of participating in the bankruptcy proceeding for the purpose of obtaining the benefits of the distribution therein made was not a waiver by Talcott of his right to proceed in an action for deceit to collect the deficiency notwithstanding the discharge. The court, moreover, decided that the opposition to the composition, its confirmation and the resulting general discharge did not constitute the thing adjudged, estopping Talcott from asserting that his claim for damages suffered by the deceit was not embraced by the discharge.

The judgment of the trial court was therefore reversed—179 Fed. Rep. 676—and the case is here on the allowance of a certiorari.

There is a contention that the questions of waiver and election, although passed on by the court below, are not open for our consideration because it is asserted they were not raised in or considered by the trial court. As we think the contention is without merit, we proceed to dispose of the propositions concerning election and waiver and *res judicata*. In doing so we shall direct our attention to four propositions taken from one of the printed arguments on behalf of the petitioners and which we think embrace all the contentions relied upon. The propositions are these:

1. The record of the bankruptcy proceedings evidenced

an election of remedies by respondent which barred his suit for fraudulent representations.

2. The order confirming the composition discharged petitioners from respondent's claim.

3. The order confirming the composition was a complete adjudication against respondent's right of action.

4. Neither the reasons assigned by the District Court for holding respondent's specifications insufficient, nor such holding itself, detract from the legal efficacy of the order confirming the composition as an adjudication of the rights of the parties.

At the outset it is to be observed that the propositions are redundant since they really involve only two distinct contentions: first, election and resulting waiver from the proof by Talcott of his claim in bankruptcy and his participation in the distribution arising from the composition, and second, the binding force of the discharge on the claim of Talcott, because of the force of the thing adjudged resulting from the order approving the composition over the objection of Talcott and the general statutory discharge which resulted.

Coming to dispose of the first contention, we put out of view as irrelevant much that is urged in argument concerning what constitutes an election and waiver in the general sense, since the question here for decision is only whether there was a waiver or election under and for the purposes of the bankrupt law.

The theory of election and waiver arising from the proof of the claim in bankruptcy as one upon contract where the right to sue in tort also existed must rest upon the assumption that it was within the power of the creditor to exercise an election to come under the operation of the bankruptcy proceedings and thus to be bound by the result of such proceedings or to stay out and escape the operation of the act. This must be the case, as it is impossible to conceive of a right of election in a case where

no such right existed. But this theory has been expressly decided to be without foundation. *Crawford* v. *Burke*, 195 U. S. 176. In that case the ruling was that where a debt was of such a character as to cause it to be within the power of the creditor to enforce the same as an obligation arising on contract or if he chose to do so as one in tort, as from the point of view of contract the debt was provable in bankruptcy, even conceding that it might not be so provable if the tort was relied upon, that it was the duty of the creditor to prove as under contract, and if he abstained from so doing his debt or claim being provable was operated upon and barred by the proceedings. The theory of election and waiver being thus established to be unreal, there is of course nothing left for the proposition to rest upon. But it is said *Crawford* v. *Burke* is inapposite because in that case although the claim under consideration involved both the elements of contract and tort, as no judgment had been entered establishing the tort, under the bankrupt law as then existing the debt was not excepted from a discharge, while here, in consequence of the amendment of 1903, the debt if there has been no waiver is excepted from the discharge. This being the case it is urged that an election and waiver resulted from the act of the debtor in proving his claim as on contract and thus taking advantage of the bankruptcy proceedings and thereby obtaining rights or benefits which he would not have had if he had stayed out and thus saved his right to be freed from the operation of the discharge. But this distinction is also wholly without foundation. Its error lies in assuming that the right which the bankrupt act confers upon enumerated classes of debts to be exempt from the operation of a discharge rests upon the conception that such debts are exempt because they are excluded from the act and may not participate in the distribution of assets. That is to say, the confusion lies in not distinguishing between creditors who are ex-

cluded from the bankrupt act and those who although included therein have had conferred upon them the benefit of an exception from the operation of the discharge. Even a superficial analysis of the text of the Bankruptcy Act will make this clear. Thus § 63*a* and *b* (30 Stat. 562) enumerates the debts which may be proved and which are therefore entitled to participate in the benefits of the act and are bound by its provisions, including a discharge. Section 17 (30 Stat. 550) enumerates the debts not affected by a discharge, that is, those exempted from its operation. It is apparent that the exemptions do not rest upon any theory of the exclusion of the creditor from the bankrupt act or of deprivation of right to participate in the distribution, but solely on the ground that although such rights are enjoyed, an exemption from the effect of the discharge is superadded. The text leaves no room for any other view, since the exceptions in terms are accorded to certain classes of debts which are provable under § 63, and therefore debts which are entitled to participate in the distribution, the language being: "A discharge in bankruptcy shall release a bankrupt from all of his *provable* debts, except such as," etc.

And a brief reference to the more important of the prior bankruptcy acts throws abundant light on the text. The Bankruptcy Act of August 19, 1841, c. 9, 5 Stat. 440, in the first section comprehensively stated the classes of claims which were embraced within its scope and expressly excluded certain enumerated classes. No exemption from the operation of a discharge when granted was conferred, and therefore all who were within the scope of the act, while enjoying its benefits, were bound by its burdens. Under this act, in *Chapman* v. *Forsyth*, 2 How. 202, it was held that although a claim was excluded from the law if brought in by the voluntary act of the creditor and he thereby participated in the distribution, the creditor by such election waived his right to

be treated as not bound by the statute, and consequently the debt or claim was discharged. The Bankruptcy Act of March 2, 1867, c. 176, 14 Stat. 517, presumably to correct the injustice which arose from excluding from all participation in the distribution of assets those creditors whom it was thought because of the meritorious nature of their debt should not be bound by the discharge, departed from the system of excluding such creditors from the act and on the contrary adopted the principle of including them in the benefits of the act and yet at the same time exempting them from the operation of the discharge. To accomplish this result, § 19 of the act (14 Stat. 525) made a most comprehensive enumeration of provable debts, including as well unliquidated damages for torts as for breaches of contracts. Those things which in the act of 1841 were stated to be excluded from the operation of the act were embodied in a particular section (§ 33, 14 Stat. 333) dealing with exemptions from discharge, and to avoid all possible misconception the section provided " . . . but the debt may be proved, and the dividend thereon shall be a payment on account of said debt." It is obvious that the present act embodies the same policy, since the exemptions from discharge which are given by the statute are found in a section devoted to that subject and are stated in words, as we have said, to be exemptions from discharge allowed in favor of provable debts, that is, debts entitled to participate which are given the benefit of an exemption from the operation of the discharge.

While the considerations just stated dispose of the question of waiver and election, they virtually also serve to indicate the error which underlies the contention as to *res judicata*, that is, a confusion of thought arising from treating things which are different as one and the same. To constitute *res judicata*, it is elementary that there must be identity of cause between the two cases. In view of

the text of the bankrupt law, the distinction which it makes between the general discharge and the right of a particular creditor to be exempt from the operation of such discharge it needs but statement to demonstrate the difference of cause which necessarily obtains between determining on the one hand in favor of the bankrupt whether he is entitled to a general discharge and of deciding on the other, as between a particular creditor and the bankrupt, whether the claim of that creditor is of such a character as to be exempt from the operation of a discharge. Nothing could more clearly emphasize the distinction which exists between the two subjects—that is, the granting of a general discharge and the question after it is granted whether a particular debt is exempted by law from its operation—than does the provision of the statute (§ 14*c*, 30 Stat. 550) authorizing a general discharge as the result of an approval of a composition, since it expressly reserves from the operation of such discharge of the bankrupt from his debts, "those not affected by a discharge." It is elaborately argued, however, that whatever be the infirmity of the decree of confirmation as *res judicata* in the complete sense, that decree was necessarily binding in so far as it established relevant facts which were at issue between the parties and therefore is here conclusive. But the proposition rests upon an unfounded assumption, as nothing in the assertion of the right to be exempt from the operation of the discharge here relied upon involves a traverse or denial of any relevant fact established as a result of the approval of the composition. On the contrary, as we have seen, the facts here relied upon to establish the exemption from discharge, are the facts which were conceded to exist and were not traversed for the purpose of the hearing on the composition.

Conceding for the sake of argument that the facts which were alleged as the basis of the opposition to the approval

of the composition were sufficient, had the law been rightly applied, to have prevented the approval of the composition, such concession would afford no ground for holding that because one case in matter of law was erroneously decided, that such decision should conclusively establish the duty to erroneously decide another and distinct case. If, on the other hand, it be conceded that the composition was rightfully approved, as the determination of that subject did not under the very terms of the statute involve passing upon the separate and distinct claim of creditors to be exempt from the operation of the discharge, it results that in no view of the case is there merit in the contention as to *res judicata*. The contentions urged in many forms based upon the recitals in the order of confirmation of the composition made conformably to the statute as to the absence of fraud or other wrongdoing, etc., is but a reiteration of the contention as to *res judicata* which we have shown to be without foundation.

Affirmed.

PLESTED *v.* ABBEY.

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

No. 156. Argued January 31, 1913.—Decided April 7, 1913.

Subordinate officers of the Land Department are under the control, and their acts are subject to the review, of their official superiors—the Commissioner of the General Land Office and ultimately the Secretary of the Interior.

Until the legal title to public land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the Land Department. *Brown* v. *Hitchcock*, 173 U. S. 433, 476.

Congress has placed the Land Department under the supervision and control of the Secretary of the Interior, a special tribunal with

large administrative and *quasi*-judicial functions, and subordinate officials should not be called upon to put the court in possession of their views and defend their instructions from the Commissioner and convert the contest before the Land Department into one before the court. *Litchfield* v. *Register*, 9 Wall. 575.

THE facts, which involve the right under the laws of the United States to purchase coal lands belonging to the United States, and the jurisdiction of the courts over the officers of the Land Department prior to issuing of the patent, are stated in the opinion.

Mr. Jesse G. Northcutt and *Mr. William C. Prentiss*, with whom *Mr. Robert H. Widdicombe* and *Mr. A. Watson McHendrie* were on the brief, for appellants:

The rights of the appellants, as well as the duty of the appellees, are to be found in § 2347, Rev. Stat., fixing twenty dollars per acre.

That statute is not ambiguous. Its language admits of but one interpretation. If the receiver or register, or both, demand more than twenty dollars they are prohibiting the exercise of the right which Congress has conferred and therefore acting beyond and contrary to the law. Being outside of the pale of the law they are not entitled to its protection, even though the rule exists that they shall not be interfered with by the courts when exercising their official functions within the law.

The rule that so long as the title of the land remains in the Government the officers of the Land Department will not be interfered with in the discharge of their official duties, unless those duties are of a character purely ministerial and involving no exercise of judgment or discretion (*Litchfield* v. *Richards*, 9 Wall. 575) has as the converse of this proposition that if the duty involved is purely ministerial, not involving the exercise of discretion, the courts on proper application will interfere for the protection of individual rights.

The courts have interfered to prevent the infliction of injury by other Federal executive officers. Why the sacred immunity of officers of the Land Department?

The question herein involved calls for no distinction between discretionary and ministerial duties. Appellants do not seek to restrain the discharge of a duty, or to enforce the discharge of a duty, but simply to restrain the defendants from doing an unlawful and wrongful thing, which if permitted to be done inflicts a wrong and injury upon the complainants here, for which they have no plain or adequate remedy, if, in fact, they have any remedy at all, except the interference of a court of equity by its preventive mandate.

The question is not whether the act is discretionary or ministerial, but whether it is lawful or unlawful. Courts of equity will restrain the officers from exercising their duties beyond the pale of the law just as they do private individuals. 2 Story's Equity, § 955 (12th ed.); 3 Pomeroy, § 4340 (3d ed.); *Noble* v. *Union R. L. & R. Co.*, 147 U. S. 165; *Board of Liquidation &c.* v. *McComb*, 92 U. S. 531, 541; *LaChapalle* v. *Buffs Indian Agt.*, 69 Fed. Rep. 481; *American School* v. *McAnnulty*, 187 U. S. 94; *New Orleans Natl. Bank* v. *Merchant*, 18 Fed. Rep. 851; *Teal* v. *Felton*, 12 How. 284; *Rector* v. *Gibbon*, 111 U. S. 276.

If the order of the Department under which the defendants here claim to act is not clearly within the power granted to the Interior Department, it is not law and has no binding force or effect. *United States* v. *United Verde Copper Co.*, 196 U. S. 207; *Ballinger* v. *Frost*, 216 U. S. 240.

As to whether the act is discretionary or ministerial, see *Roberts* v. *United States*, 176 U. S. 221.

The Department can exercise only such power in making regulations as is conferred upon it by statute. § 161, Rev. Stat.

As to specific authority to make regulations concern-

ing coal lands, see §§ 2347, 2351, Rev. Stat. Even if Congress in enacting § 2347, fixing the price at not less than $20.00 per acre, intended to reserve the right to charge more, it has nowhere vested in the Interior or any other executive department the power to fix a greater or any other price. Such power could not be exercised without an express delegation thereof. And see as to intent of Congress in this respect, *United States* v. *The Trinidad Coal & Coke Co.*, 137 U. S. 160, construing the acts of July 1, 1864, and March 3, 1873. See also departmental regulation of July 31, 1882, and 1 L. D. 689, par. 12, fixing the price at $10–$20, depending upon distance from railways.

This has been universally the construction of the Department as shown by the following cases: *In re Foster*, 2 L. D. 730–733; *Re. Colton*, 10 L. D. 422; *Re Conant*, 29 L. D. 637; *Secretary's Instructions*, 1 L. D. 540; *Re Largent*, 13 L. D. 396; *Re Burgess*, 24 L. D. 11.

The construction placed upon a statute by an executive department and followed for a term of years is entitled to great weight, as repeatedly held by this court. *United States* v. *Finnell*, 185 U. S. 236.

The construction thus placed upon the statute will be respected by the courts unless obnoxious to the plain provisions of the statute, and if doubtful will not be overruled except for cogent reason. *Edwards* v. *Darby*, 12 Wh. 206; *United States* v. *Fillbrick*, 120 U. S. 52; *United States* v. *Alabama G. S. R.*, 142 U. S. 615.

The Executive had no right to withdraw these lands from entry. *United States* v. *Fitzgerald*, 15 Pet. 421; *United States* v. *Tichenor*, 12 Fed. Rep. 423.

Where parties have lawfully tendered their money to the Department and the tender is wrongfully rejected, the rights of the applicants are the same as though the money had been accepted. *Ballinger* v. *Frost, supra.*

The withdrawal under the authorities above cited

was inoperative to reserve the lands from entry. *Osborne* v. *Froyseth*, 216 U. S. 571.

None of the constitutional powers vested in the President include a delegation to him of control over the public lands. If, then, he has any power over the public lands, it must be found in the acts of Congress. *Northern Pac. R. R. Co.* v. *Davis*, 19 L. D. 87; *Titamore* v. *So. Pac. R. Co.*, 19 L. D. 249; Instructions, 33 L. D. 104; *Fort Boise Hay Reservation*, 6 L. D. 16; *United States* v. *Blendaner*, 122 Fed. Rep. 703; *Hewitt* v. *Schultez*, 180 U. S. 139; *So. Pac.* v. *Bell*, 183 U. S. 675.

The state courts had no jurisdiction of the subject-matter; they are without power to issue process against a Federal officer where, as here, the subject of the suit is inquiry into the legality of acts done by him in the transaction of strictly Federal Government business. *McClung* v. *Silliman*, 6 Wheat. 598; *Slocum* v. *Maybery*, 2 Wheat. 1; *Re Ferguson*, 9 Johns. 239; *Hill* v. *Confederate States*, 38 Alabama, 461.

As the state courts have no jurisdiction in this case, the Federal court, sitting as such, has exclusive jurisdiction. *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356; *The Ira M. Hedges*, 218 U. S. 264.

Mr. Assistant Attorney General Cobb, with whom *Mr. Solicitor General Bullitt* was on the brief, for appellees:

It appears on the face of the bill that the title to the land sought to be acquired is in the United States, and that the proceedings to acquire that title are still *in fieri*, in the only forum, i. e., the Land Department, appointed by law to adjudicate such matters, involving, as they do, the exercise of judgment and discretion; and that the courts are, therefore, without jurisdiction to interfere in equity or at law, by review or otherwise, with the exercise of that judgment and discretion. *Brown* v. *Hitchcock*, 173 U. S. 433, 476, 478; *Knight* v. *Land Association*, 142

U. S. 161; *Litchfield* v. *Register and Receiver*, 9 Wall. 575; *Naganab* v. *Hitchcock*, 202 U. S. 473; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Roberts* v. *United States*, 176 U. S. 221; *Ness* v. *Fisher*, 223 U. S. 683; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *United States* v. *Schurz*, 102 U. S. 373, 396.

Were it otherwise, that is, if the local officers, the defendants in this suit, owe merely a plain ministerial duty which they are neglecting to perform, the remedy is at law, in mandamus and not in equity.

It further appears, on the face of the bill, that complainants, if they were wronged by the action of the register and receiver (the defendants), have not exhausted their remedy by resort to the process authorized by law and accorded by the regulations of the Land Department.

The action of the local land officers in requiring the payment of the price fixed by the Land Department was in accordance with the law. *Binns* v. *United States*, 194 U. S. 486, 495; *Commonwealth* v. *Brown*, 210 Pa. St. 29; *Drake* v. *The State*, 5 Tex. App. 649; *Hankins* v. *The People*, 106 Illinois, 628, 634; *Maxwell* v. *Dow*, 176 U. S. 581, 601; *Rusch* v. *The City of Davenport*, 6 Iowa, 443, 454; *Stewart* v. *Griswold*, 134 Massachusetts, 391; *Stewart* v. *Lehigh Valley R. R. Co.*, 38 N. J. Law, 505, 517; *Stimson* v. *Pond*, 23 Fed. Cas. No. 13455; *United States* v. *Freight Association*, 166 U. S. 290; *United States* v. *Trinidad Coal and Coking Co.*, 137 U. S. 160; *Worth* v. *Peck*, 7 Pa. St. 268.

The question of the validity of the reservation or withdrawal is not in this case. That question was litigated by complainants before the Land Department, decided against them, and abandoned. This suit is based upon a second—an independent—application of complainants to enter the land based upon the appraised price.

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

The appellants prosecute this direct appeal from a decree

sustaining a demurrer to a bill by them filed and dismissing the cause for want of jurisdiction. The suit concerned the right of the complainants under the laws of the United States to purchase certain coal lands belonging to the United States, and the defendants were the local land officers of the United States at Pueblo, Colorado.

The theory that the decree dismissing the bill is susceptible of being directly reviewed rests upon the assumption that the controversy, because of its nature and because of the official character of the defendants, was one of exclusive Federal cognizance, and therefore the refusal to exercise jurisdiction necessarily involved a ruling concerning the authority of the court below as a Federal court.

To decide the issue it is essential to consider the averments of the bill and the reasons which led the court below to sustain the demurrer. The bill alleged that in the spring of 1897 the complainants took possession of and commenced the improvement of two hundred and forty acres of coal land, the property of the United States, situated within fifteen miles of a completed railroad, in Las Animas County, Colorado. In due time, it was averred, they filed in the local land office at Pueblo the declaratory statement authorized by § 2349, Revised Statutes, and on July 1, 1907, tendered twenty dollars per acre for the land and applied to enter the same under § 2350, Revised Statutes. It was alleged that on January 11, 1908, both the declaratory statement and the application were rejected by the local land office upon the ground that the land had been withdrawn from sale under the coal land laws by a departmental order dated July 26, 1906, and that on appeal the Commissioner of the General Land Office affirmed the action of the local officials, and on a further appeal such decision was approved on January 30, 1909, by the Secretary of the Interior.

The following facts were then averred:

In June, 1910, the land in question, with other land, was restored to entry, and on June 28, 1910, the register notified the complainants in writing that they would be allowed sixty days from the receipt of the communication in which to make a formal claim to the land as to which they had previously filed a notice of claim, and that the price fixed by the United States Geological Survey for certain of the land was one hundred and twenty-five dollars per acre and for the remainder one hundred and fifteen dollars per acre, aggregating thirty thousand dollars for the entire tract. It was alleged that soon afterwards the complainants filed in the local land office a written application for the purchase of the land and by direction of the register a notice of the application was published and copies thereof were posted as required by statute, and due proof of the performance of such acts was filed in the land office. In September following, in response to communications from the complainants, the local land office notified complainants that payment for the land must be made within thirty days or the application to purchase would be rejected. Within the time fixed a tender of forty-eight hundred dollars was made to the receiver, as being the price fixed by § 2347, Revised Statutes. The receiver refused to accept the money or to give any receipt therefor. The bill then averred that it was the intention of the land officers to refuse to permit the complainants to purchase the land unless they were willing to pay, not the alleged statutory price, but the sum of thirty thousand dollars, arbitrarily fixed by the Secretary of the Interior as the price of the lands. The prayer of the bill was for both a restraining and a mandatory injunction, the one forbidding the defendant land officers from carrying out the orders of the Secretary of the Interior and the Commissioner of the General Land Office and the other commanding the defendant land officers to accept the application of the complainants and allow them

to purchase the lands upon the payment of the sum of $20 per acre. It was, moreover, prayed that defendants be restrained from receiving or accepting the application of any other person for the entry of the lands.

As at the outset stated, a demurrer was sustained and the cause was dismissed for want of jurisdiction, the court in its certificate stating that this was done "upon the ground that a ruling or decision by the officers of a local land office of the United States made in the usual course of proceedings for the acquisition of the title to public lands is not subject to review or correction in the courts while the title to the lands remains in the United States, and also upon the further ground that while the title to public lands remains in the United States and the proceedings for acquiring that title are still *in fieri*, the courts are without power, by injunction or otherwise, to control the judgment and discretion of the officers of the land department in respect of the disposal of such lands under the public land laws."

In testing the correctness of the ruling we treat as negligible the averments of the bill assailing the validity of the rejection on January 30, 1909, of the application then pending to enter the land. We do this because if complainants had a remedy in the courts growing out of such rejection it was their duty to invoke and pursue that remedy, and not having done so, but on the contrary having for more than a year and a half acquiesced in the judgment of the Land Department and having made subsequently an entirely new application, we think their rights must be measured by the later application. Considering the issue in that respect, we are of opinion that the principle which caused the Circuit Court to hold that it had no jurisdiction to award the relief prayed and hence to dismiss the bill was a correct one. The United States had not parted with the legal title to the land. The defendants were subordinate officials of the Land

Department, and the acts and omissions complained of were done pursuant to instructions from the head of the Land Department, vested by law with the power to control the conduct of his subordinates in matters of this character.

As officers administering the land laws, the defendants therefore were, in the nature of things, under the control and their acts were subject to the review of their official superiors—the Commissioner of the General Land Office and ultimately of the Secretary of the Interior. As said in *Litchfield* v. *Register & Receiver*, 9 Wall. 575, 578, subordinate officials of the Land Department should not be called upon "to put the court in possession of their views and defend their instructions from the Commissioner and convert the contest before the Land Department into one before the court." Indeed the doctrine upon which the court below based its action has been frequently announced and enforced. It was thus epitomized in *Brown* v. *Hitchcock*, 173 U. S. 473, 476, that "until the legal title to public land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the Land Department." In *United States* v. *Schurtz*, 102 U. S. 378, 396, the doctrine is thus stated:

"Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizen. This Court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere."

See also *United States ex rel. Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Knight* v. *Land Association*, 142 U. S. 161; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Naganab* v. *Hitchcock*, 202 U. S. 473; and the very recent decision in *United*

States ex rel. Ness v. *Fisher*, 223 U. S. 683. In the last named decision the *Litchfield Case* was cited with approval, and it was again reiterated that Congress has placed the Land Department under the supervision and control of the Secretary of the Interior, a special tribunal with large administrative and *quasi*-judicial functions, to be exerted for the purpose of the execution of the laws regulating the disposal of the public lands.

Without, therefore, expressing any opinion upon the merits, we hold that under the facts stated in the bill this resort to the courts was premature, and the judgment below must therefore be

Affirmed.

UNITED STATES *v.* ANDERSON.

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

No. 705. Argued February 26, 1913.—Decided April 7, 1913.

The prohibition in the Indian Appropriation Act of 1884, against sale of cattle purchased by the Government for the Indians without the consent of the Secretary of the Interior relates to all cattle purchased by the Government for Indians, and is not limited to such cattle as has been purchased from unexpended balances under another provision of the act.

The two provisions of the act above referred to are not interdependent.

Wholly distinct and non-related provisions of a general appropriation act should not be brought together and construed as one when such construction defeats the obvious purpose of the act and policy of the Government declared in that and other acts.

189 Fed. Rep. 262, reversed.

THE facts, which involve the construction of provisions in the Indian Appropriation Act of 1884 relative

to sale of cattle purchased by the Government for the Indians, are stated in the opinion.

Mr. Solicitor General Bullitt for the United States:

The transaction is within the letter of the act; that is, the cattle were really "purchased by the Government."

The cattle were purchased by the Secretary of the Interior pursuant to specific authority from Congress.

The cattle purchased by the Secretary of the Interior under the act of June 21, 1906, were "purchased by the Government" within the spirit and intent (as well as the letter) of the act of 1884, which prohibited outsiders from buying from the Indians any of their cattle "which have been purchased by the Government."

The object of the criminal provision was not to protect the government property but was to protect the Indians.

The criminal provision applies whether the title to the cattle be considered in the Government or in the Indians.

There is no difference between the Government's purchase of stock cattle for the benefit of the Indians out of surplus subsistence appropriations and its purchase for issuance to the Indians in exchange for ceded lands.

It has been the policy of the Government to prevent the whites from purchasing from the Indians cattle which have been issued to the Indians in exchange for ceded lands. Act May 1, 1888, 25 Stat. 113, 114; Act June 10, 1896, 29 Stat. 321, 355.

Mr. Arthur C. Emmons filed a brief for defendant in error:

The cattle were purchased with the Indians' money, and it makes no difference whether that money was the purchase price of his land or the purchase price of his labor.

The cattle were delivered to the Indians under and

pursuant to an agreement, and not by reason of an act of Congress.

The object of the criminal provision was not to affect cattle procured by the Indians with their own money or property.

The criminal provision does not apply to cattle unconditionally owned by the Indians.

There is no similarity between the government purchase of stock cattle for the benefit of the Indians out of surplus subsistence appropriations and its delivery of cattle to the Indians in part payment for the purchase of their land.

It has never been the policy of the Government to control the property acquired by the Indians either by his labor or the exchange of other property.

The acts of May 1, 1888, 25 Stat. 113, and of June 10, 1896, 29 Stat. 321, 355, show that special provisions were necessary in order to limit the ownership of the Indians.

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

By the Indian Appropriation Act of July 4, 1884, c. 180, 23 Stat. 76, 94, the following general provision was enacted:

"That where Indians are in possession or control of cattle or their increase which have been purchased by the Government such cattle shall not be sold to any person not a member of the tribe to which the owners of the cattle belong or to any citizen of the United States whether intermarried with the Indians or not except with the consent in writing of the agent of the tribe to which the owner or possessor of the cattle belongs. And all sales made in violation of this provision shall be void and the offending purchaser on conviction thereof shall be fined not less than five hundred dollars and imprisoned not less than six months."

The United States brings this case directly here to review the action of the court below in sustaining a demurrer to an indictment charging the defendant in error with a violation of the provision just referred to on the ground that when rightly construed it did not embrace the acts charged in the indictment to have been committed in violation of its provisions. The facts stated in the indictment as the basis of the charge were these:

"That on the 17th day of June, 1901, an agreement was entered into between an agent of the United States, to wit, James McLaughlin, who was then and there acting for and on behalf of the said United States, and the Klamath and Modoc Tribes of Indians and the Yahooskin Band of Snake Indians, all of which said Indians belong to the Klamath Indian Reservation, located in the State of Oregon, by the terms of which said agreement the said Indians ceded to the Government of the United States approximately six hundred thousand acres of land, for which said land the said United States was to pay to the said Indians the sum of $537,007.20 in the manner and form as follows, that is to say, $25,000 of the said amount was to be paid in cash to be distributed amongst the said Indians; $350,000 of the said amount was to be deposited with the Treasurer of the United States to the credit of the said Indians, which said last-named sum of money was to draw interest, and the interest thereof was to be disbursed to the said Indians in annual payments; that the remaining portion of the said $537,007.20, after the payment of attorneys' fees, was to be expended for the benefit of the said Indians, under the direction of the Secretary of the Interior, and upon request of the said Indians acting through the proper Indian agent for the following purposes; that is, in the drainage or irrigation of their land and in the purchase of stock cattle for issue to them, and for such other purposes as might in the discretion of the Secretary of the Interior, best promote

the welfare of the said Indians, including a reasonable cash payment per capita not exceeding ten per centum of the principal sum.

"That by the act of Congress approved June 21, 1906, c. 3504, 34 Stats. p. 368, the said agreement was duly ratified and the sum of $537,007.20 was appropriated out of the money in the Treasury of the United States, for the purpose of carrying into effect the aforesaid agreement, it being provided that out of the sum so appropriated '$350,000 shall be deposited in the Treasury of the United States to the credit of said Indians, and the remainder shall be expended as provided in the third article of said agreement.'

"The grand jurors further find that, acting under authority of the aforesaid agreement and the act of Congress ratifying the same, the Indians of the Klamath Indian Reservation made requisition through the United States Indian agent in charge of said reservation, to the proper officers of the Government for an issue of cattle to be made to the said Indians, and thereafter the Indian Department advertised in the manner provided by law for the purchase of 4,500 heifers to be delivered at the Klamath Agency for issue to the said Indians; that pursuant to the said advertisement and in conformity therewith and after receiving proper bids, the Commissioner of Indian Affairs did, on May, 1909, purchase of and from one Wm. Hanley, of Portland, Oregon, 4,000 heifers, which were delivered during the month of August, 1909, to the superintendent of the Klamath Indian Reservation at Klamath Agency, Oregon, and thereafter payment was duly made to the said Wm. Hanley from money appropriated to carry into effect the aforesaid agreement.

"That after the cattle were duly delivered to the superintendent of said Indian Reservation they were branded with the United States Government brand and were issued to the various Indians on said reservation who

were entitled thereto, and that each Indian upon receipt of his apportioned number of cattle branded the same with his own individual brand; that Frank Lynch and Elmer Lynch were two Indians residing on said Klamath Indian Reservation who were entitled to and who received cattle that had been purchased and issued in the manner aforesaid.

"And the grand jurors further find, allege, and present that O. T. Anderson on, to wit, the 24th day of October, 1910, in Klamath County, in the State and district of Oregon, and within the jurisdiction of this court, did then and there knowingly and unlawfully purchase of and from Frank Lynch and Elmer Lynch, who were then and there Indians living and residing within the limits of the Klamath Indian Reservation and wards of the Government, fifteen head of cattle, a more accurate description of which cattle is to the grand jurors aforesaid unknown, said cattle being then and there in the possession of the said Frank Lynch and Elmer Lynch, and which said cattle so purchased as aforesaid by the said defendant had been before that time bought by the Government of the United States and issued to the said Frank Lynch and Elmer Lynch in the manner heretofore set out in this indictment, and that the said O. T. Anderson, defendant above named at the time of so purchasing the said cattle from the said Indians was not a member of the tribe of Indians to which the said Frank Lynch and Elmer Lynch belonged, nor was he a member of any Indian tribe, and that the sale of said cattle of the said Frank Lynch and Elmer Lynch and the purchase thereof by the said O. T. Anderson, defendant as aforesaid, was without the consent in writing or otherwise by the agent in charge of said Indians, and that at the time of the purchase of said cattle by the said O. T. Anderson as aforesaid he, the said O. T. Anderson, well knew that the said Frank Lynch and Elmer Lynch were Indians and wards of the

Government of the United States and that the cattle so purchased by him had before that time been issued by the Government of the United States to the aforesaid Indians, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

As we have said, the provision charged to have been violated was enacted as part of a general Indian appropriation bill. In such bill there was a clause authorizing the President to use "any sum appropriated for the subsistence of the Indians and not absolutely necessary for that purpose, for the purchase of cattle for the benefit of the tribe for whom such appropriation is made." 23 Stat., p. 97. Although this clause was not even by proximity associated with the provision here involved; indeed the two were separated by many intervening and entirely distinct provisions, and there was nothing from which otherwise the inference was deducible that they were intended to be associated, the court below thought, because they were in the same appropriation bill, it was essential to treat them as interdependent. Upon this premise as it was deemed that the sum of the unexpended appropriations was money of the United States, the inference was deduced that cattle bought with such money were the property of the United States after their delivery to Indians on a reservation and that only cattle so owned were covered by the prohibition against sale.

Coming to determine whether the facts stated in the indictment brought the case within the statute as thus interpreted, it was held that as the money with which the cattle embraced in the indictment were bought was Indian money, the price of land sold by them to the United States, the relation of principal and agent existed and hence the cattle when bought were acquired by the Indians through the United States as their representative, were owned by them and their sale was not within the

prohibition against sale. In addition this result was fortified by what was decided to be the intent of Congress in enacting the prohibition against sale, that is, the protection of the property of the United States and not the preventing the Indians on a reservation from selling their own cattle. But conceding without so deciding, the soundness of the inference deduced from the premise upon which the court proceeded, we are of opinion that error was committed in bringing together wholly distinct and non-related provisions simply because they were found in one general appropriation bill and thus interpreting the act not by its true text, but by an imaginary context. When the ambiguity produced by the erroneous consolidation is removed, the text is, we think, free from obscurity. The cattle bought under the conditions stated in the indictment were beyond doubt "cattle purchased by the United States" and which were on the reservation "in possession and control" of the Indian by whom it is charged they were wrongfully sold. The theory that the words possession and control contemplated only cattle which belonged to the United States cannot be indulged in without reading out the words forbidding the sale of cattle, in possession or control, to any one not a member "of the tribe to which the owners of the cattle belong." The fact that sales are not prohibited when made between members of the tribe, and the further fact that even the prohibited sales are permitted when made "with the consent in writing of the agent of the tribe to which the possessor or owner of the cattle belongs," demonstrates clearly that the purpose of the prohibition was not merely to protect cattle to which the United States had title as owner. This must be unless it be assumed that although the object of the legislation was to protect the title of the United States, the right to violate that title was freely permitted if only the wrong was accomplished by agreement of two or more Indians,

or was consented to by an Indian agent. And the right which the statute thus recognizes in the members of a tribe on the reservation to freely sell, among themselves, cattle, even although they may have been in possession or control as the result of a purchase made by the United States, joined with the authority conferred upon the Indian agent, not only adds to the certainty of the plain meaning of the text, but demonstrates the intent of the act, that is, the public purpose of protecting the Indians on the reservation and of keeping thereon cattle purchased by the United States. As suggested in argument by the Government, we think this continuing public purpose is cogently illustrated by the acts of May 1, 1888, c. 213, 25 Stat. 113, 114, and of June 10, 1896, c. 398, 29 Stat. 321, 355, in both of which cattle bought for Indian use from the proceeds of the price of land ceded by the Indians were subjected to a prohibition against sale like that embodied in the statute under consideration. Nor do we think there is force in the suggestion made on the other hand that the expression of the prohibition in the particular cases referred to must be taken as indicating that it was deemed that the general prohibition of the statute here involved did not apply to cattle bought under such circumstances, otherwise the enactment of the special prohibition was unnecessary. We say this since the contention disregards the fact that in the two cases referred to the special legislation added to the restrictions contained in the general law by subjecting the cattle in the particular cases dealt with, not only to a prohibition against sale, but also against exchange or slaughter of such cattle, an extension of the prohibition of the general law which presumably experience had demonstrated to be essential to the efficient execution of the public purpose which that law, as also the special provisions, were intended to accomplish.

Reversed.

METROPOLIS THEATRE COMPANY *v.* CITY OF CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 181. Argued March 12, 1913.—Decided April 7, 1913.

A classification of theatres for license fees based on, and graded according to, prices of admission is not arbitrary and unreasonable, even though some of the theatres charging the higher admission may have less revenue than those charging a smaller price of admission and hence paying lower license fees; and so *held* that the Chicago theatre license ordinance is not unconstitutional as a denial of equal protection of the law.

There is a natural relation between price of admission and revenue that justifies a classification based on the former.

This court will consider that a distinction between classes engaged in the same business that obtains in all large cities must be a substantial basis for governmental action in classifying those engaged in such business for taxation.

The fact that a law may be faulty does not demonstrate its invalidity under the Federal Constitution; even though it may seem unjust and oppressive it may be free from judicial interference.

Mere errors of government are not subject to judicial review by this court; and only a palpably arbitrary exercise of authority can be declared void under the Fourteenth Amendment.

246 Illinois, 20, affirmed.

Bill in equity brought in the Circuit Court of Cook County, State of Illinois, to restrain the enforcement of a certain ordinance of the city of Chicago, requiring licenses for places of amusement. The ordinance divides the places of amusement into twenty-one classes. The entertainments offered by complainants fall within the first class, which is defined as "all entertainments of a theatrical, dramatic, vaudeville, variety or spectacular character." The license fee is graded according to the price of admission, exclusive of box seats, as follows: If $1.00 or more, the fee is $1000; if it exceeds 50 cents

but is less than $1.00, $400; if it exceeds 30 cents but is less than 50 cents, $300; if it exceeds 20 cents but not more than 30 cents, $250; if it does not exceed 20 cents, $200.

The foundation of the bill is that the ordinance, in so far as it charges an annual license fee of $1000 upon theatres charging $1.00 or more for any seat, exclusive of box seats, violates the Fourteenth Amendment of the Constitution of the United States.

The city filed a demurrer to the bill, which was overruled, and, the city declining to plead further, a decree was entered enjoining the enforcement of § 104 of the ordinance. The decree was reversed by the Supreme Court of the State and the case remanded with directions to sustain the demurrer and dismiss the bill. This writ of error was then sued out.

The bill describes the complainants as persons, firms or corporations, and describes the theatres conducted by each of them as follows: The Colonial theatre, capacity 1482 seats; McVicker's theatre, 1868 seats; Illinois theatre, 1249 seats; Powers' theatre, 1115 seats; Studebaker theatre, 1350 seats; Cort theatre, 962 seats; Grand Opera House, 1379 seats, Great Northern theatre, 1205 seats; LaSalle theatre, 770 seats; Princess theatre, 950; Chicago Opera House, 1434 seats; Olympic theatre, 1532 seats; Garrick theatre, 1259 seats; Whitney Opera House, 708 seats.

The following are the other pertinent facts: The theatres cannot, under the ordinance, accommodate or grant admission to any number of persons in excess of the number of the seats.

There have been given and produced at the theatres respectively, excepting in the Cort theatre, for more than two years last past, and in the Cort theatre for more than two months last past, entertainments and performances of the various kinds described in the ordinance,

and in some of the theatres the price of admission has not exceeded $1.00 and in others it has not exceeded $2.00. In some the minimum price of admission has been 50 cents and in some 25 cents. All the theatres, with the exception of one or two, have at different times during the last two years made, and intend in the future to make different maximum and minimum prices of admission, dependent upon the location of seats and according to the cost of production, the season of the year and condition of business. It is impossible to tell in advance the condition of business or the character of entertainment or the highest or lowest prices of admission. At the present time the highest price to some parts of each of the theatres is $1.00 or over and the lowest price is much less. There is not now and never has been any fixed rule or standard among theatres in Chicago as to the number of seats in any theatre for which an admission fee of $1.00 or over is made. In some of the theatres owned and operated by complainants, and in some theatres owned and operated by others, there are more seats sold for more than $1.00 for a performance, than in others operated by complainants. The gross revenue per performance of complainants' theatres and other theatres, if all of the seats were occupied would differ and vary according to the seating capacity of the theatres, respectively, and also according to the conditions prevailing, including in the conditions the charge made for admission, and the different prices of admission to different parts of the theatres, there being no theatres in Chicago wherein the prices of admission to all parts of the theatre are identical with the prices of admission charged for the same number of seats in any other theatre.

The seating capacity of the largest theatre of complainants is 1868, and of the smallest, 708, the gross revenue of the latter being, when fully occupied, less than $1000, and of the former not more than $1500, figured on the

basis of existing prices of admission to all parts of the theatre. The largest theatre or place of amusement in Chicago (the performance being of the kind described in the ordinance and similar to those given by complainants) has a seating capacity in excess of 4000, its highest price of admission is $1.00, and during many weeks of each licensed period its gross revenue is in excess of $4000, to-wit: $5000. And there are other theatres to which the highest price of admission is less than $1.00, performances in which are given twice a day, thereby increasing their seating capacity; and the gross and net revenue thereof is more than twice that of some of complainants' theatres. In many other theatres, including those of complainants, charging more than $1.00 for admission, eight performances only are given per week.

The complainants pay taxes upon their buildings and personal property, and they have expended in excess of $10,000 for the purpose of producing and giving entertainments of the kind described and in excess of $5000 in advertising. The good will and business of complainants are of great value, and if the theatres are not permitted to continue as places of amusements a large part of the investment of complainants will be destroyed and they will suffer great and irreparable damage, and in an amount which cannot be adequately ascertained or compensated in an action at law.

The business of complainants is lawful and their theatres have been approved by the authorities of the city and have conformed in every particular to the ordinance of the city.

On December 17, 1909, an ordinance was passed which the officers of the city threatened to enforce against complainants, whereupon a suit was brought by the latter and others to enjoin the same upon the grounds, among others, that its provisions were discriminatory. The ordinance in controversy was then passed.

There are theatres in Chicago other than those of com-

plainants with various seating capacities which, under the ordinance of December 17, 1909, were obliged to pay a license fee of $1000, but which under the ordinance in controversy are required to pay only $400.

The income obtained by theatres of the second, third and fourth classes of the amended ordinance is often largely in excess of the income obtained by those of the first class, and there are and for a long time have been given entertainments at which large assemblages of persons congregate and to which no admission fee is charged.

Complainants intend to give entertainments at their theatres and have refused to pay the license required by the ordinance, and, as such theatres are not impressed with a public use, the city has no right to designate the amount to be charged as admission thereto.

Many causes of action are threatened against complainants and many of their managers and officers.

Theatres and places of amusement in Chicago have paid a license fee starting at $100, in 1881, and progressively increasing during certain periods to January 1, 1910, when it was fixed at $500, and complainants paid the license fee exacted during the several periods.

The inspection and regulation of complainants' theatres do not cost the city more than $50 per year.

The other provisions of the bill set forth in other ways what is alleged to be the discriminatory character of the ordinance arising from basing the license fee upon the price of admission and an infringement of the constitution of the State of Illinois and of the United States is charged.

Mr. Alfred S. Austrian, with whom *Mr. Levy Mayer* was on the brief, for plaintiffs in error:

While classification is permissible in an ordinance imposing a license fee either for the purposes of regulation or revenue, the distinctions created by such an ordinance must bear some reasonable and just relation to the subject-

matter of the classification, and to the proposed purposes of the ordinance; and if an arbitrary and improper classification is made, the ordinance cannot be sustained, as a person discriminated against by such an ordinance is deprived of the equal protection of the law, and suffers the deprivation of his property without due process of law. *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Southern Railway Co.* v. *Greene*, 216 U. S. 400; *Gulf &c. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Farrington* v. *Mensching*, 187 N. Y. 8; *State* v. *Mitchell*, 97 Maine, 66; *State* v. *Ashbrook*, 154 Missouri, 375; *Chicago* v. *Netcher*, 183 Illinois, 104; *Bailey* v. *People*, 190 Illinois, 28; *Los Angeles* v. *Lankershim*, 160 California, 800; *Owen County* v. *Cox*, 132 Kentucky, 738; 117 S. W. Rep. 296; *City* v. *Wehrung*, 46 Illinois, 392; *Wiggins Ferry Co.* v. *East St. Louis*, 102 Illinois, 560; *Bessette* v. *People*, 193 Illinois, 334; *Hibbard* v. *Chicago*, 173 Illinois, 91; *Monmouth* v. *Popel*, 183 Illinois, 634; *Zanone* v. *Mound City*, 103 Illinois, 552; *State* v. *Sheriff*, 48 Minnesota, 236; *Lappin* v. *Dist. of Col.*, 22 App. D. C. 68; *State* v. *Shedroi*, 75 Vermont, 277; *Nichols* v. *Walters*, 37 Minnesota, 264.

Mr. Charles M. Haft, with whom *Mr. William H. Sexton* was on the brief, for defendants in error:

The ordinance in question creates a reasonable classification and does not violate the Federal Constitution by depriving the complainants of the equal protection of the law or causing them to suffer the deprivation of their property without due process of law. *Douglas* v. *People*, 225 Illinois, 536, 544; *Bessette* v. *People*, 193 Illinois, 334; *Heath* v. *Worst*, 207 U. S. 338, 354; *Hawthorn* v. *People*, 109 Illinois, 311; *Tappon* v. *Merchants*, 19 Wall. 490; *State* v. *R. R. Tax Cases*, 92 U. S. 601; *State* v. *Central*, 48 N. J. L. 106; *Head Money Cases*, 112 U. S. 580; *Pacific*

Exp. Co. v. *Seibert*, 142 U. S. 339; *People* v. *Iron &c.*, 12 Colorado, 369; *Wehrung* v. *City*, 46 Illinois, 392; *Travelers Ins. Co.* v. *Connecticut*, 185 U. S. 364–371; *Kochersperger* v. *Drake*, 167 Illinois, 122; *Banta* v. *City*, 172 Illinois, 219; *Marmet* v. *The State*, 45 Oh. St. 63; *In re Abel*, 10 Idaho, 288; *State* v. *Montgomery*, 92 Maine, 433; *Ex parte Heylman*, 92 California, 482; *Mechanicsburg* v. *Koons*, 18 Pa. Sup. Ct. 131; *Nashville* v. *City*, 118 Alabama, 362; *Gamble* v. *City*, 147 Alabama, 682; *Ex parte Lemon*, 143 California, 558; *State* v. *McKinney*, 29 Montana, 375; *Commonwealth* v. *Clark*, 195 Pa. St. 634; *Sworn* v. *Selser*, 106 Louisiana, 691; *Cowart* v. *City*, 67 S. Car. 35; *Morgan* v. *Commonwealth*, 98 Virginia, 812; *City* v. *Newhall*, 115 Iowa, 55; *Newton* v. *Atchison*, 31 Kansas, 131; *Ex parte Sisto Li Protti*, 68 California, 636; *Voss* v. *Memphis*, 9 Lea, 294; *Howland* v. *Chicago*, 108 Illinois, 500; *Smith* v. *Louisville*, 6 S. W. Rep. 911; *St. Paul* v. *Dow*, 37 Minnesota, 20; *St. Louis* v. *Bircher*, 7 Mo. App. 169; *Gibson* v. *Corapolis*, 22 Pitts. L. J. (N. S.) 64; *State* v. *Schlier*, 3 Heisk. 281; *S. C.*, 8 Heisk. 455; *State* v. *Schoenhausen*, 37 La. Ann. 42; *Amader* v. *Kennedy*, 70 California, 458; *Tulloss* v. *Sedan*, 31 Kansas, 165; *State* v. *Traders &c.*, 42 La. Ann. 329; *New Orleans* v. *Ponchartrain*, 41 La. Ann. 519; *State* v. *Liverpool*, 40 La. Ann. 510; *Ficklin* v. *Shelby*, 145 U. S. 1; *Ex parte Mount*, 66 California, 448; *Walker* v. *Springfield*, 94 Illinois, 364; *State* v. *Hoboken*, 41 N. J. L. 71; *Fretwell* v. *Troy*, 18 Kansas, 271; *St. Joseph* v. *Ernst*, 95 Missouri, 360; *St. Louis* v. *Green*, 70 Mo. App. 468; *Kiliski* v. *Grady*, 25 La. Ann. 576; *State* v. *Rolle*, 30 La. Ann. 991; *Sacramento* v. *Crocker*, 16 California, 119; *Smith* v. *Louisville*, 6 S. W. Rep. 911; *New Orleans* v. *DuBarry*, 30 La. Ann. 481; *Webber* v. *Chicago*, 50 Illinois, 110; *S. C.*, 48 Illinois, 313; *Littlefield* v. *State*, 42 Nebraska, 223; *McGrath* v. *Newton*, 29 Kansas, 364; *Commonwealth* v. *Rearick*, 203 U. S. 507; *Rosenbloom* v. *State*, 64 Nebraska, 342; *Homes* v. *Ft. Smith*, 93 Fed. Rep. 857; *City* v. *Clark*,

124 Georgia, 254; *City* v. *Bolton*, 128 Iowa, 108; *Iowa* v. *Gilbertson*, 129 Louisiana, 508; *State* v. *Hammond*, 110 Louisiana, 180; *People* v. *Hotchkiss*, 118 Michigan, 59; *In re Lipschitz*, 14 N. Dak. 622; *Commonwealth* v. *Muir*, 180 Pa. St. 47; *Commonwealth* v. *Clark*, 57 L. R. A. 348; *State* v. *Doherty*, 2 Idaho, 1105; *State* v. *O'Hara*, 36 La. Ann. 94; *Osborn* v. *State*, 33 Florida, 362; *State* v. *Traders' Co.*, 41 La. Ann. 329; *In re Watson*, 17 S. Dak. 486; *Hays* v. *Commonwealth*, 107 Kentucky, 655; *Danville* v. *Weaver*, 17 Pa. Co. Ct. 17; *State* v. *Webber*, 214 Missouri, 272; *People* v. *Smith*, 147 Michigan, 391; *City of Chicago* v. *Brownell*, 146 Illinois, 64; *Quong Wing* v. *Kirkendall*, 223 U. S. 59.

There is no provision in the Federal Constitution which forbids unequal taxation by the States. *Davidson* v. *New Orleans*, 96 U. S. 97, 106; *Bells Gap* v. *Pennsylvania*, 134 U. S. 232; *Pac. Exp. Co.* v. *Seibert*, 142 U. S. 339, 351; *Merchants* v. *Pennsylvania Co.*, 167 U. S. 461; *Coulter* v. *Louisville*, 196 U. S. 599; *Savannah R. R. Co.* v. *Savannah*, 198 U. S. 392; *Metropolitan* v. *New York*, 199 U. S. 1; *St. Louis* v. *Davis*, 132 Fed. Rep. 629.

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

The attack of complainants (we so call plaintiffs in error) is upon the classification of the ordinance. It is contended that the purpose of the ordinance is to raise revenue and that its classification has no relation to such purpose and therefore is arbitrarily discriminatory, and thereby offends the Fourteenth Amendment of the Constitution of the United States. The character ascribed to the ordinance by the Supreme Court of the State is not without uncertainty. But we may assume, as complainants assert, that the court considered the ordinance as a revenue measure only. The court said: "The ordinance may be sustainable under the taxing power alone, without reference to its

reasonableness as a regulatory measure." And, regarding it as a revenue measure, complainants attack it as unreasonable in basing its classification upon the price of admission of a particular theatre and not upon the revenue derived therefrom; and to exhibit the discrimination which is asserted to result, a comparison is made between the seating capacity of complainants' theatres and the number of their performances within given periods and the theatres of others in the same respects and the resulting revenues. But these are accidental circumstances and dependent, as the Supreme Court of the State said, upon the advantages of the particular theatre or choice of its owner, and not determined by the ordinance. It will immediately occur upon the most casual reflection that the distinction the theatre itself makes is not artificial and must have some relation to the success and ultimate profit of its business. In other words, there is natural relation between the price of admission and revenue, some advantage certainly that determines the choice. The distinction obtains in every large city of the country. The reason for it must therefore be substantial, and if it be so universal in the practice of the business it would seem not unreasonable if it be adopted as the basis of governmental action. If the action of government have such a basis it cannot be declared to be so palpably arbitrary as to be repugnant to the Fourteenth Amendment. This is the test of its validity, as we have so many times said. We need not cite the cases. It is enough to say that we have tried, so far as that Amendment is concerned, to declare in words, and the cases illustrate by examples, the wide range which legislation has in classifying its objects. To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and un-

scientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void under the Fourteenth Amendment; and such judgment cannot be pronounced of the ordinance in controversy. *Quong Wing* v. *Kirkendall*, 223 U. S. 59.

Judgment affirmed.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *v.* CRAM.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 193. Argued March 18, 1913.—Decided April 7, 1913.

The legislature of a State, when so authorized by its constitution, has power to impose a limitation of the time for transportation of livestock.

The legislature of a State, when so authorized by its constitution, has power to provide a definite measure of such damages as may be difficult to estimate or prove for culpable violations of a statute limiting the time for transportation of livestock.

A contention that a statute is unconstitutional under a particular provision of the Constitution cannot be made in this court if not made in the court below.

Contracts made after the enactment of a statute are subject to, and do not impair, it.

The cattle train speed act of Nebraska establishing a rate of speed on branch lines within the State and imposing a penalty of $10 per car per hour, is not unconstitutional under the Fourteenth Amendment as depriving the railroad company of its property without due process of law because it fixes an arbitrary amount as liquidated damages.

84 Nebraska, 607, affirmed.

THE State of Nebraska enacted a law requiring railroads conveying livestock to convey the same at a rate of speed so that the time consumed in a journey from the initial point of receiving the stock to the point of feeding or destination should not exceed one hour for each eighteen miles travel, including the time of stops at stations or other points. It is provided that where the initial point is not a division station, and on all branch lines not exceeding 125 miles in length, the rate of speed shall be such that not more than one hour shall be consumed in traversing each twelve miles of the distance, including stops at stations or other points, from the initial point to the first division station or over said branches. The time consumed in picking up and setting out, loading or unloading stock at stations, shall not be included in the time required.

It is further provided that upon branch lines not exceeding 125 miles in length, livestock of less than six cars in one consignment the railroad company may designate three days in each week as stock-shipping days and publish and make public the days so designated. After notice of ten days of the days selected and designated the schedule provided in the act shall only apply to such stock-shipping days. It is provided that a carrier "violating any provisions of the act shall pay to the owner of such livestock, the sum of ten dollars for each hour for each car it extends or prolongs the time of transportation beyond the period here limited as liquidated damages to be recovered in an ordinary action, as other debts are recovered." The act was approved March 30, 1905. Nebraska Session Laws, 1905, p. 506, Chapter 107.

Defendant in error brought an action against plaintiff in error in the District Court of Garfield County, for the sum of $1770, being the aggregate of twenty-five violations of the act for stock delivered to the railroad July 14,

1905, and subsequent dates for transportation in full carloads, each violation being made a cause of action, the amount of each varying with the time of prolongation of the transportation of the stock.

There was alleged in the cause of action no ground of recovery other than the statute and the delay in the transportation of the stock. In other words, the time consumed in the transportation of the stock, such time being given and alleged to be "longer than permitted by the statutes of Nebraska, to the damage of the plaintiff . . . as provided for by statutes."

A demurrer was filed to the petition charging that the statute violated the due process and equality clauses of the Fourteenth Amendment of the Constitution of the United States; that the plaintiff (defendant in error) sought "to recover property or money from the defendant without its consent and for the private use of the plaintiff, without compensation, and which recovery, if had, would amount to confiscation of the property of the defendant in violation of the provisions of Article Fourteen of the amendments of the Constitution of the United States. The recovery sought by the plaintiff, if permitted, would be the recovery of a penalty under an act of the legislature which is penal in its character, and it is not such a right as the plaintiff can have or enforce, in violation of sec. 5, Art. 8 of the Constitution of Nebraska."

The demurrer was overruled and the defendant answered, alleging the following: The shipments were duly and properly made without unnecessary delay and the consignments carried were each and all duly delivered to the consignee in accordance with the contracts made for the shipment of the stock, and without any fault or negligence on the part of the defendant company.

A written contract for each shipment was duly made and entered into by plaintiff and defendant by which it was contracted and agreed that the shipments would

not be carried within any specified time, nor to arrive at destination for any particular market.

The damages sought to be recovered are in reality a penalty or forfeiture and that a recovery by plaintiff would be in violation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

The plaintiff's cause of action is for the recovery of a penalty sought to be imposed upon the defendant contrary to the provisions of article 8, § 5 of the constitution of Nebraska, and plaintiff had no right or authority under the law to prosecute the action or to recovery therein.

An amended answer was filed which repeated the above and alleged that the stock was accepted and carried according to the laws, rules and usages that regulated and governed common carriers, and in accordance with the schedules for the movement of trains as established and in force at the times the shipments were made. The line of the defendant's railroad was alleged, the manner of conducting its business, the times of receiving the various shipments, their arrival at particular stations and at destination.

A replication was filed to the answer denying its allegations.

The case was tried by the court without a jury and judgment was rendered for plaintiff in the sum of $1640 and costs.

The Supreme Court decided that the judgment was excessive in the amounts of $250 and $170 and those sums, in accordance with the order of the court, were remitted by the plaintiff, and with those reductions the judgment was affirmed. 84 Nebraska, 607.

Mr. Halleck F. Rose, with whom *Mr. James E. Kelby*, and *Mr. John F. Stout* were on the brief, for plaintiff in error:

The Nebraska statute so far as it creates a determinate and measured pecuniary liability against railroad companies in favor of shippers of livestock in car load lots, of $10 per car per each hour consumed in transportation over a specified speed schedule, is not a punitive measure, and cannot be upheld as an exercise of the police power.

The Supreme Court of the State construed the statute to be a mere legislative admeasurement and judgment, determining and liquidating the amount of pecuniary recovery by a stock shipper in car lots against railroads who failed to attain a specified rate of speed during the whole course of transportation.

The state court agreed that if the imposition was penal in character, it would be void because forbidden by the state constitution. *See Railway Co.* v. *Baty*, 6 Nebraska, 37; *Roose* v. *Perkins*, 9 Nebraska, 315; *Riewe* v. *McCormick*, 11 Nebraska, 264.

Punitive damages are not given in Nebraska in any class of cases between private parties. Compensation, under the rules of law, is all to which a plaintiff is entitled in a civil suit at law. *Bolt* v. *Budwig*, 19 Nebraska, 745; *Grand Island & W. C. R. Co.* v. *Swinbank*, 51 Nebraska, 525.

In *Graham* v. *Kibble*, 9 Nebraska, 185, the act there in question was upheld, not as a punitive imposition, but as a provision for liquidation of compensatory damages. And see *Grand Island & W. C. R. Co.* v. *Swinbank*, *supra*.

Imposition of damages in favor of the narrow class of shippers specified in the act for failure to observe a severe and impractical speed schedule is the equivalent of a rebate.

The legislatures of the States may not, consistently with the Federal guaranty of due process, determine and liquidate the amount of a pecuniary recovery in

damages enforceable in favor of one private suitor out of the property of another, in advance of the incident creating the right of recovery, and without notice, or opportunity of hearing, to either party.

Determination of the amount of the compensation or the quantum of damages suffered by a shipper of livestock in car load lots by prolonging the period of transportation, is a judicial function. It reaches and transfers to the shipper the property of railroads; and to whatever department or forum it may be referred, this function can only be exercised by proceedings conformable to the due process clause of the Fourteenth Amendment and in this respect the Nebraska act is unconstitutional. *Satterlee* v. *Matthewson*, 2 Pet. 413; *Vanhorn* v. *Dorrance*, 2 Dall. 304; *Loan Association* v. *Topeka*, 20 Wall. 655, 667; *Irrigation District* v. *Bradley*, 164 U. S. 158, 159; *Davidson* v. *New Orleans*, 96 U. S. 107; *Missouri P. R. Co.* v. *Nebraska*, 164 U. S. 403, 417; *Wilkinson* v. *Leland*, 2 Pet. 656; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 311, 345; *Isom* v. *Mississippi C. R. Co.*, 30 Mississippi, 300, 315; *C., B. & Q. R. Co.* v. *Chicago*, 165 U. S. 233, 236.

While the property of railroads is employed to perform the public service of transportation, it is, none the less, private property, under the dominion of private ownership, and within the protection of constitutional guaranties. *Missouri P. R. Co.* v. *Nebraska*, 164 U. S. 417; *Smyth* v. *Ames*, 169 U. S. 466; *Missouri P. R. Co.* v. *Nebraska*, 217 U. S. 196; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 466. And see also *Ives* v. *South B. R. Co.*, 200 N. Y. 271.

Domestic animals constitute a considerable portion of the national wealth. The variations in value of different members of the same species will show, in horses for example, divergencies between $25 and $100,000. Divergencies equally marked in the valuations of individual

members exist in all the different species of domestic animals. In our system of government these animals are not subject to be valued by legislative act, any more than are lands or corporate franchises.

If the legislature be unfettered in the exercise of this despotic power it may fix the sum or amount of the claim at any figure that suits its will or whim. North Dakota, more moderate than Nebraska, in an act, since held invalid as an undue burden on commerce, fixed $5 per car per each hour as the measure of the stock shipper's claim for delay in transportation beyond a statutory speed schedule. *Douglas* v. *Northern P. R. Co.*, 125 N. W. Rep. 475, and see *C., R. I. & P. R. Co.* v. *Witte*, 32 Nebraska, 383, 384.

So also the legislature, if unfettered in its power to liquidate and measure damages, may supersede the functions of the court and jury by enacting legislation establishing damages in all other classes of cases.

Sun Printing and Publishing Co. v. *Moore*, 183 U. S. 642, distinguished, as was a case enforcing liquidated damages stated by contract. Whether the difficulty in proving the amount of damages is sufficient to relieve the function of determining the amount of recovery from the reach of the guaranty of due process, is a Federal question upon which the decision of the state court is not controlling.

The holding of the state court, that proof of the amount of damages accruing from delay in transporting livestock in cars is difficult or impossible, is palpably erroneous, contrary to common experience, and without any basis or foundation upon which to rest.

Previous to the adjudications under review, the Nebraska court had not found that there was any difficulty in proving the amount of damages actually sustained in such cases. *Nelson* v. *C., B. & Q. R. Co.*, 78 Nebraska, 57; *Denman* v. *C., B. & Q. R. Co.*, 52 Nebraska, 140; *C., B. & Q. R. Co.* v. *Williams*, 61 Nebraska, 608; *Wente* v.

C., B. & Q. R. Co., 79 Nebraska, 179; *Squires* v. *Elwood*, 33 Nebraska, 126; *Gillilan* v. *Rollins*, 41 Nebraska, 540; *Lee* v. *Carroll Normal School*, 96 N. W. Rep. 65.

While the Fourteenth Amendment may not prohibit the States from assigning judicial powers to their legislative assemblies, that judicial power can only be exercised, by any department of the state government, in conformity to the requirement of due process.

Obviously the state court did not rest its decision either on the proposition that the state legislature could exercise judicial power, or that the imposition is penal.

If this court interprets the imposition on railroad companies in favor of shippers of livestock in car load lots of $10 per car for each hour of delay to be a punishment in the nature of a fine, as it did the Missouri statute in *Missouri Ry. Co.* v. *Humes*, 115 U. S. 512, the statute must be held repugnant to the equal protection guaranty.

Mr. E. J. Clements, with whom *Mr. S. H. Cowan* was on the brief, for defendants in error:

The Constitution of the United States does not prohibit a state legislature from exercising judicial functions, and whether or not it has done so is not a Federal question. *Saterlee* v. *Mathewson*, 12 Pet. 380. See also *Dryer* v. *Illinois*, 187 U. S. 71, which has been cited, with approval, in *Reitz* v. *Michigan*, 188 U. S. 507; *Carfer* v. *Caldwell*, 200 U. S. 297; *Prentis* v. *Atlantic Coast Lines*, 211 U. S. 225; *Soliah* v. *Heskin*, 222 U. S. 522.

The object of the act in question is the regulation of *quasi*-public corporations, in the conduct of their business as common carriers, and its provisions are clearly within the police power of the State.

Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. When a statute is susceptible of two constructions, one making it constitutional

and the other unconstitutional, the former must be adopted. Black's Const. Law, § 30; 8 Cyc. 801, 804; *United States* v. *Delaware*, 213 U. S. 407; *Knights Templars Co.* v. *Jarman*, 187 U. S. 197, 205; *Harriman* v. *Int. Com. Comm.*, 211 U. S. 407; *Hooper* v. *California*, 155 U. S. 657; *A., T. &c. R. R. Co.* v. *Matthews*, 174 U. S. 104.

In all of its relations to the public, a railroad company has the character of a public agent, is a *quasi*-public corporation, and is subject to any reasonable legislative regulation or control. 2 Elliott on Railroads, §§ 662, 670; 7 Cyc. 447, 448; *C., B. & Q. Ry. Co.* v. *Iowa*, 94 U. S. 113; *Gladsen* v. *State*, 166 U. S. 427; *Wisconsin &c. Ry. Co.* v. *Jacobson*, 179 U. S. 287; *Atlantic &c. Ry. Co.* v. *North Carolina Com.*, 206 U. S. 1.

Legislative power to regulate and control *quasi*-public corporations is not confined to railroad companies alone, but extends to banks, elevator, insurance, gas, water, telephone and telegraph companies, and all corporations engaged in business of a public nature. *Munn* v. *Illinois*, 94 U. S. 113; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307; *Noble State Bank* v. *Haskell*, 219 U. S. 104.

The right of the legislature to regulate and control a business affected with a public interest is a part of the police power of the State. 9 Ency. of U. S. Sup. Ct. Dec. 483; *Lake Shore Ry. Co.* v. *Ohio*, 173 U. S. 285; *Lake Shore Ry. Co.* v. *Smith*, 173 U. S. 684; *Western Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347; *C., B. & Q. R. Co.* v. *Drainage Com.*, 200 U. S. 561; *Bacon* v. *Walker*, 204 U. S. 311; *Bank* v. *Haskell*, 219 U. S. 104; *German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307; *Gladson* v. *Minnesota*, 166 U. S. 427.

The fact that the company was organized under the laws of another State does not affect the right to regulate it. *Stone* v. *Farmers L. & T. Co.*, 116 U. S. 334; Freund on Police Power, § 398; 33 Cyc. 648; *New York &c. R. R.*

Co., v. *New York*, 165 U. S. 628; *Harrington* v. *Georgia*, 163 U. S. 299.

The act in question is therefore a police regulation.

The object and purpose of § 2 are to enforce the regulations provided for in § 1, and to furnish a simple and expeditious remedy to a party injured by a violation thereof.

This method of enforcement does not in any manner conflict with the Fourteenth Amendment, or any other provision of the Federal Constitution. *Mo. Pac. Ry. Co.* v. *Hume*, 115 U. S. 512; *Minneapolis &c. Ry. Co.* v. *Emmons*, 149 U. S. 312; *Minneapolis &c. Ry. Co.* v. *Beckwith*, 129 U. S. 31.

If, therefore, § 2 provides for a penalty, it is not inimical to the Constitution of the United States. *Illinois &c. R. Co.* v. *Illinois*, 163 U. S. 152, distinguished, and see *Atchison &c. R. Co.* v. *Matthews*, 174 U. S. 96, 100; *Huntington* v. *Attrill*, 146 U. S. 657, 682.

If, upon independent inquiry, this court shall determine that the recovery provided for by § 2 is in the nature of a penalty, then its former decisions are conclusive that it does not violate the Fourteenth Amendment.

The construction placed upon this act and similar statutes by the Supreme Court of Nebraska does not affirm or deny that the statute is or is not a police regulation; nor that it is or is not penal in its nature; nor that if it were penal it would or would not violate the state constitution. Counsels' contention that the court held that it was penal is based upon the fact that the recovery is termed "liquidated damages."

The statute would not necessarily be unconstitutional if it provided for anything more than compensatory damages, or was in any sense penal. For cases in which penal, or *quasi*-penal, statutes have been upheld, see *Graham* v. *Kibble*, 9 Nebraska, 184; *Phœnix Ins. Co.* v. *Bohman*, 28 Nebraska, 251; *Phœnix Ins. Co.* v. *McEvony*, 52 Nebraska, 566; *Clearwater Bank* v. *Kurkonski*, 45

Nebraska, 1; *Deering* v. *Miller*, 33 Nebraska, 655; *Hier* v. *Hutchings*, 58 Nebraska, 334.

The common-law rule that, in cases showing wanton or malicious injury, punitive damages may be allowed,—which is still recognized and adhered to by this court and the courts of many States,—has been abrogated in some jurisdictions, including Nebraska. *Boyer* v. *Barr*, 8 Nebraska, 68; *A. & N. R. Co.* v. *Baty*, 6 Nebraska, 37.

This court has sustained punitive damage statutes under the Fourteenth Amendment. *Minn. Ry. Co.* v. *Beckwith*, 129 U. S. 27.

A state legislature has the power to fix, by statute, the maximum, or even the exact amount recoverable by a person sustaining injury from the delinquency of a public, or *quasi*-public, agent; and such a statute does not violate any of the provisions of the Fourteenth Amendment. Field's Law of Damages, § 17.

See cases involving the construction and enforcement of insurance statutes fixing penalties and damages. In several of said cases, it is expressly held that the statutory provisions in regard to the amount of the recovery amount to a statutory liquidation of damages, which become a part of the contract, and must govern notwithstanding any conflicting provisions embodied therein by the parties. *Lancashire Inv. Co.* v. *Bush*, 60 Nebraska, 121; *Oshkosh Gas Light Co.* v. *Ins. Co.*, 71 Wisconsin, 454; *Havens* v. *Ins. Co.*, 123 Missouri, 403; *Orient Insurance Company* v. *Daggs*, 172 U. S. 557; *Fidelity Mut. Assn.* v. *Mettler*, 185 U. S. 226.

The constitutional guaranties of due process and equal protection of law can have no greater force or effect when invoked by a railroad company than when claimed by an insurance corporation. *Brady* v. *Daly*, 175 U. S. 148. See also statute fixing liquidated damages for infringing patents. *Pirkle* v. *Smith*, 42 Fed. Rep. 410. See also for other liquidated damage statutes, *Coover* v.

Walker, 31 Missouri, 574; *Carroll* v. *M. P. Ry. Co.*, 88 Missouri, 239; *Miller* v. *M. P. Ry. Co.*, 109 Missouri, 350; *Lamphear* v. *Buckingham*, 33 Connecticut, 238; *Texas Cent. R. Co.* v. *Hannoy & Co.*, 130 S. W. Rep. 250; *Orange County* v. *Harris*, 97 California, 600.

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

The case is here in a simple aspect. There was no attempt made to explain or justify the delays in the shipments, and any attack on the statute on the ground that it includes delays resulting from the act of God or cause over which the carriers have no control is precluded by the construction put upon the act by the Supreme Court of the State.

The only proposition, then, which is presented is whether the statute is beyond the power of government and, therefore, offends the Fourteenth Amendment of the Constitution of the United States by depriving plaintiff in error of its property without due process of law.

This is contended upon two grounds: 1. The statute, as considered by the Supreme Court of the State, is a legislative determination of the quantum of damages arising from a breach of a private contract for the shipment of livestock and a legislative determination of damages wholly distinct and apart from the exercise of police power, and not a punitive measure to enforce compliance with the commands of the statute. 2. The statute, being declared of such character, is "a usurpation of functions which are exclusively judicial, contrary to the law of the land" and repugnant to the provisions of the Fourteenth Amendment.

It is the concession of the contentions that had the statute been considered by the Supreme Court a police regulation, the objection made to it would be without

foundation. But, meeting the effect of the concession, plaintiff in error asserts that if the court had so ruled defendant in error would have had no right of action because under § 5, article 8, of the constitution of the State, all penalties must be appropriated to the use and support of the common schools.

The court found no conflict between the law and the constitution of the State. Section 5, article 8, however, was not discussed in any of the opinions. Other provisions of the constitution were considered and the contentions based on them decided to be untenable. The omission is not important to our inquiry, and we shall assume, as plaintiff in error contends, that the court regarded the statute as giving compensation for damages for injuries suffered rather than penalties for omission of duties prescribed. It does not follow, however, that the court decided that the statute was not passed in exercise of the power of the State to regulate the conduct of the carriers in the performance of their duties to the public. The opinion of the court makes the contrary manifest. The court said (p. 611), "In the instant case, the enforcement of the law, as we view the record, will not deprive defendant of any constitutional guarantee, state or national. Defendant's property is affected by a public interest . . . it must, to the limit of the interest thus acquired by the public, submit to the control of such property for the public good. . . . The public is interested not only in being permitted to have its property transported for a reasonable compensation, but also in having that property, especially if subject to rapid depreciation, transported with reasonable promptness and care. . . . It is a matter of common knowledge that livestock confined in a freight car deteriorates in condition and that, if the animals are to be placed on the market within a short time of the termination of transportation, the depreciation is not confined to a

shrinkage in weight, but to many other factors difficult to prove, but actually existing and seriously affecting the market value of said property. As the damage accruing from the protracted confinement of stock is difficult to prove with reasonable exactitude, and yet always exists, the legislature has the power to provide for liquidated damages. Such legislation is not unsound in principle and has been upheld in many courts."

The court, in illustration of its views and the quality of the statute, compared it to § 4966 of the Revised Statutes of the United States which provides for a liability of one hundred dollars for the first infringing performance of a copyrighted dramatic piece and fifty dollars for the second performance, as, the court said (p. 613), "a reasonable liquidation of the damages which the proprietor had suffered from the wrongful acts of the defendant."

The court also adduced two examples from statutes of the State sustained by decisions, in both of which fifty dollars was given as liquidated damages; in one, against an officer for collecting a fee greater than allowed by law; in the other, against a mortgagee for failing to release a chattel mortgage; and five hundred dollars against an officer for re-arresting a person after his discharge on *habeas corpus*.

Answering the objection that the legislature might subject an occupant of a public office to damages for particular unlawful acts and not have such power over others, the court said that the reason applied as well to "like provisions in statutes passed to regulate public carriers in the transaction of their business."

It is clear from the excerpts from the opinion of the court that it considered the statute as passed to regulate public carriers and to give damages against them for the omission of the duties prescribed by it which, though existing, could not be exactly estimated or proved. The

court therefore only announced and applied the principle of liquidated damages. It would seem, too, by the examples it adduced from other statutes of the State, to reject the view asserted by plaintiff in error that even if the statute be regarded as imposing penalties upon the carriers, it was thereby made to conflict with § 5, article 8, of the state constitution and could be made payable to the party injured. This was declared in *Clearwater Bank* v. *Kurkonski*, 45 Nebraska, 1, and sums provided to be recovered by other statutes were decided in other cases to be in the nature of penalties. *Graham* v. *Kibble*, 9 Nebraska, 182; *Phœnix Ins. Co.* v. *Bohman*, 28 Nebraska, 251; *Same* v. *McEvony*, 52 Nebraska, 566; *Deering* v. *Miller*, 33 Nebraska, 654. These cases are distinguishable from those cited by plaintiff in error in which the court disapproved a statute which purported to give double damages, and the court, in the case at bar, explicitly distinguished them from cases in which liquidated damages were provided for. In other words, the court decided that the statute imposed only compensatory damages, fixing them at a sum certain because of the difficulty "of the ascertainment of the actual damages suffered by the aggrieved person."

We need not extend the discussion. We repeat, the case is here in a simple aspect. Two propositions only are involved: (1) the power of the legislature to impose a limitation of the time for the transportation of livestock; (2) to provide a definite measure of damages which may be difficult to estimate or prove. It is too late in the day to deny the possession of the first power, and we think the other is as fully established and that the statute was enacted to meet conditions which had arisen from the conduct of carriers, and which, in the judgment of the legislature, demanded a remedy. And the court confined the act strictly to culpable violation of its requirements. To the plea of extra expense which might be incurred by

obedience to the statute, the court said it could be compensated by extra charge.

The contention is made that the statute impairs the obligation of the contracts which existed between plaintiff in error and defendant in error; but that contention was not made in the court below and cannot therefore be made here. Besides, there is no evidence of the contracts in the record. Contracts were pleaded and there appears to have been some attempt to introduce them in evidence, but unsuccessfully, and they were stricken from the bill of exceptions. But, assuming the contracts may be considered on this record, a complete answer to the contention that the statute impairs their obligation is, they were made subsequently to the statute and, therefore, are subject to it.

Judgment affirmed.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *v.* KYLE.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 194. Argued March 18, 1913.—Decided April 7, 1913.

Nebraska Live Stock Speed Law sustained on authority of *Chicago, Burlington & Quincy Ry. Co.* v. *Cram*, ante, p. 70.

THE facts, which involve the constitutionality of the Nebraska freight speed law, are stated in the opinion.

Mr. Halleck F. Rose, with whom *Mr. James E. Kelby* and *Mr. John F. Stout* were on the brief, for plaintiff in error.

Mr. E. J. Clements, with whom *Mr. S. H. Cowan* was on the brief, for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case also involves the validity of the statute of Nebraska which was considered in *Chicago, Burlington & Quincy Railroad Co.* v. *Cram*, No. 193, and was submitted at the same time with that case.

The cause of action was based on the ground of prolongation in the transportation beyond the statutory schedule of five cars of cattle from Palmer, Nebraska, to South Omaha, in the same State, which were delivered to the railroad September 6, 1905. It was alleged that the time of transportation was for a period of nine hours "over the time allowed by law in that behalf," and that by failure to transport the cattle "within a reasonable time and within the time allowed by law for that purpose," the plaintiff was damaged in the sum of $450, which was the statutory rate of $10 per hour.

The answer filed by the railroad company to the petition alleged that the shipment was made pursuant to a contract in writing and that the cattle were transported and delivered as contracted for without any fault or negligence on its part. The answer also denied the allegations of the petition. A replication was filed to the answer.

The case was tried to a jury, which rendered a verdict for Kyle, upon which judgment was entered. It was affirmed by the Supreme Court of the State for the reasons stated by the court in *Cram's Case.*

The case was submitted to the jury upon the evidence of the plaintiff, the railroad company offering no testimony. There was no proof that there was actual injury or damage done to the shipper by the alleged delay in transportation. The statute was the sole basis of the claim in the suit. The court instructed the jury that if the time exceeded that provided for by the statute under the conditions expressed by the statute, they should find for the

complainant; otherwise, for the defendant. The railroad company requested explicit instructions against the recovery by the plaintiff of any sum.

The contentions are the same as in *Cram's Case*, and upon the authority of its decision the judgment in this case is

Affirmed.

UNITED STATES OF AMERICA *v.* PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY, PACIFIC COAST STEAMSHIP COMPANY, ALASKA STEAMSHIP COMPANY, CANADIAN PACIFIC RAILROAD COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR ALASKA, DIVISION NO. 1.

No. 697. Argued February 26, 1913.—Decided April 7, 1913.

While under the Interstate Commerce Act a carrier may select its through route connections, agreements for such connections may constitute violations of the Anti-trust Act if made not from natural trade reasons or on account of efficiency, but as a combination and conspiracy in restraint of interstate trade and for the purpose of obtaining a monopoly of traffic by refusing to establish routes with independent connecting carriers.

In reviewing the decision of the lower court sustaining a demurrer to an indictment charging a combination in violation of the Anti-trust Act, this court is not called upon to consider what the elements of the plan may be independently, or whether there is or is not a standard of reasonableness which juries may apply. If a criminal violation of the act is charged, the criminal courts have cognizance of it with power of decision in regard thereto.

A combination made in the United States between carriers to monopolize certain transportation partly within and partly without the United States is within the prohibition of the Anti-trust Act, and

also within the jurisdiction of the criminal and civil law of the United States even if one of the parties combining be a foreign corporation.

While the United States may not control foreign citizens operating in foreign territory, it may control them when operating in the United States in the same manner as it may control citizens of this country.

The purpose of the Interstate Commerce Act is to establish a tribunal to determine the relation of communities, shippers and carriers, and their respective rights and obligations dependent upon the act, and the conduct of carriers is not subject to judicial review in criminal or civil cases based on alleged violations of the act until submitted to and passed on by the Commission.

Quære, what the effect is of a finding by the Interstate Commerce Commission in such a case.

Where the District Court holds that the averments of the indictment are not sufficient to connect certain defendants with the offense charged, it construes the indictment and not the statute on which it is based, and this court has no jurisdiction under the Criminal Appeals Act to review the decision.

An objection to the demurrer made by certain defendants and sustained as to one count, and not passed on as to other counts which were struck down by the District Court but sustained by this court, may be raised in the District Court by such defendants in regard to such counts when the case is again before that court.

INDICTMENT for alleged violations of the Sherman Anti-trust Act and of the Interstate Commerce Act.

The indictment contains six counts. The first and second counts charge violations of the Anti-trust Law. The first by the defendants engaging in a combination and conspiracy in restraint of trade and commerce with one another to eliminate and destroy competition in the business of transportation in freight and passengers between various ports in the United States and British Columbia in the south, and the various cities in the valleys of the Yukon River and its tributaries, both in British and American territory, in the north, upon a line of traffic described, for the purpose and with the intention of monopolizing such trade and commerce. The second count charges the monopolization of trade and commerce in the

same business and between the same ports. The manner of executing the alleged criminal purpose is charged to be the same in both counts.

The places of the incorporation of the corporate defendants are alleged, and the following facts: The Pacific Coast Steamship Company and the Alaska Steamship Company operate respectively lines of steamships as common carriers of freight and passengers running in regular route between Seattle, State of Washington, and Skagway, Alaska. The Canadian Pacific Railway Company is a like carrier and operates a line of steamships between Vancouver, British Columbia, and Skagway. During the time mentioned in the indictment the Pacific & Arctic Railway & Navigation Company owned and operated a railroad from tidewater at Skagway to the summit of White Pass, a distance of about twenty miles to the boundary line between Alaska and British Columbia, at which latter point it connected with a railroad owned and operated by the British Columbia Yukon Railway Company. The latter road extended from the summit of White Pass to the east shore of Lake Bennett and the boundary line between British Columbia and Yukon District of Canada, a distance of about twenty-five miles, at which point it connected with another railroad, owned and operated by the British Yukon Railway Company, which extends to White Horse on the headwaters of the Yukon River, in Yukon District of Canada. During all the times mentioned there was a line of steamers plying upon the Yukon River and the headwaters thereof between White Horse and Dawson, owned and operated by the British Yukon Navigation Company. The four corporations last above mentioned and their stocks and bonds were owned and controlled by the same persons and individuals, and the said three lines of railroads and their lines of steamers were under one and the same management and were operated as one continuous line

of common carriers of freight and passengers between the towns of Skagway and Dawson and way points under the name and style of the White Pass and Yukon Route, referred to as "the railroad" and had the sole and exclusive monopoly of the transportation business between Lynn Canal and the navigable waters of the Yukon River. A general trade and commerce was carried on between British Columbia and Puget Sound ports and the Yukon Valley, both in American and British territory, over the designated routes and to the various places on the routes, and the shortest and most natural route for such trade and commerce was, has been, and is by water craft from said southern ports to Skagway, and thence over Moore's Wharf, so called, to the points of destination. Trade and commerce from White Horse and Dawson to said southern ports would naturally, when left untrammeled by unlawful interference, move up the Yukon to the headwaters of that river and thence by the way of said railroad to Skagway, Alaska, thence over said Moore's Wharf, and thence by steamship or other water craft to the said southern ports.

The North Pacific Wharves & Trading Company was the owner and in exclusive possession and control of all of the wharves at Skagway at which steamships or other water crafts could take and discharge, or load cargo, that company having a complete and absolute monopoly of the wharfage business at Skagway and owning and operating the Moore Wharf, which wharf, by agreement between the Wharves Company and the railroad, had been made and was the terminus of the railroad over which all freight going to or coming from or passing through Skagway had necessarily to pass. The wharf was operated as a public wharf. Continuously during the three years immediately preceding the finding of the indictment the defendants combined and conspired together to eliminate and destroy competition in the transportation business between the said southern ports and Skagway, for the purpose and

with the intention of giving to and creating for the Alaska Steamship Company, the Pacific Coast Steamship Company and the Canadian Pacific Railroad Company a monopoly of such business, and, to that end, purpose and intention, entered into, and continuously maintained a joint traffic arrangement between the railroad and the steamship companies, by and through the individual defendants as officers and agents of the corporate defendants, pursuant to which arrangement either of the steamship companies could and did bill freight and passengers through from either of the said southern ports to any point on the said railway or on said Yukon River or its tributaries along and over the route of travel and transportation described, and the railroad could and did bill freight and passengers through from Yukon and other northern points to said southern ports only on ships from Skagway south, billing to either of the steamship companies. The rates for freight and passengers were fixed and an apportionment between the said respective carriers of the gross receipts was established and agreed upon. With the like intent and purpose it was agreed that the railroad should, and it did, refuse to enter into any joint through traffic arrangement with any other carrier or carriers, and refused to receive any other through billing on shipments from the said southern ports except such as arrived at Skagway by some ship belonging to one of the steamship companies, or from said Yukon points to the southern ports, except by the same ships. As part of the same combination and with the same intent and purpose it was agreed that the Wharves Company should, and it did, during all the times mentioned, charge wharfage at the rate of $2.00 per ton for all freight handled over its wharf except when the same was shipped on a vessel owned by either of the companies, or was consigned to some one who had entered into or was about to enter into a contract with either of said steamship companies to

bind himself to have all of his freight carried by such steamship company and by no one else, in which latter case a wharfage of $1.00 per ton only was charged and any charge in excess of $1.00 was unreasonably high and was exacted for the unlawful purpose aforesaid. With like intention and purpose and as part of the same combination and conspiracy, it was arranged and agreed by and between the defendants that the said railroad should, and it accordingly did, fix and establish local rates and transportation charges for freight and passengers from 5% to 25% higher than the through joint rates, differing according to classification of the various commodities shipped. Pursuant to such arrangement and the purpose and intention aforesaid, the said railroad received for through shipments, as its share of freight charges, from 15% to 30% less than it charged for the same class of freight shipped between Skagway and the same Yukon points. By reason of the facts alleged it became and was, during all of the time mentioned, unprofitable for the public to employ any carrier in the trade, traffic or commerce save and except the said steamship companies, and competition in the said water transportation between the steamship companies and other carriers was in that manner and by the means of said combination and conspiracy eliminated and destroyed, the defendants being enabled to monopolize such trade, traffic, transportation and commerce to the injury of the public.

The third count charged an unlawful and unjust discrimination in the transportation of passengers and freight, in violation of the Interstate Commerce Act. The discrimination is charged to have been practiced against the Humboldt Steamship Company between January 1, 1909, and August 10, 1910, which company is alleged to be a California corporation and engaged as a common carrier of freight and passengers operating a line of steamers from the same ports from which the defendant steamship

companies operate their respective lines to Skagway, Alaska. In the conduct of its business the Humboldt Steamship Company operated a steamship called the "Humboldt" on a regular schedule and route between Seattle, Washington, and Skagway. "The railroad," as we have seen the White Pass & Yukon route is called in all of the counts, had entered into and maintained during the time aforesaid with the defendant steamship companies a joint traffic arrangement whereby and under the terms of which freight and passengers might be billed at a joint through rate from the said southern ports over the route described to the various Yukon points, but refused without cause or excuse to enter into a joint traffic arrangement with the Humboldt Company, though requested to do so, or to receive, carry or handle any freight billed through from Seattle to Yukon points on the railroad or the Yukon River; and neither would nor did carry any freight whatever from Skagway to any of said points in British or American territory at a less rate or charge than from 5% to 30% more, according to classification and character, than it received from the defendant steamship companies as its proportion of joint through rates from such southern points to the corresponding Yukon points. The railroad company, it is charged, caused the North Pacific Wharves & Trading Company to charge for all freight shipped on the steamship "Humboldt" for transshipment on the railroad to points along its line on the Yukon River a wharfage of $2.00 per ton, whereas it included at the same time in its portion of the through rate on through bills under its arrangement with defendant steamship companies all wharfage charges. And it is alleged that the defendants knowingly, willfully and maliciously induced and incited the railroad company to practice the discrimination described, and each and all aided and abetted one another and the railroad company in such practice.

The other facts as to routes, commerce and carriers, their relations and arrangements and the effect of them are the same as in the first and second counts, the order of statement being somewhat different.

Count 4 is the same, as to the facts alleged, as the third count except the discrimination is charged to have been practiced against the Humboldt Steamship Company between August 18, 1910, and January 1, 1912.

Count 5 brings the discrimination charged down to the finding and presentation of the indictment. There is no allegation of discrimination in wharfage charges.

Count 6 charges the crime of conspiracy to commit an offense against the United States by destroying competition between the defendant steamship companies and the Humboldt Steamship Company. The same facts are alleged as in the other counts.

Motions to quash the indictment and each of its counts were made and denied. Demurrers to the indictment were filed and sustained to all counts but the sixth. To that, the demurrer of the individual defendants was sustained.

Mr. Solicitor General Bullitt for the United States:

The United States may indict for violations of the Sherman Anti-trust Act without the necessity of any prior action by the Interstate Commerce Commission on the facts involved.

An act may be in violation of the Sherman Anti-trust Law without being in violation of the Interstate Commerce Act. *Meeker* v. *Lehigh Valley R. R. Co.*, 183 Fed. Rep. 548; *Texas R. R. Comm'n* v. *A., T. & S. F. Ry. Co.*, 20 I. C. C. Rep. 463, 465; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505; *United States* v. *Trans-Missouri Ass'n*, 166 U. S. 290.

The Interstate Commerce Commission has nothing to do with prosecutions under the Anti-trust Act.

The United States may indict for unjust discriminations,

&c., in violation of the Interstate Commerce Act without the necessity of first having the Interstate Commerce Commission determine the legality or propriety of the acts complained of.

The Interstate Commerce Commission has powers as between carriers and shippers but not as between the United States and carriers or shippers.

Different rules govern applications by shippers for relief in the courts from those governing the United States. (*a*) In the light of reason. (*b*) The provisions of the statute. (*c*) Under the authorities.

For suits between private parties see *Atlantic Coast Line* v. *Macon Grocery Co.*, 166 Fed. Rep. 206; *B. & O. R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Columbus Iron Co.* v. *Kanawha Ry. Co.*, 171 Fed. Rep. 713; *Houston Coal Co.* v. *N. & W. Ry. Co.*, 171 Fed. Rep. 723; *Jewett Bros.* v. *C., M. & St. P. Ry. Co.*, 156 Fed. Rep. 160; *Kiser Co.* v. *Central of Ga. Ry. Co.*, 158 Fed. Rep. 193; *No. Pac. Ry. Co.* v. *Pacific Coast &c. Ass'n*, 165 Fed. Rep. 1; *Proctor & Gamble* v. *United States*, 225 U. S. 282; *Robinson* v. *B. & O. R. Co.*, 222 U. S. 506; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Union Pacific R. R. Co.* v. *Oregon & Wash. Ass'n*, 165 Fed. Rep. 13; *Wickwire Steel Co.* v. *N. Y. C. & H. R. R. Co.*, 181 Fed. Rep. 316.

As to prosecutions by the United States see *Armour Packing Co.* v. *United States*, 209 U. S. 56; *A., T. & S. F. Ry. Co.* v. *United States*, 170 Fed. Rep. 250; *Chicago & Alton Ry. Co.* v. *United States*, 156 Fed. Rep. 558; *S. C.*, 212 U. S. 563; *Chicago, St. P. &c. Ry. Co.* v. *United States*, 162 Fed. Rep. 835; *C., B. & Q. Ry. Co.* v. *United States*, 209 U. S. 90; *Great Nor. Ry. Co.* v. *United States*, 208 U. S. 452; *L. V. R. R. Co.* v. *United States*, 188 Fed. Rep. 879; *N. Y. Central* v. *United States*, 212 U. S. 481, 500; *Standard Oil Co.* v. *United States*, 179 Fed. Rep. 614; *United States* v. *B. & O. R. Co.*, 153 Fed. Rep. 997; *United*

States v. *Great Nor. R. Co.*, 157 Fed. Rep. 288; *United States* v. *Hocking Valley Ry. Co.*, 194 Fed. Rep. 234; *United States* v. *Mer. & Min. &c. Co.*, 187 Fed. Rep. 363; *United States* v. *Miller*, 223 U. S. 599; *United States* v. *P. & R. Ry. Co.*, 184 Fed Rep. 543; *United States* v. *Sunday Creek Co.*, 194 Fed. Rep. 252; *United States* v. *Texas & Pac.*, 185 Fed. Rep. 820; *Wight* v. *United States*, 167 U. S. 512; *Wisconsin Cent.* v. *United States*, 169 Fed. Rep. 76.

Mr. W. H. Bogle, with whom *Mr. Carrol B. Graves*, *Mr. W. B. Stratton*, *Mr. Ira Bronson*, *Mr. Morven Thompson* and *Mr. Bruce C. Shorts* were on the brief, for defendants in error:

Under the provisions of the act of March 2, 1907, the questions for review are only those arising from the decision of the court below in construing the statutes upon which the indictment is founded.

Holding that the indictment did not sufficiently specify the acts of the individual defendants which were relied upon as constituting a participation by them in the offense charged, or in aiding or assisting therein is not a construction of either the conspiracy statute, upon which that count of the indictment was founded, or of the Interstate Commerce Act, the violation of which was the crime which the defendants were alleged to have conspired to commit. The ruling of the court below sustaining the demurrer as to count 6 was based upon general principles of criminal pleading, and is not reviewable under this writ. *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Stevenson*, 215 U. S. 190.

Neither of the acts charged in the indictment, nor the two combined, amounts to undue restraint of trade or monopoly, under the Anti-trust Act, or undue discrimination under the Interstate Commerce Act.

The Pacific and Arctic Railway & Navigation Com-

pany was constructed and operated from the international boundary line to Skagway. It was under no legal duty to assume any obligations whatever with respect of the carriage of either freight or passengers by water between Skagway and the southern ports. If it voluntarily assumed any obligations for carriage beyond its own line, it had the legal right at its own discretion to select the agencies beyond its own line for which it would be responsible. Under the principles of common law, it had this absolute right, and could enter into an agreement for through routing and through rating with one connecting carrier and refuse to enter into any such agreement with any other connecting carrier. *A., T. & S. F. R. Co.* v. *D. &c. Co.*, 110 U. S. 667; *S. P. R. Co.* v. *I. Com. Comm.*, 200 U. S. 536; *Interstate Com. Comm.* v. *N. P. Co.*, 216 U. S. 538; *St. Louis Drayage Co.* v. *L. & N. R. R.*, 65 Fed. Rep. 39; *O. S. L. Co.* v. *N. P. R. Co.*, 51 Fed. Rep. 465; *C. & N. W. Co.* v. *Osborne*, 52 Fed. Rep. 912; *P. & S. Co.* v. *A., T. & S. F. Co.*, 73 Fed. Rep. 438; *G., C. & S. R. Co.* v. *S. S. Co.*, 86 Fed. Rep. 407; *Central Stock Yards Co.* v. *L. & N. R. Co.*, 118 Fed. Rep. 113.

The provision in § 1 of the Commerce Act requiring carriers to establish through routes and just and reasonable rates applicable thereto, does not require a carrier to establish through routes with all connecting carriers. So long as reasonable through routes are established the obligation imposed is complied with.

This clause in § 1 standing alone, is not capable of particular enforcement, and it must be read in connection with § 15. Two carriers cannot establish a through route unless they can agree upon the terms and conditions, and upon the amount and division of the through rate. The failure of carriers to come to terms of agreement cannot be made a criminal offense under § 10 of the Commerce Act or under the Sherman Act. *Cardiff Coal Co.* v. *C., M. & St. P. R. Co.*, 13 I. C. C. Rep. 460. There

was no legal duty upon the carrier to make a through routing agreement with any particular connecting carrier, until the Interstate Commerce Commission, after a hearing, had in the first instance determined that such a through route was required by the public interest, and ordered its establishment. *Interstate Com. Comm.* v. *N. P. Co.*, 216 U. S. 538.

The indictment in this case does not allege that any particular agreement for through routing was ever presented to the railway company by any other connecting carrier than the defendants, nor does it allege upon what terms and conditions the railway should have contracted, nor indicate in any way how the defendant railway company was to be protected against the additional obligations resulting from a through routing with such carrier.

It is intended by the Interstate Commerce Act that the question, when and under what circumstances a through route should be established between any two particular connecting carriers (in the absence of voluntary agreement between them), and upon what terms and conditions such through route should be established, was committed in the first instance exclusively to the determination of the Interstate Commerce Commission pursuant to the provisions of § 15 of the act; that the courts could not, in either a civil or criminal proceeding, determine in the first instance and in the absence of action by the Commission, whether a through route as between any two specified connecting carriers was or was not required by the public interest; and that in the absence of any action by the Commission, an allegation that a carrier entered into a through routing agreement with one connecting carrier and refused to make such agreement with any other carrier, cannot be held to be undue discrimination under the Commerce Act, or undue restraint of trade under the Anti-trust Act. *Tex. & Pac. Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *B. & O. R. Co.* v.

Pitcairn Coal Co., 215 U. S. 482; *Robinson* v. *B. & O. R. Co.*, 222 U. S. 506; *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282.

The establishment or non-establishment of a through route in a given instance is administrative in its nature, and the determination of the necessity for its establishment is, in the first instance, committed exclusively to the judgment of the Commission by § 15 of the act.

The construction of the indictment by the court below, showing a difference in conditions under which different wharfage rates were charged, is binding upon this court. *United States* v. *Biggs*, 211 U. S. 507; *United States* v. *Patten*, 226 U. S. 525; *United States* v. *Winslow*, 227 U. S. 202.

The reasonableness of the wharfage rate on local shipments, and the reasonableness of the difference in the rate on local and on through-routed shipments, are questions for the solution of which there is no certain or fixed standard, and upon which different men might reasonably reach different conclusions. To make criminality depend, not upon facts, but upon the view of a jury as to the reasonableness of rates, is contrary to fundamental principles. *Tozier* v. *United States*, 52 Fed. Rep. 917; *Van Patten* v. *C., M. & St. P. Ry. Co.*, 81 Fed. Rep. 545.

While it is alleged that the lines from Skagway to Dawson were under one and the same management and operated as one continuous line, it is not alleged that the defendant railroad company or any of the other defendants had any interest in or control over or participated in the operation of either of the three foreign lines.

The laws of the United States cannot make it either criminal or wrongful for the owners of a foreign railroad to refuse to enter into traffic agreements with any other carrier whether located within or without the United States, and involving a carriage in such foreign country. It is not and cannot be criminal or wrongful for the

defendant railway company or its officers to refuse to extend through-routing privileges over railroads and steamship lines owned and operated by other corporations in a foreign country. Neither the defendants nor the Interstate Commerce Commission itself had any power to establish through-routing and through-rating over these foreign lines without the consent of the owners and operators of such foreign lines. Our laws cannot be extended so as to control or affect foreign carriage. *Am. Banana Co.* v. *United Fruit Co.*, 213 U. S. 347.

The acts charged against the defendants were lawful at common law, and are not forbidden by the Interstate Commerce Act; it cannot, therefore, be held that they constitute either undue restraint of trade or undue discrimination. The refusal by the railroad company to give to the Humboldt Steamship Company, or any other company, privileges which it was under no legal obligation to give, and to which such other company was not legally entitled, cannot be made the basis of a charge of either undue discrimination or undue restraint of trade. *A. J. & F. S.* v. *Tiedt*, 196 Fed. Rep. 349; *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279; *Gamble-Robinson Co.* v. *Railroad*, 168 Fed. Rep. 161; *G., C. & S. R. Co.* v. *Miami Steamship Co.*, 86 Fed. Rep. 407.

With respect to counts 1 and 2, the allegations of the indictment are too general and indefinite.

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

The District Court said that it was "without jurisdiction to entertain or determine the questions involved in the first five counts of the indictment in either a criminal or civil proceeding," until the matters of discrimination between carriers or shippers or the giving or refusing of joint traffic arrangements "have been submitted to

and passed on by the Interstate Commerce Commission." For this conclusion the court relied on *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 427, and *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 492.

It may be well, even at the expense of repetition, to give a summary of the indictment before passing to the special contention of the parties. The route described is between ports of the United States (called southern ports) and places in northern Alaska and Canada (called northern ports)—(1) by steamship lines from the United States and Vancouver, (southern ports) to Skagway (the entire wharfage facilities being owned by The North Pacific Wharves & Trading Company); (2) thence by railroad to the headwaters of the Yukon River; (3) thence by boat down the Yukon River to Dawson, etc., (called the northern ports). The route is designated as the White Pass and Yukon Route and is constituted of (a) The Pacific and Arctic Railway and Navigation Company, a West Virginia corporation; (b) The British Columbia-Yukon Railway Company, incorporated under the laws of British Columbia; (c) The British-Yukon Railway Company, incorporated under the laws of the Dominion of Canada; and (d) The British-Yukon Navigation Company, Limited, incorporated under the laws of British Columbia. These companies are referred to as "the railroad company" and own the only line of transportation between the wharf at Skagway and the Yukon River.

By mutual agreement between the defendant steamship companies, the Wharves Company and the railroad company, through routes and joint rates were established, thus making one continuous line of common carriers for freight and passengers between the United States (southern ports) and northern Alaska (northern ports).

The Humboldt Steamship Company and other independent lines plied between the United States and Skagway.

By agreement between the defendants the railroad refused to make any through route or joint rates with the Humboldt Company, or with any of the independent steamship lines, and refused to bill freight or passengers from the United States to Yukon River points, or reversely, except by ships belonging to one of the defendant companies.

By agreement between the defendants the railroad fixed so-called local rates between Skagway and the Yukon River points, which rates were very much higher than the railroad's pro rata of the through rate.

The Wharves Company charged $2.00 a ton for freight if shipped on a vessel not owned by one of the defendant companies. If so shipped and consigned to one who had entered into, or was about to enter into a contract to have all of his shipments so carried, the wharfage charge was only $1.00. Wharfage charges in excess of $1.00 are unreasonably high.

As a result of the agreement, shippers were compelled to use only the ships of the defendant steamship companies, as in that way alone could lower through rates be obtained. Competition in water transportation was destroyed between the defendant steamship companies and the independent lines, defendants obtained a monopoly of the transportation business between the United States and Alaska, and the Humboldt Company was discriminated against in the matter of through rates. These agreements between the defendant companies are alleged to be (count 1) for the purpose of eliminating competition from the business of transportation between the United States and Alaska; (second count) to monopolize such business; (counts 3, 4 and 5) to discriminate against the Humboldt Company. Count 6 we omit from consideration for the present.

The charges of the indictment may be even further concentrated and attention directed to these elements: The

defendant steamship lines and the Humboldt and independent lines from the United States to Skagway, the wharf at Skagway and the railroad from Skagway to the Yukon River points. The only possibility of competition is in the water part of this route. This controlled, the entire transportation is controlled; and to this control the action of the defendants was directed, the means of control being an agreement between the defendants to throw all the trade into the hands of the defendant steamship companies by the railroad company establishing through route and joint rates with them and refusing to do so with the Humboldt Company or any of the independent companies. The Wharves Company gave its assent by its wharfage charges and all evasion was prevented by so fixing the local rates that their combination was greater than the through rate agreed on. It is manifest that the scheme was effective and cut out the Humboldt line and the independent lines as factors in the routes of transportation between the United States and the Yukon River points. Is the scheme illegal?

This is asserted by the Government and denied by the defendants. The court below, if we take some parts of its decisions, held that the forum of that question was the Interstate Commerce Commission. But, considering the decision of the court as a whole, we think it construed the Anti-trust Act, upon which counts 1 and 2 were based, and to those counts we shall confine our discussion for the present. This is admitted by defendants. They say that as the court held that in order to constitute restraint of trade or monopolization of trade under the Anti-trust Act the act charged must be such as at common law constituted restraint of trade, and were unlawful, to that extent the court construed the act. And, setting forth the grounds of the ruling, counsel say that the court decided that the entering into through route agreements by a common carrier with one or more connecting carriers

and the refusal to make such agreements with other connecting carriers was not unlawful either at common law or by the Interstate Commerce Act, and the court held, therefore, that such act did not constitute restraint within the meaning of the Anti-trust Act. The right of a carrier to select its connections must be admitted (we state the right as absolute, without regard to the Interstate Commerce Act, for our present purposes), and if there were nothing else in the case the conclusion of the District Court would have to be affirmed. But there is another and important element to be considered. The charge of the indictment is that the agreements were entered into not from natural trade reasons, not from a judgment of the greater efficiency or responsibility of the defendant steamship lines as instruments in the transportation than the independent lines, but as a combination and conspiracy in restraint of trade by preventing and destroying competition in the transportation of freight and passengers between the United States and Alaska and obtaining a monopoly of the traffic by engaging not to enter into agreements with the independent lines. There is a charge, therefore, of infringement of the Anti-trust Law, of something more done than the exercise of the common-law right of selecting connections, and the scheme becomes illegal. *Swift & Co.* v. *United States*, 196 U. S. 375, 396. We do not pause to justify this conclusion, either by the general purpose of the act or by its adjudged applications. Its general purpose has been elaborately set forth in very recent cases; and particular instances of its application, pertinent to the case at bar and illustrative of it, are exhibited by *Swift & Co.* v. *United States*, *supra*, and *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U. S. 20. In those cases, as here, rights were brought forward to justify a purpose which transcended the limits put upon their exercise by the Anti-trust Act. In those cases, as here, the purpose (the

means being different) was the prevention or destruction of competition, and the agreements here are exactly adapted to the purpose. Not the railroad only but the Wharves Company as well is charged to be in the combination. It was intermediate the railroad and the steamship lines and discriminated in its wharfage charge, it is alleged, to aid in the purpose of the combination, and, to complete and make effective the purpose, the local rates from Skagway to Yukon points were made greater than that part of the through transportation.

Whether $2.00 per ton (the rate charged to independent lines as against $1.00 per ton charged to the defendant steamship lines) was reasonable or unreasonable, or whether a through rate may be less than the sum of the local rates, we are not called upon to consider, although the court below thought the inquiry important and the defendants make it prominent in their contentions. The plan makes the parts unlawful (*Swift & Co.* v. *United States*, *supra*), whatever they may be independently of it, and whether there is or is not a standard of reasonableness which juries may apply is aside from the question. It is equally unimportant to consider whether the Interstate Commerce Commission has power to pass on the rates, as such, or through routing, as such. We are dealing with an indictment which charges a criminal violation of the Anti-trust Act, and of that the criminal courts have cognizance, with power of decision upon the principle which we have expressed.

The next contention of defendants is that as part of the transportation route was outside of the United States the Anti-trust Law does not apply. The consequences and, indeed, legal impossibility are set forth to such application, and, it is said, "make it obvious that our laws relating to *interstate* and *foreign* commerce were not intended to have any effect upon the carriage by foreign roads in foreign countries, and . . . it is equally clear that

our laws cannot be extended so as to control or affect the foreign carriage." This is but saying that laws have no extra-territorial operation; but to apply the proposition as defendants apply it would put the transportation route described in the indictment out of the control of either Canada or the United States. These consequences we cannot accept. The indictment alleges that the four companies which constitute the White Pass & Yukon Route (referred to as the railroad) and owned and controlled by the same persons, entered into the combination and conspiracy alleged, with the intention alleged, with the Wharves Company and the defendant steamship companies. In other words, it was a control to be exercised over transportation in the United States, and, so far, is within the jurisdiction of the laws of the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations.

The ruling of the District Court, sustaining the demurrer to the first and second counts, was therefore erroneous.

The decision of the District Court upon counts 3, 4 and 5 must be determined upon different principles than those which we have just expressed in passing on counts 1 and 2. The District Court, as we have seen, decided that the conduct of the defendants was not subject to judicial review in a criminal or civil case until it had been submitted to and passed upon by the Interstate Commerce Commission. The Government attacks the conclusion with arguments of great strength and contends that it makes the Commission not only the judges of the civil relief that private shippers may be given against the carriers by the Interstate Commerce Act, but gives the Commission the control and practical determination of

the criminal provisions of the law. The argument, in effect, is that the conclusion of the District Court confounds the civil and criminal remedies of the law, the private injury and the public injury, resulting from the violation of its provisions. And who, it is asked, will initiate the criminal proceeding and by what proof will it be supported? What degree of proof is to be accorded to the finding of the Commission—presumptive or conclusive? If neither, it is argued, "it would be a senseless thing to regard such a finding as a condition precedent of the United States to indict." If, it is asked further, the finding of the Commission is to have either *prima facie* or conclusive effect, against whom is it to have such effect? If against a defendant, what becomes of the Sixth Amendment of the Constitution? The argument of the Government is cast in a series of questions which end in the final answer, as it is contended, that under the decision of the District Court the Interstate Commerce Commission "becomes practically the court of final criminal jurisdiction."

The contentions of the Government would be formidable indeed if the Interstate Commerce Act was entirely criminal. But it is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission. This view avoids the consequences depicted by the Government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the Interstate Commerce Act what it was intended to be and defined to be in the cases cited by the District Court, to-wit: *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* and *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co., supra.* And it would in our judgment be an erroneous view to take that the great problems which

the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal. We need not extend the discussion. The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment.

The District Court sustained count 6, against the demurrer of the corporate defendants, but held its averments were not sufficient to connect the individual defendants with the offense charged. This is a construction of the indictment and not subject to review.

It is urged by the individual defendants that the objection is applicable to the other counts of the indictment and that the court would have undoubtedly so ruled but for its construction of the Anti-trust Act, and it is also urged that in case of reversal of the court's decision upon the construction of the act it be permitted to pass upon such of the grounds of demurrer as were not passed upon in the former ruling. We yield to the request, and the more readily as the Government does not express great confidence in the sufficiency of the indictment. Its final contention is that the judgment of the District Court be reversed, with instructions "to pass on the sufficiency of the indictment without regard to the action or non-action of the Interstate Commerce Commission."

The judgment is therefore reversed as to counts 1 and 2 and the case remanded with instructions to proceed in accordance with this opinion.

FROSCH *v.* WALTER.

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

No. 192. Argued March 17, 18, 1913.—Decided April 7, 1913.

A declaration in a deed of trust which clearly shows that the sole object of the instrument is to provide for certain specifically named children of the grantor who has other children, so dominates the instrument that the word " children " when thereafter used will be construed as referring to those particular children and not to include any other children of the grantor.

While the word " heirs " if used as a term of purchase in a will may signify whoever may be such at the testator's death, the word " children " as used in the deed involved in this case should be construed as including only those persons answering the description at the time of execution.

Surviving children of the grantor in such an instrument held to include children of one of the children specifically mentioned who had died prior to the grantor.

34 App. D. C. 338, reversed.

THE facts, which involve the construction of a deed conveying real estate in trust, are stated in the opinion.

Mr. Ralph P. Barnard, Mr. M. J. Colbert and *Mr. Benjamin F. Leighton*, with whom *Mr. Guy H. Johnson, Mr. H. T. Taggart* and *Mr. Oliver Metzerott* were on the brief, for appellants.

Mr. James B. Archer, with whom *Mr. Andrew Lipscomb* and *Mr. Jno. Lewis Smith* were on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by Catharine Frosch against a trustee under a deed to compel him to transfer

to her or otherwise according to the construction of the instrument certain of the property conveyed by the deed. Other parties in interest are joined, and argument has been heard on their behalf. The facts are as follows: John Walter, the plaintiff's father, executed the deed on June 18, 1869. At that time his first wife had died leaving five children of whom the plaintiff is one, and he had married again.

Two of these children, John Walter, Junior, and William Walter, were of age. On the date mentioned their father gave them severally certain property in fee simple, and then made the deed before us, reciting therein that he was "desirous of making provision for his children by his first wife, to-wit: Catharine Magdalena Sophia Walter, [the plaintiff,] George N. Walter, and Mrs. Barbara King," these three then being under age. The final limitation is the one to be construed, but it will be understood better when the previous ones have been summed up.

The deed conveys to John Walter, Jr., certain parcels of land in trust, after certain contingent prior payments and after the death of the grantor, to hold the first named parcel and pay the rents and profits to the plaintiff for life and then to hold for the use of her children in fee. It similarly disposes of a bond for $10,000, given by John Walter, Jr., to his father as part consideration for the above mentioned gift to him, stating that it is "in order to equalize the division of my property between my said children." Then comes a gift of the second and third parcels upon like limitations and trusts for another daughter, Mrs. Barbara King, and also of secured notes for $7300, like the gift of the bond for Catharine, "in order more fully to equalize the division of his property, among his children." The fourth parcel is given upon similar trust for George N. Walter, the youngest son.

Then comes the doubtful clause. "In the event of the death of any one of the above-mentioned children of the

said John Walter, Senior, to-wit: Catherine, George & Barbara, without leaving any child or children or any issue of any child or children, then and in that case that the property held in trust by said Trustee, party of the second part, for the benefit of the party then dying without issue, shall be sold by said party of the second part, after the death of John Walter, Senior, and the proceeds paid over in equal portions to the surviving children of the said John Walter, Senior." John Walter, Senior, died on April 12, 1907. Before that date George had died in 1892 unmarried, and it is the disposition to be made of his share that is in question here. Barbara had died on August 23, 1904, leaving eight children, defendants herein, and John Walter, Jr., had died on November 17, 1906, leaving two children, defendants herein. William Walter, who with John had been provided for separately, survives and also is made a defendant. The grantor's second wife afterwards died, childless, and he married a third wife, who died leaving four children, also defendants in this suit. It may be remarked, if in any way material, that the grantor in 1900 provided for these last mentioned children by gifts similar to the above, subject like them to a life estate in himself.

To begin with the claim of the children of the third marriage, we are of opinion that it is unfounded. The word heirs if used as a term of purchase in a will, might be held to reach forward and to signify whoever might turn out to be such by the law in force and applicable at the testator's death. But this is a deed and the word is children. In view of what we have to say further, it is enough to state our opinion that the word as here used is confined to persons who answered the description at the moment when the deed was executed and spoke.

The Court of Appeals held that all persons were embraced who answered that description at that time, provided they survived the grantor, and directed a de-

cree in favor of the plaintiffs, Catharine and William Walter. 34 App. D. C. 338. But we take a different view. In the first place we are of opinion that the word children as used habitually in the deed means the three children for whom it declares at the outset that its object is to provide. That very declaration not only dominates the deed as a statement of the sole reason for the whole thing, but foreshadows the mode of referring to these three children in terms broad enough to signify all—'is desirous of making provisions for his children by his first wife'—a phrase only cut down by a 'to-wit: Catharine, George and Mrs. King.' When the grantor speaks of equalizing his property "between my said children" we understand him to refer to the three that have been mentioned together under that name. And we understand him to mean nothing different when later he speaks of equalizing the division of his property among his children. This interpretation perhaps is strengthened by the fact that 'my property' cannot properly include that which had been conveyed to his two elder sons and therefore that the equalizing contemplated was an equalizing as between the three children among whom his remaining property was divided by the present deed.

In the clause under consideration he shows whom he had meant by 'said children' when he says 'above mentioned children, . . . to-wit: Catharine, George and Barbara'—and when a few lines further on he says 'surviving children' the inference is strong that he means the children that up to that moment he had been talking about by that name throughout. It would seem that the grantor considered that he had made a division that would be fair as against the two elder children who had received their gifts in fee, if each of the three children and after them their descendants respectively received and retained the portion allotted to each. The groups set over against each other in his mind were the two adults

and the three minors. If one of the latter died without issue and his share went to the other two the equality was kept up because all of the three were equally subject to the chance, but assuming a substantial equality between the five lots the two adults being subject to no chance of loss had no claim to a chance of gain. It follows that William Walter is excluded, contrary to the decree of the Court of Appeals.

There remains the question whether children of Barbara King are entitled to share with Catharine as held by the Supreme Court. The Court of Appeals was of opinion that the interest of Barbara King was contingent upon her surviving the grantor, and that as she died before him her children could not take, the word children obviously being used in its proper sense and not embracing issue of such children, mentioned antithetically in the same sentence. It reached this conclusion because the direction to sell and distribute did not operate till after the death of the grantor and in its view the time of distribution determined the time of vesting an individual title in any child. On this point also we take a different view. The limitation over on the death of one of the three children without issue was of general import and scope, and was not confined to such a death before the grantor's. If George had died after his father instead of before the gift over still would have taken effect. Surviving children then means those of the three children who survive the child who dies without issue. The death of the child determines who shall take as surviving children. It is true that if that death happens before the grantor's the distribution is postponed, but that obviously is inserted to exclude any implication that in that event the grantor gives up the life estate that he has reserved throughout. It does not appear to us to warrant the conclusion that the time of the child's death with reference to this collateral fact was to affect the nature or quality of the interest given to the children

who survive. It is true that the gift is contained in the direction for distribution after sale, but in view of our opinion that it would have operated equally whenever George died, and that the reason of the postponement of distribution to after the grantor's death was solely on the grantor's own account, that fact cannot affect the result. The decree of the Court of Appeals is reversed and the original decree of the Supreme Court will be restored.

Decree reversed.

MR. JUSTICE PITNEY, concurring.

I concur in the result reached, and agree with the reasoning expressed in the opinion of the court except upon one point. The opinion states:

"The limitation over on the death of one of the three children without issue was of general import and scope, and was not confined to such a death before the grantor's. If George had died after his father, instead of before, the gift over still would have taken effect."

Upon this point I agree with the view expressed in the opinion of the Supreme Court of the District, that—"The equitable title to George's portion, subject to the life estate of John Walter, Sr., became vested in the complainant herein (Mrs. Frosch) and her sister, Barbara King, at George's death, May 14, 1892. Being so vested, Barbara's share passed by her death to her eight children; and William Walter, the children of John Walter, Jr., and the four children of the third wife, have no share in the said property."

McDERMOTT *v.* STATE OF WISCONSIN.

GRADY *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

Nos. 112, 113. Argued January 17, 20, 1913.—Decided April 7, 1913.

State legislation in regard to labeling articles in interstate commerce which are required to be branded under the Federal Pure Food and Drugs Act, is void so far as it interferes with the provisions of such act and imposes a burden on interstate commerce; and so *held* as to certain provisions of the Wisconsin statute.

Congress not only has the right to pass laws regulating legitimate commerce among the States and with foreign nations, but also has full power to bar from the channels of such commerce illicit and harmful articles.

Congress may itself determine the means appropriate to this purpose; and, so long as they do no violence to the other provisions of the Constitution, Congress is itself the judge of the means to be employed in exercising the powers conferred on it in this respect.

The Pure Food and Drugs Act must be construed in the light of the purpose and power of Congress to exclude poisonous and adulterated food from interstate commerce. *Hipolite Egg Co.* v. *United States*, 220 U. S. 45.

Articles, the shipment or delivery of which in interstate commerce is prohibited by § 2 of the Food and Drugs Act, are those which are adulterated or misbranded within the meaning of the act in the light of those provisions of the act wherein adulteration and misbranding are defined.

"Package" or its equivalent, as used in § 7 of the Food and Drugs Act, refers to the immediate container of the article which is intended for consumption by the public. To limit the requirements of the act to the outside box which is not seen by the purchasing public would render nugatory one of the principal provisions of the act.

Quære, and not necessary to decide in this case, what is the exact meaning of the terms "original unbroken package" and "broken package" as used in §§ 2, 3 and 10 of the Food and Drugs Act.

While the enactment by Congress of the Food and Drugs Act does not

prevent the State from making regulations, not in conflict therewith, to protect its people against fraud or imposition by impure food and drugs, *Savage* v. *Jones*, 225 U. S. 501, the State may not, under the guise of exercising its police power, impose burdens upon interstate commerce or enact legislation in conflict with the act of Congress on the subject.

A state law on a subject within the domain of Congress must yield to the superior power of Congress; to the extent that it interferes with or frustrates the operation of the act of Congress a state statute is void.

Whether articles in interstate commerce have been branded in accordance with the terms of the Food and Drugs Act is not for the State to determine but for the Federal courts in the manner indicated by Congress.

As the Federal Food and Drugs Act requires articles in interstate commerce to be properly labeled, a State cannot require a label when properly affixed under that statute to be removed and other labels authorized by its own statute to be affixed to the package containing the article so long as it remains unsold by the importer, whether it be in the original case or not.

The doctrine of original packages was not intended to limit the right of Congress, when it chose to assert it, as it has done in the Food and Drugs Act, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end.

State legislation cannot impair legislative means provided by Congress in a Federal statute for the enforcement thereof.

The statute of Wisconsin of 1907 prescribing a label for corn syrup and prohibiting all others is invalid so far as it relates to articles properly branded on the immediate container thereof under the Federal Food and Drugs Act and brought into the State in interstate commerce, so long as they remain unsold by the importer, whether in the original outside package or not.

143 Wisconsin, 18, reversed.

THE facts, which involve the constitutionality of the Wisconsin syrup law and the construction of the Federal Pure Food and Drug law, are stated in the opinion.

Mr. H. O. Fairchild for plaintiffs in error.

Mr. John M. Olin, with whom *Mr. L. H. Bancroft*, Attorney General of the State of Wisconsin, *Mr. Harry L.*

Butler, *Mr. William R. Curkeet* and *Mr. Burr W. Jones* were on the brief, for defendant in error:

The Wisconsin act of 1907, is not invalid because in violation of the commerce clause of the Federal Constitution or of the Federal Food and Drugs Act of 1906.

In the absence of congressional action otherwise indicating, an article ceases to be the subject of interstate commerce, and becomes subject to the police power of the State, when the original package in which it is usually, and in good faith shipped, has been received and broken by the importer, or when he has made the first sale thereof, in the original package so received. *Cook* v. *Marshall County*, 196 U. S. 261; *Austin* v. *Tennessee*, 179 U. S. 343; *May* v. *New Orleans*, 178 U. S. 496; *Sponge Co.* v. *Drug Co.*, 124 Wisconsin, 469.

The mere fact that Congress, in the exercise of its power to regulate commerce, has legislated upon the general subject of the transportation and sale of an article of interstate commerce, does not, in itself, take away the right of the State, in the exercise of its police power, to make regulations concerning the same article as a subject of interstate commerce, at least so long as such state regulations do not conflict with the Federal regulation.

Congressional regulation does not exclude state regulation except so far as the former, lawfully exercised, conflicts with the latter. *Reid* v. *Colorado*, 187 U. S. 137; *Asbell* v. *Kansas*, 209 U. S. 251; *Crossman* v. *Lurman*, 192 U. S. 189; *State* v. *C., M. & St. P. Ry. Co.*, 136 Wisconsin, 407, 416; *Chicago, M. & St. P. Ry. Co.* v. *Solan*, 169 U. S. 133; *M., K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613, 624; *Gulf &c. Ry. Co.* v. *Hefley*, 158 U. S. 98, 104; *W. U. Tel. Co.* v. *James*, 162 U. S. 650, 654; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345; *Penn. R. Co.* v. *Hughes*, 191 U. S. 477; *Savage* v. *Scovell*, 171 Fed. Rep. 566; *Northern P. R. Co.* v. *Washington*, 222 U. S. 370, 379;

Southern R. Co. v. *Reid*, 222 U. S. 424, 442; *Savage* v. *Jones*, 225 U. S. 501.

The act of 1906 does not expressly or impliedly operate upon the original package of commerce, after it has been broken, or after its first sale as such by the importer, but on the contrary, the act clearly shows the congressional intention to leave the article subject to state regulation after it has so ceased to be the subject of interstate commerce; and, therefore, there is no conflict between the Federal act and the state law.

The terms "original, unbroken package" as used in §§ 2 and 10 of the act, and "unbroken package" as used in § 3 of the act, had prior to its adoption been judicially treated as synonymous. *Low* v. *Austin*, 13 Wall. 29; *United States* v. *Fox*, Fed. Cas. No. 15155.

Where a party, in transporting goods from one State to another, selects an unusual method for the express purpose of evading or defying the police laws of the latter State, the commerce clause of the Federal Constitution and an act of Congress cannot be invoked as a cover for fraudulent dealings. *Austin* v. *Tennessee*, 179 U. S. 343.

An original package within the meaning of the Food and Drugs Act is the unit, complete in itself, delivered by the shipper to the carrier addressed to the consignee, and received by him in the identical condition in which it was sent, without separation of the contents in any manner. Thornton, Foods and Drugs, p. 971.

The foregoing was the judicially accepted definition of "original package," "original, unbroken package," and "unbroken package," at the time of the adoption of the act of 1906. *Brown* v. *Maryland*, 12 Wheat. 419; *Low* v. *Austin*, 13 Wall. 29; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Leisy* v. *Hardin*, 135 U. S. 100; *Vance* v. *Vandercook Co.*, 170 U. S. 438; *Austin* v. *Tennessee*, 179 U. S. 343; *Guckenheimer* v. *Sellers*, 81 Fed. Rep. 997; *May* v. *New Orleans*, 178 U. S. 496; *In re Harmon*, 43 Fed. Rep. 372; *Cook* v.

Marshall Co., 196 U. S. 261; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *United States* v. *Fox*, 25 Fed. Cas. No. 15155; *State ex rel.* v. *Board*, 15 So. Rep. (La.) 10; *Commonwealth* v. *Schollenberger*, 156 Pa. St. 201; Thornton, Foods and Drugs (1912), pp. 143, 150, 177.

The Federal act is not to be construed as displacing state authority to regulate the adulteration or branding of foods which have been shipped from without the State, and thereby become subject to the Federal law, but which have been removed from the original package of shipment. *Armour & Co.* v. *Bird*, 123 N. W. Rep. 580 (Dec., 1909); *Savage* v. *Scovell*, 171 Fed. Rep. 566 (1908).

A construction of the act of 1906, which would make it operate upon the contents of the original package of shipment or upon such original package after its first sale by the importer, would render the act, thus far at least, invalid, as an unconstitutional invasion by Congress of the power reserved to the States to regulate their own internal affairs.

The regulation of the internal affairs of a State by Congress is as unconstitutional as is the direct attempt by a State to regulate interstate commerce. *Ill. Cent. R. R.* v. *McKendree*, 203 U. S. 514; *Geer* v. *Connecticut*, 161 U. S. 519, 531; *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 210; *Sands* v. *Manistee R. I. Co.*, 123 U. S. 288, 295; *The Daniel Ball*, 10 Wall. 557, 564; *The Employers' Liability Cases*, 207 U. S. 463, 502; *United States* v. *DeWitt*, 9 Wall. 41; *Gibbons* v. *Ogden*, 9 Wheat. 1, 186; *License Cases*, 5 How. 504, 574; *Keller* v. *United States*, 213 U. S. 139; *Ex parte Agnew*, 89 Nebraska, 306.

A statute, whose terms are broad enough to include both intrastate and interstate commerce, will be construed as applicable only to intrastate commerce, when it would be unconstitutional if applied to interstate commerce. *Chicago & N. W. Ry. Co.* v. *State*, 128 Wisconsin, 553, 650, 651; *Church of the Holy Trinity* v. *United States*, 143

U. S. 457, 459; *State* v. *Anson*, 132 Wisconsin, 461, 473; 17 Am. & Eng. Ency. of Law, 2d Ed., 75, 76; *Ratterman* v. *West. Un. Tel. Co.*, 127 U. S. 411, 427, 428; *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 186 Fed. Rep. 966, 972; *Commonwealth* v. *Gagne*, 153 Massachusetts, 205; *Commonwealth* v. *People's Express Co.*, 88 N. E. Rep. 420, 424; *West. Un. Tel. Co.* v. *State*, 121 S. W. Rep. 194, 196; *Wagner* v. *West. Un. Tel. Co.*, 133 S. W. Rep. 91; *Sponge Co.* v. *Drug Co.*, 124 Wisconsin, 469, 476; *State* v. *West. Un. Tel. Co.*, 75 Kansas, 620; 90 Pac. Rep. 299; *G., C. & S. F. Ry. Co* v. *Gray*, 87 Texas, 313; *I. & G. N. R. Co.* v. *R. R. Commissioners*, 99 Texas, 332; *McCord* v. *State*, 101 Pac. Rep. 280, 286; *Standard Oil Co.* v. *State*, 117 Tennessee, 618; *Freight Discrimination Cases*, 95 N. Car. 428; *Beardsley* v. *N. Y., L. E. & W. R. Co.*, 44 N. Y. Supp. 175, 178; *Dillon* v. *Erie Ry. Co.*, 43 N. Y. Supp. 320, 326; *Ex parte Agnew*, 89 Nebraska, 306; 131 N. W. Rep. 817, 820; *El Paso & N. E. Ry. Co.* v. *Gutierrez*, 215 U. S. 87, 96.

Under the principles here announced—and they have frequently been applied by this court—there should be no difficulty in sustaining this act, even though the language is broad enough to include both interstate and intrastate commerce. It cannot be said that the idea of controlling interstate commerce was even present to the mind of the legislature, much less that it was the controlling inducement to the passage of the act for the purpose of controlling commerce within the State. *Berea College* v. *Kentucky*, 211 U. S. 45; *Presser* v. *Illinois*, 116 U. S. 252, 263; *Albany County* v. *Stanley*, 105 U. S. 305; *Field* v. *Clark*, 143 U. S. 649, 695; *Huntington* v. *Worthen*, 120 U. S. 97, 102; *Scott* v. *Donald*, 165 U. S. 58, 105; *State* v. *Sawyer County*, 140 Wisconsin, 634; *Quiggle* v. *Herman*, 131 Wisconsin, 379, 382; *Cornish* v. *Tuttle*, 53 Wisconsin, 45; *Lynch* v. *Steamer "Economy,"* 27 Wisconsin, 69, 72; *Walsh* v. *Dousman*, 28 Wisconsin, 541; *Kennedy* v. *Railway Co.*, 22 Wisconsin,

581, 590; *Wakely* v. *Mohr*, 15 Wisconsin, 609; *Slauson* v. *Racine*, 13 Wisconsin, 398, 404; *Fayette County* v. *People's Bank*, 10 L. R. A. 196, 201; *McCullough* v. *Virginia*, 172 U. S. 102, 112; *Des Moines Water Co.* v. *City of Des Moines*, 192 Fed. Rep. 193, 196; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 21, 53; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 395.

Whether the statute in question shall be construed to be applicable to intrastate commerce solely, or not, is purely a question for the state court, and upon the proper construction to be given, the state courts are not restricted by Federal decisions. In such cases the Federal courts adopt the construction given by the state courts. *Osborne* v. *Florida*, 164 U. S. 650, 654; *Louisville &c. Ry. Co.* v. *Mississippi*, 133 U. S. 587, 591; *St. L., I. M. &c. Ry.* v. *Paul*, 173 U. S. 404; *Tullis* v. *Lake Erie & Western Ry.*, 175 U. S. 348; *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388, 395; *Buffalo Refrigerating Mach. Co.* v. *Penn. H. & P. Co.*, 178 Fed. Rep. 696; *Spinello* v. *N. Y., N. H. & H. R. Co.*, 183 Fed. Rep. 762; *Chicago &c. Ry. Co.* v. *Minnesota*, 134 U. S. 418, 456; *San Diego Land Co.* v. *National City*, 174 U. S. 739, 748.

The Wisconsin statute in no way violates the Fourteenth Amendment of the United States Constitution.

The act in question falls clearly within the police power of the State, and as such should be sustained. It is only when the bounds of reason have been so clearly exceeded as to violate some constitutional prohibition, express or implied, that the court has any power to interfere with the exercise of this legislative power. *State* v. *Redmon*, 134 Wisconsin, 89; *In re Rahrer*, 140 U. S. 545; *Austin* v. *Tennessee*, 179 U. S. 343.

Aside from the question of the wholesomeness or unwholesomeness of the article, the legislation in Wisconsin is a proper exercise of the police power. This extends to the prevention of deception and fraud in the sale of food

products as well as to the securing of wholesomeness in such products. The Wisconsin Supreme Court has, in a number of cases, laid down the rule that the legislature, in the exercise of its police power, may legislate as to all matters appertaining to the lives, limbs, health, comfort, good morals, peace and safety of society. *Baker* v. *State*, 54 Wisconsin, 368, 372; *State ex rel. Larkin* v. *Ryan*, 70 Wisconsin, 676, 681; *State* v. *Heinemann*, 80 Wisconsin, 253; *Bittenhaus* v. *Johnston*, 92 Wisconsin, 588; *Kellogg* v. *Currens*, 111 Wisconsin, 431; *State* v. *Redmon*, 134 Wisconsin, 89; *State* v. *Cary*, 126 Wisconsin, 135.

The police power of the State is not limited to regulations necessary for the preservation of good order or the public health and safety. The prevention of fraud and deceit, cheating, and imposition are equally within the power. *People* v. *Freeman*, 242 Illinois, 373; *People* v. *Wagner*, 86 Michigan, 594.

The principle for which the State contends is illustrated in oleomargarine decisions. See *Powell* v. *Pennsylvania*, 127 U. S. 678; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Collins* v. *New Hampshire*, 171 U. S. 30; *State* v. *Marshall*, 64 N. H. 549; *People* v. *Arensburg*, 105 N. Y. 123, 129; *State* v. *Addington*, 77 Missouri, 110, 118; *Butler* v. *Chambers*, 36 Minnesota, 69; *Weideman* v. *State*, 55 Minnesota, 183; *State* v. *Newton*, 50 N. J. L. 534; *State* v. *Capital City Dairy Co.*, 62 Oh. St. 350; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238; *Commonwealth* v. *Caulfield*, 211 Pa. St. 644; *Commonwealth* v. *McDermott*, 224 Pa. St. 362; *People* v. *Freeman*, 242 Illinois, 373.

The same principle is also illustrated by the legislation as to other food products. See *Commonwealth* v. *Caulfield*, 211 Pa. St. 644; *Commonwealth* v. *McDermott*, 224 Pa. St. 362.

The law is a constitutional and proper exercise of the police power of the State. See decisions dealing with the

manufacture and sale of food products other than oleomargarine. *Crossman* v. *Lurman*, 171 N. Y. 329; *S. C.*, affirmed, 192 U. S. 189; *State* v. *Aslesen*, 50 Minnesota, 5; *State* v. *Hanson*, 86 N. W. Rep. 768; *Iowa* v. *Snow*, 81 Iowa, 642; *Stolz* v. *Thompson*, 44 Minnesota, 271; *State* v. *Sherod*, 80 Minnesota, 446; *State* v. *Layton*, 160 Missouri, 474; *Palmer* v. *State*, 39 Oh. St. 236; *Chicago* v. *Bowman Dairy Co.*, 234 Illinois, 294; *People* v. *Wagner*, 86 Michigan, 594; *State* v. *Crescent Cream Co.*, 83 Minnesota, 284; *State* v. *Tetu*, 98 Minnesota, 351; *Hathaway* v. *McDonald*, 27 Washington, 659; *People* v. *Niagara Fruit Co.*, 77 N. Y. Supp. 805; *S. C.*, aff'd 173 N. Y. 629; *People* v. *Girard*, 145 N. Y. 105; *People* v. *Worden Grocer Co.*, 118 Michigan, 604; *Board of Health* v. *Vandruens*, 72 Atl. Rep. 125; *Commonwealth* v. *Evans*, 132 Massachusetts, 11; *People* v. *Cipperly*, 37 Hun, 324, dissenting opinion aff'd 101 N. Y. 634; *People* v. *West*, 106 N. Y. 293; *State* v. *Campbell*, 64 N. H. 402; *State* v. *Smythe*, 14 R. I. 100; *Arbuckle* v. *Blackburn*, 113 Fed. Rep. 616 (1902); *Armour & Co.* v. *Bird*, 159 Michigan, 1.

The Constitution of the United States does not secure to anyone the privilege of defrauding the public. *In re Rahrer*, 140 U. S. 545; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345; *Crossman* v. *Lurman*, 192 U. S. 189.

The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the General Government nor directly restrained by the Constitution of the United States, and essentially exclusive. *In re Rahrer*, 140 U. S. 545, 554–555; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Crossman* v. *Lurman*, 192 U. S. 189; *Hathaway* v. *McDonald*, 27 Washington, 659; *People* v. *Niagara Fruit Co.*, 77 N. Y. Supp. 805; *Jewett Brothers* v. *Small*, 20 S. Dak. 232; *Powell*

v. *Pennsylvania*, 127 U. S. 678; *Lieberman* v. *Van De Carr*, 199 U. S. 552; *Logan & Bryan* v. *Postal Tel. Co.*, 157 Fed. Rep. 570, 583; *State* v. *Crescent Creamery Co.*, 83 Minnesota, 284; *Arbuckle* v. *Blackburn*, 113 Fed. Rep. 616.

The provision of the Federal Constitution, invoked by the defendants, was not designed to interfere with the exercise of the police power by the States, and it has not shorn the States of their power to regulate trades and occupations so as to guard against injury to the public, and to prevent deception and fraud in the manufacture and sale of food products. See in addition to cases cited above: *Barbier* v. *Connolly*, 113 U. S. 27, 31; *St. Louis* v. *Fisher*, 167 Missouri, 654; *St. Louis* v. *Bippen*, 201 Missouri, 528; *Powell* v. *Commonwealth*, 114 Pa. St. 265; *Gundling* v. *City of Chicago*, 177 U. S. 183; *Hill* v. *Hesterberg*, 184 N. Y. 126; *Heath & Milligan Co.* v. *Worst*, 207 U. S. 338; *Silz* v. *Hesterberg*, 211 U. S. 31.

The fact that corn syrup may be a recognized article of commerce is immaterial if the sale of the article under that name does, in fact, mislead and deceive the public. *Crossman* v. *Lurman*, 192 U. S. 189; affirming *S. C.*, 171 N. Y. 329; *State* v. *Tetu*, 98 Minnesota, 351.

The decision of the lower court is a complete answer to counsel's contention as to the facts established by the evidence.

The decision of the lower court was in no way controlled by any mistake of fact.

The claim that the article in question cannot be sold under the name of "glucose flavored with refiners' syrup" is unfounded.

Mr. Justice Day delivered the opinion of the court.

The plaintiffs in error, George McDermott and T. H. Grady, were severally convicted in the Circuit Court of Dane County, in the State of Wisconsin, upon complaints made against them by an Assistant Dairy and Food

Commissioner of that State for the violation of a statute of Wisconsin relating to the sale of certain articles and for the protection of the public health. The convictions were affirmed by the decision of the Supreme Court of Wisconsin. 143 Wisconsin, 18.

The complaint against McDermott charged that on March 2, 1908, at Oregon, in Dane County, he "did unlawfully have in his possession with intent to sell, and did offer and expose for sale and did sell, a certain article, product, compound and mixture composed of more than seventy-five per cent. glucose and less than twenty-five per cent. of cane syrup, said cane syrup being then and there mixed with said glucose, and that the can containing said compound and mixture was then and there unlawfully branded and labeled 'Karo Corn Syrup' and was then and there further unlawfully branded and labeled '10% Cane Syrup, 90% Corn Syrup,' contrary to the statute in such case made and provided." As to Grady, the complaint was similar to that against McDermott except that the label designated the mixture as "Karo Corn Syrup with Cane Flavor" and added "Corn Syrup, 85%." The statute of Wisconsin for the violation of which plaintiffs in error were convicted is found in Laws of Wisconsin for 1907, § 4601 at page 646, being chapter 557, and the pertinent parts of it are as follows:

"Section 1. . . . No person, . . . by himself . . . or agent . . . shall sell, offer or expose for sale or have in his possession with intent to sell any syrup, maple syrup, sugar-cane syrup, sugar syrup, refiners' syrup, sorghum syrup or molasses, mixed with glucose, unless the barrel, cask, keg, can, pail or other original container, containing the same be distinctly branded or labeled so as to plainly show the true name of each and all of the ingredients composing such mixture, as follows:

* * * * * * * *

"Third. In case such mixture shall contain glucose in a proportion exceeding 75 per cent. by weight, it shall be labeled and sold as 'Glucose flavored with Maple Syrup,' 'Glucose flavored with Sugar-cane Syrup,' . . . 'Glucose flavored with Refiners' Syrup' . . . as the case may be. The labels . . . shall bear the name and address of the manufacturer or dealer. . . . In all mixtures in which glucose is used in the proportion of more than 75 per cent. by weight, the name of the syrup or molasses which is mixed with the glucose for flavoring purposes and the words showing that said syrup or molasses is used as a flavoring, as provided in this section, shall be printed on the label of each container of such mixture. . . . The mixtures or syrups designated in this section shall have no other designation or brand than herein required that represents or is the name of any article which contains a saccharine substance; . . . nor shall any of the aforesaid glucose, syrups, molasses or mixtures contain any substance injurious to health, nor any other article or substance otherwise prohibited by law in articles of food."

The facts are that the plaintiffs in error were retail merchants in Oregon, Dane County, Wisconsin; that before the filing of the complaints against them each had bought for himself for resale as such merchant from wholesale grocers in Chicago and had received by rail from that city twelve half gallon tin cans or pails of the articles designated in the complaints, each shipment being made in wooden boxes containing the cans, and that when the goods were received at their stores the respective plaintiffs in error took the cans from the boxes, placed them on the shelves for sale at retail, and destroyed the boxes in which the goods were shipped to them, as was customary in such cases. From their nature, the articles thus canned and offered to be sold, instead of being labeled as they were, if labeled in accordance with

the state law, would have been branded with the words "Glucose flavored with Refiner's Syrup," and, as the statute provides that the mixtures or syrups offered for sale shall have upon them no designation or brand which represents or contains the name of a saccharine substance other than that required by the state law, the labels upon the cans must be removed, if the state authority is recognized.

Plaintiffs in error contend that the cans were labeled in accordance with the Food and Drugs Act passed by Congress, June 30, 1906, 34 Stat. 768, c. 3915, and that that fact is evidenced by the decision of the Secretaries of the Treasury, Agriculture and Commerce and Labor made under the claimed authority of that act, which is as follows:

WASHINGTON, D. C., February 13, 1908.

"We have each given careful consideration to the labeling, under the Pure Food Law, of the thick, viscous syrup obtained by the incomplete hydrolysis of the starch of corn, and composed essentially of dextrose, maltose and dextrin. In our opinion it is lawful to label this syrup as corn syrup, and if to the corn syrup there is added a small percentage of refiner's syrup, a product of cane, the mixture in our judgment is not misbranded if labeled 'corn syrup with cane flavor.'

George B. Cortelyou, Secretary of the Treasury.

James Wilson, Secretary of Agriculture.

Oscar H. Strauss, Secretary of Commerce and Labor."

And it is insisted that the Federal Food and Drugs Act passed under the authority of the Constitution has taken possession of this field of regulation and that the state act is a wrongful interference with the exclusive power of Congress over interstate commerce, in which, it appears, the goods in question were shipped. The case presents.

among other questions, the constitutional question whether the state act in permitting the sale of this article only when labeled according to the state law is open to the objection just indicated.

That Congress has ample power in this connection is no longer open to question. That body has the right not only to pass laws which shall regulate legitimate commerce among the States and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce and to bar them from the facilities and privileges thereof. Congress may itself determine the means appropriate to this purpose, and so long as they do no violence to other provisions of the Constitution it is itself the judge of the means to be employed in exercising the powers conferred upon it in this respect. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421; *Lottery Case*, 188 U. S. 321, 355; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45; *Hoke* v. *United States*, 227 U. S. 308.

The Food and Drugs Act was passed by Congress, under its authority to exclude from interstate commerce impure and adulterated food and drugs and to prevent the facilities of such commerce being used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and of the power exerted in its passage by Congress that this act must be considered and construed. *Hipolite Egg Co.* v. *United States, supra.*

Section 2 of the act provides that "the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia . . . of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall

ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia . . . any such article so adulterated or misbranded within the meaning of this Act, . . . shall be guilty of a misdemeanor, and for such offense be fined," etc. The article of food or drugs, the shipment or delivery for shipment in interstate commerce of which is prohibited and punished, is such as is *adulterated or misbranded within the meaning of the act.* What it is to adulterate or misbrand food or drugs within the meaning of the act requires a consideration of its other provisions, wherein such adulteration or misbranding is defined.

According to the terms of § 7 drugs are "adulterated" where, if they are sold under a name recognized in the United States Pharmacopœia and differ from the standard of strength therein laid down, the standard of strength, etc., is not plainly stated upon the bottle, box, or other container; and food is "adulterated" where it contains an added poisonous or other added deleterious ingredient which may render it injurious, except that, where directions are printed on the covering or the package for the necessary removal of such preservative, the provisions of the act shall apply only when the food is ready for consumption. Turning to § 8, we find that the term "misbranded," as used in the statute, shall apply to all drugs or articles of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein, which is false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, etc., in which it was manufactured; and in the case of drugs it is provided that, if the contents of the package as originally put up shall have been removed in whole or in part and other contents placed in such package, or, if the package fail to bear a statement on the label as required, the drugs

shall be deemed misbranded; and as to food, if it shall be labeled or branded so as to deceive or mislead a 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 whole or in part and other contents placed in such package, or, if the package fail to bear a statement on the label as required, or, if in package form and the contents are stated in terms of weight or measure and they are not plainly and correctly stated on the outside of the package, or, if the package containing it or its label contain any design or device regarding the ingredients or the substances contained therein which are false or misleading in character, the food shall be deemed misbranded.

That the word "package" or its equivalent expression, as used by Congress in sections 7 and 8 in defining what shall constitute adulteration and what shall constitute misbranding within the meaning of the act, clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. And it is sufficient, for the decision of these cases, that we consider the extent of the word package as thus used only, and we therefore have no occasion, and do not attempt, to decide what Congress included in the terms "original unbroken package" as used in the second and tenth sections and "unbroken package" in the third section. Within the limitations of its right to regulate interstate commerce, Congress manifestly is aiming at the contents of the package as it shall reach the consumer, for whose protection the act was primarily passed, and it is the branding upon the package which contains the article intended for consumption itself which is the subject-matter of regulation. Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by

removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed.

The object of the statute is to prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food, and in order that its protection may be afforded to those who are intended to receive its benefits the brands regulated must be upon the packages intended to reach the purchaser. This is the only practical or sensible construction of the act, and, for the reasons we have stated, we think the requirements of the act as so construed clearly within the powers of Congress over the facilities of interstate commerce, and such has been the construction generally placed upon the act by the Federal courts. *In re Wilson*, 168 Fed. Rep. 566; *Nave-McCord Mercantile Co.* v. *United States*, 182 Fed. Rep. 46; *United States* v. *American Druggists' Syndicate*, 186 Fed. Rep. 387; *United States* v. *Ten Barrels of Vinegar*, 186 Fed. Rep. 399; *Von Bremen* v. *United States*, 192 Fed. Rep. 904; *United States* v. *Seventy-five Boxes of Alleged Pepper*, 198 Fed. Rep. 934.

While these regulations are within the power of Congress, it by no means follows that the State is not permitted to make regulations, with a view to the protection of its people against fraud or imposition by impure food or drugs. This subject was fully considered by this court in *Savage* v. *Jones*, 225 U. S. 501, in which the power of the State to make regulations concerning the same subject-matter, reasonable in their terms and not in conflict with the acts of Congress, was recognized and stated, and certain regulations of the State of Indiana were held not to be inconsistent with the Food and Drugs Act of Congress. While this is true, it is equally well settled that the State

may not, under the guise of exercising its police power or otherwise, impose burdens upon or discriminate against interstate commerce, nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the state law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424; *Second Employers' Liability Cases*, 223 U. S. 1; *Savage* v. *Jones*, *supra*, 533.

Having in view the interpretation we have given the Food and Drugs Act and applying the doctrine just stated to the instant cases, how does the matter stand? When delivered for shipment and when received through the channels of interstate commerce the cans in question bore brands or labels which were supposed to comply with the requirements of the act of Congress. Whether the Secretaries had the power under the Food and Drugs Act to make the regulation set out above is not now before us. It is enough for the present purpose to say that, so far as this record discloses, it was undertaken in good faith to label the articles in compliance with the act of Congress, and, if they were not so labeled, by § 2 provision is made for the enforcement of the act by criminal prosecution and by § 10 by proceedings *in rem*. Whether the labels complied with the Federal law was not for the State to determine. This was a matter provided for by the act of Congress and to be determined as therein indicated by proper proceedings in the Federal courts.

The label upon the unsold article is in the one case the evidence of the shipper that he has complied with the act of Congress, while in the other, by its misleading and false character, it furnishes the proof upon which the Federal

authorities depend to reach and punish the shipper and to condemn the goods. If truly labeled within the meaning of the act his goods are immune from seizure by Federal authority; if the label is false or misleading within the terms of the law the goods may be seized and condemned. In other words the label is the means of vindication or the basis of punishment in determining the character of the interstate shipment dealt with by Congress. While in this situation, the goods being unsold, as a condition of their legitimate sale within the State, and also of their being in the possession of the importer for the purpose of sale and of being exposed and offered for sale by him, the Wisconsin statute provides that they shall bear the label required by the state law and none other (which represents a saccharine substance, as do the labels in these cases). In other words, it is essential to a legal exercise of possession of and traffic in such goods under the state law that labels which presumably meet with the requirements of the Federal law and for the determination of the correctness of which Congress has provided effectual means, shall be removed from the packages before the first sale by the importer. In this connection it might be noted that as a practical matter, at least, the first time the opportunity of inspection by the Federal authorities arises in cases like the present is when the goods, after having been manufactured, put up in package form and boxed in one State and having been transported in interstate commerce, arrive at their destination, are delivered to the consignee, unboxed, and placed by him upon the shelves of his store for sale. Conceding to the State the authority to make regulations consistent with the Federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a State to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal

statute which have accrued both to the Government and the shipper, and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject.

To require the removal or destruction before the goods are sold of the evidence which Congress has, by the Food and Drugs Act, as we shall see, provided may be examined to determine the compliance or noncompliance with the regulations of the Federal law, is beyond the power of the State. The Wisconsin act which permits the sale of articles subject to the regulations of interstate commerce only upon condition that they contain the exclusive labels required by the statute is an act in excess of its legitimate power.

It is insisted, however, that, since at the time when the state act undertook to regulate the branding of these goods, namely, when in the possession of the plaintiffs in error and held upon their shelves for sale, the cans had been removed from the boxes in which they were shipped in interstate commerce, they had therefore passed beyond the jurisdiction of Congress, and their regulation was exclusively a matter for state legislation. This assertion is based upon the original package doctrine as it is said to have been laid down in the former decisions of this court. The term "original package" had its origin in *Brown* v. *Maryland*, 12 Wheat. 419, in which this court had to consider the extent of the protection given under Federal authority to articles imported into this country from abroad for sale, and it was there held that (p. 441):

"When the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it

was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

That doctrine has been many times applied in the decisions of this court in defining the line of demarcation which shall separate the Federal from the state authority where the sovereign power of the Nation or State is involved in dealing with property. And where it has been found necessary to decide the boundary of Federal authority it has been generally held that, where goods prepared and packed for shipment in interstate commerce are transported in such commerce and delivered to the consignee and the package by him separated into its component parts, the power of Federal regulation has ceased and that of the State may be asserted. Some of the cases in which this doctrine has been considered will be found in the margin.[1] In the view, however, which we take of this case it is unnecessary to enter upon any extended consideration of the nature and scope of the principles involved in determining what is an original package. For, as we have said, keeping within its Constitutional limitations of authority, Congress may determine for itself the character of the means necessary to make its purpose effectual in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination and seizure necessary to enforce the prohibitions of the act, and when § 2 has been violated the Federal authority, in enforcing either § 2 or § 10, may follow the adulterated or misbranded article at least to the shelf of the importer.

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[1] *Leisy* v. *Hardin*, 135 U. S. 100; *Rhodes* v. *Iowa*, 170 U. S. 412, 424; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 19 *et seq.*; *May* v. *New Orleans*, 178 U. S. 496; *Austin* v. *Tennessee*, 179 U. S. 343; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 519 *et seq.*; *Cook* v. *Marshall County*, 196 U. S. 261; *Heyman* v. *Southern Ry. Co.*, 203 U. S. 270, 276; *Savage* v. *Jones*, 225 U. S. 501, 520; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 200.

Congress having made adulterated and misbranded articles contraband of interstate commerce, in the manner we have already pointed out, provides in § 10 of the act that such articles may be proceeded against and seized for confiscation and condemnation while being transported from one State, Territory, district, or insular possession to another for sale, or, having been transported, remaining "unloaded, unsold, or in original unbroken packages," and the subsequent provisions of the section regulate the disposition of the articles seized. To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain "unloaded, unsold, or in original unbroken packages." The opportunity for inspection en route may be very inadequate. The real opportunity of Government inspection may only arise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped and remain, as the act provides, "unsold." It is enough, by the terms of the act, if the articles are *unsold*, whether in original packages or not. Bearing in mind the authority of Congress to make effectual regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of § 10 are clearly within its power. Indeed it seems evident that they are measures essential to the accomplishment of the purpose of the act.

The doctrine of original packages had its origin in the opinion of Chief Justice Marshall in *Brown* v. *Maryland*, already referred to. It was intended to protect the importer in the right to sell the imported goods which was the real object and purpose of importation. To determine the time when an article passes out of interstate into state jurisdiction for the purpose of taxation is entirely

different from deciding when an article which has violated a Federal prohibition becomes immune. The doctrine was not intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end. The legislative means provided in the Federal law for its own enforcement may not be thwarted by state legislation having a direct effect to impair the effectual exercise of such means.

For the reasons stated, the statute of Wisconsin, in forbidding all labels other than the one it prescribed, is invalid, and it follows that the judgments of the state court affirming the convictions of the plaintiffs in error for selling the articles in question without the exclusive brand required by the State, must be

Reversed, and the cases are remanded to the state court for further proceedings not inconsistent with this opinion.

BOGART, AS EXECUTOR OF LAWRENCE, *v.* SOUTHERN PACIFIC COMPANY.

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

No. 165. Argued March 5, 1913.—Decided April 7, 1913.

The question intended to be brought to this court by direct appeal under § 5 of the Circuit Court of Appeals Act is the jurisdiction of the Circuit Court as a Federal court; questions of general jurisdiction applicable as well to state as to Federal tribunals are not included in such review.

The question cannot be brought into the record by certificate if not really presented, and whether so presented or not this court will determine for itself. *Darnell* v. *Illinois Cent. R. R. Co.*, 225 U. S. 243.

Neither § 737, Rev. Stat., nor Equity Rule 47 defines what an indispensable party to an action is, but each simply formulates principles already controlling in courts both state and Federal; a decision dismissing a case removed from the state court because of the absence of an indispensable party rests on the broad principles of general law in that respect, and a direct appeal does not lie under § 5 of the act of 1891.

Where the Circuit Court dismisses a case removed from the state court for want of an indispensable party the question is not one of jurisdiction of the Federal court as such, and this court cannot, in a direct appeal under § 5 of the Circuit Court of Appeals Act, answer a question embodied in a certificate as to whether under such circumstances the case should be remanded to the state court.

THE facts, which involve the jurisdiction of this court of direct appeals under § 5 of the Circuit Court of Appeals Act of 1891, are stated in the opinion.

Mr. H. Snowden Marshall, with whom *Mr. James A. O'Gorman*, *Mr. A. J. Dittenhoefer* and *Mr. David Gerber* were on the brief, for appellants:

As to the jurisdiction of this court on direct appeal: The jurisdiction of the court was in issue in the Circuit Court, so that the appeal was properly taken directly to this court.

In view of the certificate of the court below and the plain facts in the case, it would seem to be unnecessary to argue this question at length.

The court below construed, adversely to its jurisdiction, a Federal statute passed manifestly for the purpose of extending the jurisdiction of the Federal courts. The court also assumed that there existed in the Federal court a jurisdiction to deny a motion to remand and dismiss a case which could be tried in the state court.

The recitals by the court below that the case was decided on jurisdictional grounds should be controlling. *In re Lehigh Mining Co.*, 156 U. S. 322; *Scully* v. *Bird*, 209 U. S. 481.

As the court below decided the cause on the ground of jurisdiction, the appeal was properly taken directly to this court. Section 5, act of March 3, 1891, 26 Stat. 827; *Chicago Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424; *Sheppard* v. *Adams*, 168 U. S. 618; *Kendall* v. *San Juan Mining Co.*, 144 U. S. 658; *Nashua Railway Co.* v. *B. & L. Railway*, 136 U. S. 336; see also *Wetmore* v. *Rymer*, 169 U. S. 115.

There was never any doubt in the court below, either in the minds of counsel or in the mind of the judge who decided the case, that the only jurisdictional question that was in issue was that of the jurisdiction of the Circuit Court as a Federal court. The bill was not dismissed for lack of equity or any of the other reasons given in the cases cited by the appellees where this court dismissed the appeals because they did not involve the jurisdiction of the court below as a Federal court.

This court, in case the certificate and other parts of the record are contradictory, can examine the opinion to find out whether the court below dismissed the bill for lack of jurisdiction. *Courtney* v. *Pradt*, 196 U. S. 89; *Loeb* v. *Columbia Township*, 179 U. S. 472.

Mr. Arthur H. Van Brunt for appellees:

On the question of jurisdiction: In appeals or writs of error from the District or Circuit Courts direct to this court under § 5 of the act of March 3, 1891, in cases in which the jurisdiction of the court below is in issue, the only question which can properly be certified to this court is that of the jurisdiction of the court below as a Federal court.

The question of jurisdiction alone can be certified.

In appeals direct from the District and Circuit Courts, under the provision of the statute involved in the present case, only the question of jurisdiction can be considered. *Schunk* v. *Moline &c. Co.*, 147 U. S. 500, 503; *Passavant*

v. *United States*, 148 U. S. 214, 217; *Greeley* v. *Lowe*, 155 U. S. 58, 76; *Mex. Cent. Ry. Co.* v. *Eckman*, 187 U. S. 429, 432; *O'Neal* v. *United States*, 190 U. S. 36; *Venner* v. *G. Nor. Ry. Co.*, 209 U. S. 24, 30, 31; *Scully* v. *Bird*, 209 U. S. 481, 485.

The question of jurisdiction referred to in the act of 1891 is that of the jurisdiction of the District and Circuit Courts as Federal courts and not of their general jurisdiction as judicial tribunals. *Smith* v. *McKay*, 161 U. S. 355; *Blythe* v. *Hinckley*, 173 U. S. 501; *Ill. Cent. R. R. Co.* v. *Adams*, 180 U. S. 28, 34; *Mex. Cent. Ry. Co.* v. *Eckman*, 187 U. S. 429; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *Bache* v. *Hunt*, 193 U. S. 523; *Courtney* v. *Pradt*, 196 U. S. 89; *Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424; *United States* v. *Larkin*, 208 U. S. 333; *Bien* v. *Robinson*, 208 U. S. 423; *Scully* v. *Bird*, 209 U. S. 481; *Steamship Jefferson*, 215 U. S. 131; *Davis* v. *Cleveland Ry. Co.*, 217 U. S. 157; *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175; *Darnell* v. *Illinois Central R. R. Co.*, 225 U. S. 243.

Where the necessary elements of Federal jurisdiction exist, the jurisdiction of the court attaches, and an exercise of that jurisdiction, as by a dismissal of the bill, does not involve any question of Federal jurisdiction which can be reviewed by this court under the act of March 3, 1891. Cases *supra* and *Smith* v. *McKay*, 161 U. S. 355; *Blythe* v. *Hinckley*, 173 U. S. 501; *Denver Bank* v. *Klug*, 186 U. S. 202; *Schweer* v. *Brown*, 195 U. S. 171; *Lucius* v. *Cawthon-Coleman Co.*, 196 U. S. 149; *Kansas City &c. R. R. Co.* v. *Zimmerman*, 210 U. S. 336; *United States* v. *Congress Construction Co.*, 222 U. S. 199, 201.

The certificate of the Circuit Court in the present case improperly certifies to this court for decision questions other than that of jurisdiction, and does not certify the question of the jurisdiction of the Circuit Court as a Federal court.

The power to certify other than jurisdictional questions is vested only in the Circuit Courts of Appeal. *Arkansas* v. *Schlierholz*, 179 U. S. 598, 601.

The question of the jurisdiction of the Circuit Court as a Federal court is not certified.

This court is not concluded by the certificate of the court below, but will dismiss the appeal if it appears that the question of the jurisdiction of the court below as a Federal court is not in issue. *Nichols Lumber Co.* v. *Franson*, 203 U. S. 278; *Darnell* v. *Illinois Central R. R. Co.*, 225 U. S. 243.

The jurisdiction of the Circuit Court as a Federal court is not in issue in the present case.

Mr. Tompkins McIlvaine filed a brief for appellee, Metropolitan Trust Company of New York.

Mr. Justice Day delivered the opinion of the court.

This is a direct appeal from a decree of the United States Circuit Court for the Eastern District of New York upon the ground that the jurisdiction of the Circuit Court is in issue under § 5 of the Circuit Court of Appeals Act (March 3, 1891, 26 Stat. 826, c. 517), and a certificate to that effect has been sent to this court.

The suit was originally brought in the New York Supreme Court for the County of Queens by Walter B. Lawrence, who has since died and for whom the appellants have been substituted, against the Southern Pacific Company, Frederick P. Olcott, Central Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company (which we will call the "Railroad Company") and The Houston & Texas Central Railway Company (which we will call the "Railway Company"). Upon the petition of the

Southern Pacific Company, Olcott and the Railroad Company, the case was removed to the United States Circuit Court. Lawrence alleged in his complaint that he was a stockholder of the Railway Company, of which the Southern Pacific Company owned a majority of the stock; that the Railway Company became involved in various foreclosure suits, to which it set up certain defenses claimed by Lawrence to be valid and sufficient; that the Southern Pacific Company entered into a certain reorganization agreement, whereby, in consideration of the withdrawal of the defenses, which was procured by the Southern Pacific Company, the mortgages were foreclosed and all the property of the Railway Company bought in by defendant Olcott, who transferred the lines of railroad, rolling stock, etc., to the defendant Railroad Company, organized pursuant to the agreement; that new bonds were issued by the Railroad Company to retire the old bonds and the lands of the Railway Company purchased by Olcott were conveyed to the three Trust Companies under the new mortgages, defendants herein, as further security for the bonds; and that under the plan the Southern Pacific was given more favorable terms than the minority stockholders in the matter of receiving the benefits of the reorganization agreement, and that consequently all the stock of the Railroad Company was taken over by the Southern Pacific Company. Lawrence prayed that the Southern Pacific Company be decreed trustee of all benefits received under the plan and for an accounting, and prayed that the Trust Companies convey the surplus arising from the sale of land, after the bonds have been liquidated, to the Railway Company, and for certain other relief.

After the removal of the case to the Circuit Court, a motion was made to remand to the state court, which was overruled. Thereafter the defendants the Southern Pacific Company, Olcott and the Railroad Company filed

a plea in which it was set up that the Railway Company was a necessary and indispensable party to the suit; that it was beyond the jurisdiction of the court and could not be brought in by process, and without its presence no decree could be rendered in the case, and therefore prayed that the bill be dismissed. Special pleas were filed by the Central Trust Company of New York, the Farmers' Loan & Trust Company and the Metropolitan Trust Company of the City of New York.

Thereafter another motion to remand was made. This motion was based upon the ground that the Circuit Court could not get jurisdiction over the Railway Company, but that the state court from which it was removed could acquire jurisdiction over all the parties. This motion was also denied by the court.

The pleas to the jurisdiction were heard upon an agreed statement of facts, from which it appears that the Railway Company was incorporated under a special act of the State of Texas, which contained no limitation upon its corporate existence, and prior to 1885 had operated certain railroads in Texas; that the Railway Company's property was sold under the foreclosure decree for seven million dollars less than the amount decreed to be due and that the deficit was unpaid and uncollectible; that the reorganization had been accomplished; that since the foreclosure sale the Railway Company has owned no property and has had no place of business in the State of New York; that no meeting of the stockholders or directors has been held since 1890, and that while there are three surviving directors, none of them visit the State of New York upon the company's business. The Circuit Court held that the Railway Company was an indispensable party to the suit and, unless it could be served with process within five days from the date of entering the order, a final decree should be entered dismissing the bill, which was thereafter done.

The Circuit Court made a certificate upon which to bring the case here containing the following questions:

"1. Whether the Circuit Court had jurisdiction to proceed with the cause, and whether the Circuit Court had jurisdiction of the cause of action.

"2. Whether the Houston & Texas Central Railway Company was an indispensable party to the action.

"3. Whether if the Houston & Texas Central Railway Company was an indispensable party to the action and would not appear therein and could not be served with process within the jurisdiction of the court, the court thereby lost jurisdiction of the cause of action so that it should dismiss the bill.

"4. Whether if the Houston & Texas Central Railway Company was an indispensable party and would not appear and could not be served with process within the jurisdiction of this court, the cause should have been remanded to the State court, from whence it was removed."

Appeals may be taken directly to this court from the Circuit Court under § 5 of the Circuit Court of Appeals Act in any case in which the jurisdiction of the Circuit Court is in issue, and it is provided that in such cases the question of jurisdiction alone shall be certified to this court for decision. The question intended to be thus brought to this court by direct appeal is well settled to be the jurisdiction of the court as a Federal court. Questions of general jurisdiction applicable as well to state as Federal tribunals are not included in such review. *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *Courtney* v. *Pradt*, 196 U. S. 89; *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175.

The question cannot be brought into the record by certificate if not really presented, and whether so presented this court will determine for itself. *Darnell* v. *Illinois Central R. R. Co.*, 225 U. S. 243.

The question to be decided is whether the case was dis-

missed for the want of jurisdiction in the Circuit Court as a Federal court, for if it be found that the case was dismissed because of the decision of a question not peculiar to the Federal jurisdiction and involving only a general question of procedure in equity, this court need not consider it. From what has been stated it is apparent that the case was duly removed because of diverse citizenship, and what was done afterwards was in pursuance of the jurisdiction thus acquired. The defendants, the Southern Pacific Company, Olcott and the Railroad Company, by plea claimed that the cause should not proceed because the Railway Company was an indispensable party to the suit. This, it is contended, presented a question of the jurisdiction of the court as a Federal court, and the dismissal of the suit was the denial of such jurisdiction.

Section 737 of the Revised Statutes provides:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

Equity Rule 47 (210 U. S. 508, 523) is to the same effect:

"In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the

parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

While the statute and rule just quoted, to the extent to which they go, are, of course, controlling, neither the rule nor the statute undertakes to define what is an indispensable party, but each merely undertakes to formulate principles already controlling in courts of equity and applicable as well to other courts as to those of Federal origin. The statute was originally passed February 28, 1839, c. 33, 5 Stat. 321, and Rule 47 of equity practice as adopted by this court is only a declaration of the effect of the act of Congress. The statute and rule came before this court in *Shields* v. *Barrow*, 17 How. 130, and, speaking of them, Mr. Justice Curtis, delivering the opinion of the court, said (p. 141):

"The act says it shall be lawful for the court to entertain jurisdiction; but, as is observed by this court in *Mallow* v. *Hinde*, 12 Wheat. 198, when speaking of a case where an indispensable party was not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.'

"So that, while this act removed any difficulty as to jurisdiction, between competent parties, regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. And the 47th rule is only a declaration, for the government of practitioners and courts, of the effect of this act of congress, and of the previous decisions of the court, on the subject of that rule. *Hagan* v. *Walker*, 14

How. 36. It remains true, notwithstanding the act of congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights. To use the language of this court in *Elmendorf* v. *Taylor*, 10 Wheat. 167: 'If the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach,—as if such party be a resident of another State,—ought not to prevent a decree upon its merits.' But if the case cannot be thus completely decided, the court should make no decree."

In other words, it was declared by this court that the rule as to indispensable parties, without which the court could not proceed to a decree, is equally applicable to all courts of equity, whatever may be their structure as to jurisdiction, and rests upon the broad principle that no court can adjudicate directly upon a person's rights unless such person is actually or constructively before the court.

What the court really did in the present case was, first to entertain jurisdiction of the suit upon the removal, and then, applying the general principle that a suit cannot be proceeded with in the absence of an indispensable party, to dismiss it because the Railway Company was an indispensable party to the present suit and had not been served and had not appeared or waived service, as would have been the requirement in any court of equity reaching the same conclusion.

Nor does the decision embodied in the fourth paragraph of the certificate and shown in the decision of the court make a question of jurisdiction of the court as a Federal court. As therein embraced the decision was that the cause should be dismissed for want of jurisdiction and not

that it should be remanded to the state court. This decision was to the effect that the court, having reached the conclusion, in the exercise of jurisdiction, that an indispensable party was not upon the record, ordered a dismissal of the action. This did not involve a decision of the jurisdiction of the court as a Federal tribunal.

We therefore are of the opinion that in no aspect in which the jurisdictional question was presented to this court is it reviewable by a direct appeal to this court from the Circuit Court.

The present appeal is therefore dismissed.

ETTOR *v.* CITY OF TACOMA.

HOWARD *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Nos. 68, 69. Argued December 6, 1912.—Decided April 7, 1913.

In the absence of legislation requiring compensation to be made for damages to abutting owners by change of grade of street, the municipality, being an agent of the State and exercising a governmental power, is not liable for consequential injuries provided it keep within the street and use reasonable care and skill in doing the work.

Under the statutes of the State of Washington as construed by the courts of that State this general rule was superseded by legislation which required municipalities to compensate for consequential damages.

A municipality cannot defend a suit for consequential damages on the ground that as the agent of the State it is immune, when its only authority to act is that given by the State coupled with an obligation to make compensation.

A state statute giving compensation for consequential damages caused by

change of grades of streets does not merely provide a remedy but creates a property right; to repeal such a statute so as to affect rights actually obtained thereunder is a deprivation of property without due process of law as guaranteed by the Fourteenth Amendment.

The statute of Washington repealing the former statute which gave a right to consequential damages from change of grade, as construed by the state courts as destroying rights to compensation which had accrued while the earlier act was in effect, amounts to a deprivation of property without due process of law.

Where no private rights have vested, a statute giving benefits under certain conditions may be repealed without violating the contract or due process provisions of the Federal Constitution, but the case is different when the right to compensation has actually accrued. *Salt Co.* v. *East Saginaw*, 13 Wall. 373, and *Wisconsin &c. Railway* v. *Powers*, 191 U. S. 375, distinguished.

57 Washington, 50, 698 reversed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of a statute of Washington in regard to damages for changing grade of streets, are stated in the opinion.

Mr. Stanton Warburton, with whom *Mr. John M. Boyle*, *Mr. E. B. Brockway* and *Mr. C. M. Boyle* were on the brief, for plaintiffs in error.

Mr. Heman H. Field, with whom *Mr. George W. Korte* and *Mr. T. L. Stiles* were on the brief, for defendant in error.

MR. JUSTICE LURTON delivered the opinion of the court.

These were actions to recover for damage inflicted upon abutting property in consequence of an original street grading done by the railroad company under authority and direction of the city of Tacoma.

At the time the grading was done there was in force an act of the Washington legislature which required the city

to make compensation for consequential damages due to an original street grading. Pending these suits and while they were actually being heard, the provision of the act referred to which expressly required the city to provide for or make compensation for all such damage, was amended so as to provide that the act should not apply to the original grading of any street. Laws of Washington, 1907, c. 153, p. 316, and Laws of 1909, c. 80, p. 151. When the attention of the trial court was called to this repealing act, it directed a verdict for the city upon the theory that the right of action was statutory and fell with the statute, there being no saving clause. This judgment, upon the same ground, was affirmed by the Supreme Court of the State.

For the plaintiffs in error the contention shortly stated is, that the act of 1907 was the sole legislative authority of the city for making the cuts and fills in front of their premises upon the public street, and that that act expressly required the city to make provision for compensating an owner so damaged; and that their right to such compensation having accrued while the act was in force cannot be destroyed by subsequent legislation without a violation of the rights guaranteed by the Fourteenth Amendment.

In the absence of legislation requiring compensation for such damage the general rule of law is that a municipality in making, grading and improving streets is the agent of the State, exercising in the performance of such work a governmental power, and is not liable for consequential injuries to property abutting, if it keep within the street and use reasonable care and skill in doing the work. 4 Dillon Municipal Corporations, 5th ed., §§ 1674, 1677; *Smith* v. *Corporation of Washington*, 20 How. 135; *Transportation Co.* v. *Chicago*, 99 U. S. 635, 641; *Humes* v. *Knoxville*, 1 Humph. (Tenn.) 403. This was the general law as announced by the Supreme Court of Washington in its first opinion in the case of *Fletcher* v. *City of Seattle*,

43 Washington, 627, and is the general law of the State as announced by the court's opinion in the instant case. Where the benefits equalled the injury, there was, of course, no injustice in the application of the general rule. But where the damage exceeded the benefits there was an apparent injustice in casting upon such an owner an undue share of the cost of an improvement for the public benefit. This was recognized in *Transportation Co.* v. *Chicago, supra,* where municipal non-liability was said to be due to the fact that in improving its highways the municipality was but the agent of the State, and that as the State could not be sued, its agents were equally immune for improvements authorized by the law of the State, without the consent of the State. But this equity which exists when the benefits are less than the damage affords a strong foundation for legislation requiring compensation in such circumstances. This consideration doubtless led to the legislation of the State requiring compensation for such damage, under which the rights of the plaintiffs in error are asserted.

Whatever may have been the authority of the City of Tacoma under its charter or the general law of the State to take or damage property for the purpose of opening, making, improving or grading its public streets, and its immunity from liability for consequential damages in making an original grading, prior to the legislation found in the two acts of 1893 and 1907, Laws of Washington, 1893, c. 84, p. 189, and Laws of 1907, p. 316, it is plain that the acts in question cover the whole subject of its authority and its liability for taking private property or "damaging" it, in either making, grading or regrading its public streets. The two acts referred to are identical in every essential. The latter is a mere reënactment of the first, by which its provisions are extended to a larger class of municipal corporations.

The act of 1893 was construed and applied by the

Supreme Court of the State in *Fletcher* v. *Seattle*, 43 Washington, 627. The action was by the owner of premises which had sustained damage while the act was in force, in consequence of an original grading. He recovered a judgment, which, upon a first hearing, was reversed by the Supreme Court, that court holding that consequential damages arising from an original grading when the work had been done with due care, was neither a taking nor a damaging of private property within the meaning of the constitution of the State requiring compensation for taking or damaging private property for public purposes. But, upon a rehearing, the attention of the court was for the first time called to the act of 1893, and the contention advanced that the only authority of the city to take or damage the property of the plaintiff for the purpose of grading the street was under that act, and that, by its terms, the city was required to make compensation for damage arising from an original grading. The construction of that act upon facts like those in the present case was thereby directly involved. It was urged that the forty-seventh section did not require compensation for consequential damages, but in answer to this, the court said (p. 633):

"We think the word 'damages' used in the section (the 47th) has the same significance and meaning that it has in other sections of the same act, and that it was used in its broad sense and includes consequential damages. We see no reason why this provision of the law should be segregated from the other provisions, and a different construction placed upon it, or why the provisions of the act in relation to the assessment of the damages should not apply to it as it does to the other sections, and if it does the right of compensation is equally granted.

"It was said that the title of the act shows that it is legislation concerning the exercise of the right of eminent domain, but we think the title is sufficient to cover the

section objected to equally as well as the other sections in the act, and it was evidently the intention of the legislature to pass an act covering the whole subject of opening streets, and of providing methods of making compensation for damages where damages followed. The title not only provides for the exercise of the right of eminent domain, but, also, the taking and damaging of land and property for public purposes, and section 1 of the act empowers the city to condemn and also empowers it to *damage* any land or other property for the purpose of opening streets. Section 2 says, when the corporation authorities of any such city shall desire to condemn land or other property *or damage the same* for any purpose authorized by this act such city shall provide, etc. In this case the city had the power to damage respondents' land, and it was found that it did damage it and it damaged it in a way that it was authorized by § 47 of this act; namely, by establishing a grade on the street upon which their property abutted. And this idea is manifested throughout the act. That the section does not contemplate such damages as are caused by an encroachment or actual trespass upon the lands of the owner, as is suggested by the appellant, is manifest from the language of the section itself which evidently contemplates that the work will be upon the street and not upon the abutting property.

"We are unable to find any more ambiguity in this section than in any other provision of the act, and under its provisions the plaintiffs are entitled to such damages as they can show they have suffered. The question of public policy and expense to the city are questions which are purely legislative."

The judgment of the lower court was thereupon affirmed.

The opinion so construing the act of 1893 was filed in September, 1906. In March, 1907, the act of 1893, then in force, was extended to a larger class of cities and re-

enacted, without any change in any material respect, the first, second and forty-seventh sections being reënacted, the forty-seventh section becoming in the later act § 48. While this act of 1907 was in force, the city directed the grading in question and made or caused the railroad company to make cuts and fills in the street in front of the premises of the plaintiffs in error which resulted in large injury to their property. The city did not provide for compensation for the damage so done by any special assessment upon the property benefited. This brought into effect the provision of the second section requiring the payment of such damage to be made out of the general funds of the city. Payment not having been made as required, the plaintiffs in error brought these actions to recover compensation.

The defense of the city that it was but the agent of the State in improving the highways of the city, and therefore immune, because the State was immune, vanishes in the face of the fact that the State had absolutely coupled authority in the matter with an obligation to make compensation. The city had no authority save that which came from the very act which imposed an obligation. It would seem to need no argument to establish the contention that the obligation to make compensation to these plaintiffs in error could not be destroyed by subsequent legislation.

Neither of the acts provided any remedy for the enforcement of the obligation to make compensation. Both provided that the city might by ordinance arrange for the ascertainment of the damages, and for their collection by special assessment on the property benefited, or within a special assessment district. But the plain requirement of the first and second sections of both acts is that if the city does not so provide for special assessments, that it should make the compensation out of its general treasury. The repealing clause of the act of 1909 does not touch the

general features of the law beyond the provision that the forty-eighth section of the act, which extended the obligation of compensation to original gradings, should not apply to damage arising from such gradings. It is a mistake to say that the act of 1907 gave a remedy where none existed before. What it did was to impose an obligation to compensate abutters injured by an original grading, an obligation which, however meritorious, had no sanction in positive law. The remedy, if the city disregarded the obligation, was that afforded by the common law for the breach of any valid contractual or statutory duty. That was the remedy which was enforced by the Washington court in *Fletcher* v. *City of Seattle, supra.*

Statutes concerning remedies are such as relate to the course and mode of procedure to enforce or defend a substantive right. Matters which belong to the remedy are subject to change and alteration, and even repeal, provided the legislation does not operate to impair a contract or deprive one of a vested property right. If the changing or repealing statute leaves the parties a substantial remedy, the legislature does not exceed its authority. Rights and remedies shade one into the other so that it is sometimes difficult to say that a particular act creates a right or merely gives a remedy. So also a statute, under the form of taking away or changing a particular remedy, may take away an existing property right, or impair the obligation of a contract. That the state court has treated the act of 1907 as merely giving a remedy where none existed before, and the act of 1909 as merely repealing the remedy so given, is plain.

The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. The obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation

to pay as for the labor employed to do the grading. It was a claim assignable and enforceable by a common-law action for a breach of the statutory obligation.

The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation. *City of Elgin* v. *Eaton*, 83 Illinois, 535; *Healey* v. *City of New Haven*, 49 Connecticut, 394; *Harrington* v. *Berkshire*, 22 Pick. (Mass.) 263; *People* v. *Supervisors*, 4 Barb. (N. Y.) 64, are cases arising under street or highway statutes. The principle has been applied in reference to rights accruing under a variety of statutes when affected by a subsequent change of the law: *Steamship Company* v. *Joliffe*, 2 Wall. 450; *Miller* v. *Union Mills*, 45 Washington, 199; *Grey* v. *Mobile Trade Co.*, 55 Alabama, 387; *Stephens* v. *Marshall*, 3 Pinney (Wis.), 203; *Gorman* v. *McArdle*, 74 S. C. Rep. (N. Y.) 484; *Westervelt* v. *Gregg*, 12 N. Y. 202; *Creighton* v. *Pragg*, 21 California, 115; *State Trust Company* v. *Railroad Company*, 115 Fed. Rep. 367.

Certain cases have been cited in support of the action of the state court, among them *Yeaton* v. *United States*, 5 Cranch, 281. But that was a case of a forfeiture to the United States. The repeal of the statute was held to end the proceeding, although a sentence had been pronounced and was pending upon appeal when the act under which it had been entered was repealed. No private right had

vested, and the Government could abandon its own proceeding if it saw fit at any stage. Another case cited is *Salt Company* v. *East Saginaw*, 13 Wall. 373. For the purpose of encouraging the manufacture of salt the State of Michigan, by a general statute addressed to no particular person or corporation, offered a bounty upon salt produced and exempted from taxation the property engaged in the business. After a time the act was repealed. The claim was that the exemption constituted a contract, and that it could not be repealed without impairing the obligation of the contract. But this court said that the exemption did not constitute a contract and was nothing more nor less than a law dictated by public policy for the encouragement of an industry. So long as the law was in force the State promised the exemption and bounty, but there was no pledge that it should not be repealed at any time. In *Wisconsin & Michigan Ry.* v. *Powers*, 191 U. S. 379, 385, 387, the case was said to point out the distinction between "an exemption in a special charter and general encouragement to all persons to engage in a certain enterprise," and the same principle was applied to an act which provided an exemption to any corporation building a line of railroad north of certain lines of latitude. The court held that it was addressed to no one in particular and constituted a mere announcement of policy not constituting a contract, and was therefore subject to repeal at any time. The case of *Louisiana* v. *New Orleans*, 109 U. S. 285, has been cited. That case merely held that a judgment against the city under a statute for damage to private property inflicted by a mob did not constitute a contract, the obligation of which had been impaired by the repeal of a statute under which the city might have been compelled to levy a special tax for its satisfaction. The case turned upon the distinction between liability for a tort and liability under a contract.

In the instant case the action is neither for a tort, nor

for a penalty, nor for a forfeiture, but for injury to property actually accomplished before the repeal of the law under which the street was graded which required compensation to be made. The right to compensation was a vested property right.

The judgments must be reversed and the cases remanded for further proceedings not inconsistent with this opinion.

UNITED STATES *v.* READING COMPANY.

TEMPLE IRON COMPANY *v.* UNITED STATES.

READING COMPANY *v.* UNITED STATES.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Nos. 198, 206, 217. Motions to modify decree submitted January 28, 1913.—Decided April 7, 1913.

The mandate in this case modified as to certain of the independent companies having some of the sixty-five per cent contracts referred to in the opinion, 226 U. S. 324.

THE facts are stated in the opinion.

Mr. Adelbert Moot for the Hillside Coal & Iron Company.

Mr. William S. Jenney and *Mr. John G. Johnson* for the Delaware, Lackawanna & Western Railroad Company.

Mr. Gilbert Collins and *Mr. William H. Corbin* for the New York, Susquehanna & Western Coal Company.

Mr. George F. Brownell for the Pennsylvania Coal Company.

Mr. Frank H. Platt for the Elk Hill Coal & Iron Company.

Mr. Attorney General Wickersham, Mr. James C. McReynolds and *Mr. G. Carroll Todd* for the United States.

The following order was entered:

This cause came on again to be heard upon five several petitions filed by the Pennsylvania Coal Company, The Elk Hill Coal & Iron Company, The New York, Susquehanna and Western Coal Company, Hillside Coal & Iron Company, and the Delaware, Lackawanna & Western Railroad Company, parties to the cause as alleged holders of sixty-five per cent. coal contracts, praying that the direction in the opinion heretofore filed that the cause should be remanded with direction to enter a decree cancelling each and every of the sixty-five per cent. contracts referred to in the pleadings held by any of the parties to the cause, and for a modification of the mandate so as to exclude from cancellation the five several contracts described and referred to in the said five separate petitions.

And it appearing that the United States, by its Attorney General, has answered the several petitions, and that in respect to that of the Pennsylvania Coal Company assents to the petition and consents that such modification be made as to dismiss the bill in so far as it is thereby sought to cancel the contract between the Pennsylvania Coal Company and the Elk Hill Coal & Iron Company of March 1, 1902, referred to in the petition of the Pennsylvania Coal Company, upon the concession that the agreement "is substantially different from the series of agreements known as the sixty-five per cent. contracts adjudged unlawful by this court," it is accordingly so ordered.

As to the applications of the four other petitioners named above for like relief, the United States denies and contests the right of each, contending that in substance and principle the facts in respect of each of the contracts in respect of which relief is sought, are not similar to the contract between the Pennsylvania Coal Company and the Elk Hill Coal & Iron Company, but fall within the general series of the sixty-five per cent. contracts condemned by the judgment of this court.

Upon this issue the transcript is confusing and the briefs inadequate. The court therefore deems it wise in the exercise of its judgment to decline any determination of the question upon the present record. It is therefore ordered that the mandate of this court be so modified as to exclude from the direction to cancel the sixty-five per cent. contracts referred to in the pleadings the said contracts mentioned in the four petitions, namely, that of the Elk Hill Coal & Iron Company, the New York, Susquehanna & Western Coal Co., Hillside Coal & Iron Company, and the Delaware, Lackawanna & Western Railroad Company, and that the cause, so far as concerns the contracts of the said petitioners, be remanded to the District Court with direction to hear and determine the merits as presented by said petitioners, and make such decree as law and justice require.

Per Mr. Justice Lurton.

Mr. Justice Day, Mr. Justice Hughes and Mr. Justice Pitney did not participate in the original case, nor in the making of this order.

HOUGHTON, RECEIVER, *v.* BURDEN.

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

No. 591. Argued January 7, 1913.—Decided April, 7, 1913.

Where a secured creditor voluntarily comes into the Bankruptcy Court and asserts a claim to property in the trustees' possession, the proceeding is one in equity and the decree is reviewable by the Circuit Court of Appeals both as to law and fact; § 566, Rev. Stat., is inapplicable and the whole case is open under § 128, Judicial Code, and an appeal lies to this court under § 241, Judicial Code.

A contract for loaning money secured by accounts payable to the borrower, who is to act as agent for the lender in their collection, providing that the lender shall, in pursuance of a provision in a bond of indemnity given by third parties, examine the accounts and books of the borrower monthly and receive a compensation therefor equivalent to a specified per cent of the accounts remaining due, *held* in this case to have been made in good faith and not for the purpose of avoiding the usury laws, and not to be a usurious and void contract under the laws of the State of New York.

On an inquiry whether the contract is one forbidden by law, evidence dehors the agreement is admissible to show that, though legal on its face, the agreement is in fact illegal.

Usury may be interposed as a defense even though it contradicts the agreement.

Where the law of the state makes usury a crime, the burden is strongly on him who would avoid a debt on that ground; and where, as in this case, the borrower is supported by one witness who is in his employ and the lender is supported by one disinterested witness, the burden is not sustained.

THE facts, which involve the jurisdiction of the Circuit Court of Appeals to review facts in certain cases coming from the Bankruptcy Court and the construction of usury laws of New York, are stated in the opinion.

Mr. Jacob B. Engel, with whom *Mr. Jacob Jno. Lazaroe* was on the brief, for appellant:

The Circuit Court of Appeals having found that the court below had not committed any errors of law, should have affirmed the final order of the District Court. Section 566, Rev. Stat.; *Campbell* v. *United States*, 224 U. S. 99; *Rogers* v. *United States*, 141 U. S. 548; *Campbell* v. *Boyreau*, 21 How. 223.

Manifestly, if Burden had commenced an action on the facts recited in his petition, as he had a right to do, his only remedy would be an action at law for trover or conversion. Under no circumstances appearing in this record did his cause of action lie in equity; had the appellee attempted to frame his complaint in equity, he would have been defeated under the laws of the State of New York by the plea that he had an adequate remedy at law. *Bradley* v. *Aldrich*, 40 N. Y. 510.

A matter of the kind at bar is not a proceeding in bankruptcy, hence the exception made by § 566, Rev. Stat., does not apply.

Courts of Bankruptcy are given jurisdiction to try matters in controversy. Section 19, subd. c, clearly relates to the provisions of the Revised Statutes regulating trials by a jury. *In re Baudoine*, 101 Fed. Rep. 574; *In re Russell*, 101 Fed. Rep. 248.

The special master having found certain facts which were confirmed by the United States District Court, the Circuit Court of Appeals should not have reversed the judgment and order entered thereon unless the findings of fact were clearly erroneous or clearly against the weight of evidence. *Davis* v. *Schwartz*, 155 U. S. 631; *Kimberly* v. *Arms*, 129 U. S. 512; *Ohio Valley Bank* v. *Mack*, 163 Fed. Rep. 155.

The preponderance of evidence was in favor of sustaining the findings of the master. *Quackenbos* v. *Sayers*, 62 N. Y. 345.

That the real motive moving the parties was the giving and taking of an usurious rate of interest and not

of an employment is abundantly evidenced by the testimony.

No errors of law having been committed in the trial court its order and mandate should be confirmed.

Parol testimony can be introduced for the purpose of showing the real transaction between the parties and showing that the agreement, as drawn, was a mere subterfuge and made with the purpose and intent of evading the usury laws. *Mercantile Trust Co.* v. *Ginbernat*, 134 App. Div. 410; *Willmarth* v. *Hine*, 137 App. Div. 528; see also *Knickerbocker Life Ins. Co.* v. *Nelson*, 7 Abb. N. C. (N. Y.) 180, citing *DeWolf* v. *Johnston*, 10 Wh. 385; *Vilas* v. *McBride*, 62 Hun (N. Y.), 324.

This is the law throughout the country. *Massa* v. *Dauling*, 2 Str. 1243; *Scott* v. *Lloyd*, 9 Pet. (U. S.) 418; *Tucker* v. *Wilamonicz*, 8 Arkansas, 157; *Train* v. *Collins*, 2 Pick. (Mass.) 145; *Denyse* v. *Crawford*, 18 N. J. L. 325; *Grayson* v. *Brooks*, 64 Mississippi, 410.

The fact that the contract is in writing does not exclude oral evidence to show that though apparently innocent it was usurious. *Kohler* v. *Dodge*, 31 Nebraska, 238; *Rowan* v. *Hanson*, 11 Cush. 44; *Roe* v. *Kiser*, 62 Arkansas, 92; *McAleese* v. *Goodwin*, 69 Fed. Rep. 759.

In all instances of this character, as well as in the case at bar, the instrument is innocent and valid on its face and it is only by resort to extrinsic facts and circumstances that it is invested with the element of illegality.

A contract may not necessarily be usurious on its face; the burden is on the one contesting it upon the ground of usury to prove the guilty intention and that the contract was a cover for usury and for the loan of money upon usurious interest. *Rosenstein* v. *Fox*, 150 N. Y. 304.

On these questions oral, extrinsic and circumstantial evidence is freely received. *Thomas* v. *Murray*, 32 N. Y. 605; *Valentine* v. *Conver*, 40 N. Y. 248.

Mr. John J. Crawford for appellee.

MR. JUSTICE LURTON delivered the opinion of the court.

This is an appeal from a decree determining a controversy arising in a bankruptcy proceeding. The origin of the matter was this: Canfield, the bankrupt, was a merchant in New York. He borrowed from Burden the sum of $10,000, and as security assigned to him certain book accounts, aggregating the sum of $14,000, and agreed to act as agent for Burden in their collection. Shortly afterwards he was adjudicated a bankrupt. The receiver obtained possession of the bankrupt's books and held on to the assigned accounts and proceeded to collect them upon the claim that the contract was usurious and void under the law of New York.

In this situation Burden intervened in the bankruptcy case and filed a petition, in which he asserted his title to the assigned accounts and to any proceeds collected by the receiver. The District Court, upon a final hearing, upheld the contention of the bankrupt's receiver, now the trustee, and dismissed the intervening petition. This decree was reversed by the Circuit Court of Appeals, that court holding that the defense of usury had not been satisfactorily made out.

The appellant contends that the controversy having been heard by the district judge without a jury, the Circuit Court of Appeals had no authority to review the facts. For this, § 566, Revised Statutes, is cited, and also the case of *Campbell* v. *United States*, 224 U. S. 99, which construes that section. But that provision only requires that the trial of issues of fact in the District Court, except in cases in equity and admiralty, and except as otherwise provided in proceedings in bankruptcy, shall be by jury. But the District Court, is, by § 2 of the Bankruptcy Act of 1898, July 1, 1898, 30 Stat. 544, c. 541, when sit-

ting as a bankruptcy court, given jurisdiction in law and equity for the purpose of collecting and distributing the estate of a bankrupt, and for the purpose of determining controversies relating thereto, except as otherwise provided. The exception has no application here, as Burden voluntarily came into the bankruptcy proceeding and submitted his claim to the adjudication of the bankruptcy court. Such an intervention for the purpose of asserting a title or claim to property in the possession of the bankrupt's trustee is an intervention in equity and a decree is reviewable by appeal to the Circuit Court of Appeals in the exercise of its general appellate powers in equity cases under § 24–a of the Bankruptcy Act. Loveland on Bankruptcy, 4th ed., §§ 826 to 829; *Hewit* v. *Berlin Machine Works*, 194 U. S. 296, 300; *Knapp* v. *Milwaukee Trust Company*, 216 U. S. 545. Upon such an appeal the law and the facts are open for reconsideration, and from the decree of the Circuit Court of Appeals, it not being final (§ 128, new Judicial Code), an appeal may be taken under § 241 of the same code.

Being an appeal from a decree in a controversy arising in a bankruptcy proceeding, and therefore, an appeal under § 24–a, and not under § 25–b, General Order XXXVI made under the latter section and requiring a finding of facts, has no application, and the appeal opens up the whole case as in other equity cases. *Hewit* v. *Berlin Machine Works, supra; Coder* v. *Arts*, 213 U. S. 223, and *Knapp* v. *Milwaukee Trust Co., supra.*

Coming now to the merits. The single question is one of usury in the contract. The lawful rate of interest in New York is 6 per cent. By § 373 of the General Business Law of New York it is provided:

"All . . . contracts whatsoever . . . whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken any greater sum or greater value for the loan or forbearance of any money,

goods or other things in action, than as above prescribed, shall be void."

Canfield was a reputable merchant engaged in business in New York. Burden was a retired merchant and an experienced accountant, who wished to secure light employment. To secure such employment he advertised that he would lend from $10,000, to $20,000, at 6 per cent. to a merchant whose rating was good, if the loan would secure such employment. Through a broker, compensated by Canfield, negotiations were opened with Burden, who proposed the loan provided he could get light employment in Canfield's office as a financial man. But the financial statement of Canfield exhibited to Burden was nearly a year old, and this did not satisfy Burden, and the negotiations fell through partly for that reason, and partly because the parties could not agree upon the position Burden desired. Some weeks later the negotiations were resumed, the broker saying that he might get additional security through an indemnity bond, by which the validity of the book accounts which were agreed to be assigned might be guaranteed as well as the payment of collections made by Canfield as agent. Canfield agreed to furnish such a bond. The proposed bond required the obligee to watch the shipping receipts and to make monthly minute examinations of Canfield's books, showing the several assigned accounts. Finding this requirement to be a condition of such a bond, Burden demanded that he should be compensated for the service he would be required to render to keep the bond in force, and a compensation of one per cent. per month upon the amount of the uncollected accounts at the end of each month was agreed upon. Thereupon the contract in question was executed, a bond of indemnity was given to Burden and something like 100 accounts aggregating about $14,000 were duly assigned, upon which an advance of $10,000 was made.

The contract is elaborate and too lengthy to be set out

in full. In substance it provided for a loan of $10,000 at 6 per cent. upon assigned accounts against reputable merchants, the loan not to exceed 75 per cent. of the face value of the accounts. Canfield agreed to act as Burden's agent in collecting and to guarantee the payment of each account so assigned. The contract also provided that after the payment of the money borrowed and interest, and costs and expense of collection and the compensation to Burden for his services as required by the bond, the remaining accounts should be re-assigned to Canfield. The clause in regard to this compensation gives rise to the claim of usury. It was in these words:

"The party of the second part shall be entitled to compensation for the labor and services to be performed, and time to be expended, by him in making the examinations required by the terms of the bond executed by the Fidelity and Casualty Company of New York, and delivered simultaneously herewith, which compensation is to be measured by computing one per cent. per month upon whatever part of the advance shall remain uncollected on the said accounts, and for the period that the same shall remain so uncollected."

The indemnity bond styled an "Assigned-Accounts bond" is in the usual form and is undoubtedly a device resorted to, to enable merchants to use book accounts as collateral for money advanced or loaned. The principal condition was in these words:

"The Obligee shall require the Principal to state in writing at the time of assigning each account, the date when the payment of such account is due, and if the payment of any account is not made within twenty days of the date that such payment is due, the Obligee shall immediately thereupon make demand by registered mail upon the debtor for the amount due. The Obligee shall require the Principal to file with the Obligee in connection with each account a certificate signed by a responsible

official or employé of the Principal stating that the account referred to in the certificate represents a bona-fide sale, and that the merchandise concerned with the account has, prior to signing of the certificate, been shipped to the customer named in the account. The Obligee, at least monthly, shall make an examination of the accounts of the Principal which shall embrace—(1) a complete examination of the books, accounts, and vouchers of the Principal as respects the accounts covered under the said agreement; (2) a strict comparison between all unpaid accounts as such accounts appear on the records of the Obligee and as such accounts appear in the books of original entry of the Principal."

That this contract upon its face is absolutely legal there can be no serious doubt. A material part of the security which Canfield proposed to give was the bond by which the collection of 75 per cent. of the face value of the assigned accounts was guaranteed, to the extent of $7,500, as well as that Canfield would promptly pay over any money and checks collected by him as agent for Burden. But a condition of this security was that the obligee should keep a watchful guard over the accounts assigned and make monthly inspection of the books of Canfield. That this would necessitate several days work each month, if actually done with fidelity, is clearly shown. That little service was rendered under this provision aside from the examination of the accounts and shipping receipts as they were assigned at different times, was due to the bankruptcy ensuing within a very short time and the seizure of the bankrupt's books by his receiver.

The contention is that this provision for compensating Burden for the service required by the indemnity bond was a mere cover for unlawful interest, and that it was never intended or expected that any such service would be given. This is sought to be shown by alleged oral declarations of Canfield. Thus, Canfield says that when

he was about to sign the contract he asked Burden what the clause about services to be rendered meant, and that he replied, "that that was simply to get around the usury law; there were no services to be rendered at all." Canfield's bookkeeper, a Miss Herzog, after saying that in the negotiations prior to the day the agreement was signed that she had heard Burden say that he must have a bonus of one or two per cent. a month as usury, testified as to what she overheard through an open window between her office and that occupied by Canfield at the time the bond was signed, as follows:

"Q. Isn't it a fact that Mr. Canfield asked Mr. Burden what was meant in this agreement concerning services and charges for services to be rendered by Mr. Burden?

"Mr. Crawford. Objected to as leading.

"The Referee. Sustained.

"Q. What did you hear Mr. Canfield say concerning this agreement shown you. A. I don't remember.

"Q. Well, did Mr. Canfield say anything about services or did Mr. Burden say anything about services to be rendered? A. Well, Mr. Burden said he would like to have about an hour's work to do in our establishment every day, and then Mr. Canfield told him we would not have any use for him there."

Burden when recalled testified to his good faith, and that the compensation agreed upon was to be for the service required by the contract and bond and would be worth what he was to receive. He denied in most emphatic terms that he ever demanded a bonus or used the word usury in any of the negotiations, or that he had ever made any such statement or declaration as testified to by Canfield. He was supported in his denial by Koehler, the broker who negotiated the loan for Canfield. All of this evidence was excepted to as contradicting the written agreement and was admitted over objection. Where the inquiry is whether the contract is one forbidden by law,

it is open to evidence dehors the agreement to show that though legal upon its face it was in fact an illegal agreement. Otherwise the very purpose of the law in forbidding the taking of usury under any cover or pretext would be defeated. The defense is one which the debtor may make even though it contradicts the agreement. *Scott* v. *Lloyd*, 9 Pet. 418.

It has been suggested that there is a distinction between the admissibility of evidence dehors the contract which is intended to show the whole and true nature of the transaction and mere declarations made by the lender in the nature of a confession that the agreement for services required to maintain the obligation of the indemnity bond was a mere scheme to cover usury, and that no service was to be rendered. We notice the distinction and pass it by, for the reason that assuming the evidence to be competent, it is not so convincing as to justify a disagreement with the view of the Circuit Court of Appeals that the defence of usury has not been satisfactorily made out.

The instrument upon its face is not usurious. Of course, if the service to be rendered should be made to appear trivial and of no real importance, the inference might be drawn that the agreement in that particular was a sham and device to cover a mere usurious contract, such as we are asked to believe Burden declared it to be. Burden's plan was that the loan should carry with it light work, such as a retired business man might do,—one or two hours of office work each day, as he explained. But he also requested security for his money. Open book accounts might answer if the borrower had a satisfactory business rating. The latter means everything to business men. Canfield's rating was not late enough to satisfy Burden and the negotiations fell through, and were not resumed for a month or more. Then Koehler, who had before negotiated loans for Canfield, suggested that he should also

give Burden the indemnity bond. Burden examined the form of such bond, and finding that one of its conditions was his own watchfulness over collections and minute inspections of Canfield's books, he proposed to make the loan upon the assigned accounts and the indemnity bond, provided he was compensated for the service the bond required from him. The amount agreed upon, Burden claims, was no more than a fair return for what Judge Hand, who in the District Court sustained the defense, describes as "work which was undeniably substantial and vexatious."

To hold the agreement void would seem to require that we shall accept as true that there was no such service expected or required, and that the clause was inserted to cover a usurious bonus. But as the indemnity bond was conditioned upon Burden doing the very things which he is said to have declared were not to be done, of what value would that security become? The natural presumption is that Burden was endeavoring to put his contract in such shape that Canfield could not defeat his obligation by the defense of usury. Yet we are asked to believe that he deliberately declared to the debtor that the agreement as to services was a device to defeat the law, and that he was not to render any such service. The incredibility of such a declaration by Burden to Canfield the debtor seems obvious. Upon this point Judge Coxe, for the Circuit Court of Appeals, said:

"Of course bankruptcy was not contemplated at that time, at least by Burden. If Canfield did not enforce the usury law Burden had nothing to fear. If the agreement did not bind Canfield, it did not bind anyone and yet Burden, if this testimony be true, made it absolutely useless to accomplish the object for which he says it was signed.

"Why should Burden make an agreement to enable him to receive usurious interest and at the same time make it

impossible for him to take such interest without placing him absolutely at the mercy of Canfield?

"There is no pretense that Burden was *non compos mentis* at the time, and yet it is difficult to believe that any rational being would have gone to the trouble and expense of having this elaborate agreement prepared for the purpose of avoiding the usury law and at the same time admit to the only man who could interpose the defense of usury that it was a void agreement. So far as the validity of the agreement is concerned, Burden might as well have stamped in red ink on its face the words, 'void for usury.'

"We must assume that Burden is a man of ordinary common-sense, but in order to find that he made the statement quoted, we must convict him of stupidity which is unique in its originality. It is difficult to imagine that a rational being would procure a safe to protect him from burglary and immediately send the 'combination' to the burglar whom he had most reason to dread."

Canfield is supported by his bookkeeper, though her account of the matter is materially different from his. Burden is supported by Koehler, the broker, who was in the negotiations throughout, and so far as appears, absolutely disinterested. There are two witnesses against two, and the burden to make out the usury is strongly upon the appellant. *Stillman* v. *Northrup*, 109 N. Y. 473, 478; *White* v. *Benjamin*, 138 N. Y. 623, 624. In the case last cited, it was said:

"Usury is a crime and he who alleges it as a defense to an obligation must establish it by clear and satisfactory evidence."

This the appellant has not done.

Decree affirmed.

Mr. Justice Pitney dissents.

GULF, COLORADO AND SANTA FE RAILWAY CO. *v.* McGINNIS.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 762. Argued January 7, 1913.—Decided April 7, 1913.

The Employers' Liability Act of 1908, as heretofore construed by this court, is intended only to compensate the surviving relatives of a deceased employé for actual pecuniary loss sustained by his death.

A recovery under the Employers' Liability Act of 1908 must be limited to compensating those relatives for whom the administrator sues as are shown to have sustained some pecuniary loss.

While the judgment for a claim under the Employers' Liability Act of 1908 may be for a gross amount, the interest of each individual must be measured by his or her industrial pecuniary loss; this apportionment is for the jury to return.

As the judgment in this case must be reversed on a Federal question and sent back for new trial, this court declines to express an opinion on the other questions; upon another trial the facts may be different.

THE facts, which involve the construction of the provisions of the Employers' Liability Act of 1908 defining who are entitled to compensation for damages thereunder, are stated in the opinion.

Mr. A. H. Culwell, with whom *Mr. J. W. Terry*, *Mr. Gardiner Lathrop* and *Mr. A. B. Browne* were on the brief, for plaintiff in error.

Mr. Winbourn Pearce and *Mr. A. L. Curtis* for defendant in error submitted.

MR. JUSTICE LURTON delivered the opinion of the court.

This action was brought in a state court of Texas under the Employers' Liability Act of April 22, 1908, 35 Stat. 65, c. 149, by the administratrix of W. T. McGinnis, to re-

cover damages for his negligent death while in the service of the plaintiff in error and while engaged as engineer on an interstate passenger train. The cause of the death was a derailment which occurred while the train was passing over a switch. The defense of the company was that the derailment was caused by malicious tampering with the switch by a stranger, and that the company had not been guilty of any negligence in either providing a safe track and appliance, or in the inspection or maintenance of the track and appliances. There was a jury, verdict and judgment for the plaintiff, which, upon writ of error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, was affirmed. A writ of error has been allowed to that court, it being the highest court to which the case could be carried under the law of the State.

It is assigned as error that the court misconstrued the character of the liability imposed by the act under which the suit was brought by a ruling that there might be a judgment for the benefit of one of the surviving children, although there was neither allegation nor evidence that that surviving child was either dependent upon or had any reasonable ground for expecting any pecuniary benefit from a continuance of the decedent's life.

The decedent left a widow and four children, and the suit was brought by the widow as administratrix for the benefit of herself and the four children named in the petition. One of the surviving children was Mrs. Nellie Saunders, a married woman, residing with and maintained by her husband. There was neither allegation nor evidence that Mrs. Saunders was in any way dependent upon the decedent, nor that she had any reasonable expectation of any pecuniary benefit as a result of a continuation of his life. The court was requested to instruct the jury that it could not find any damage in favor of Mrs. Saunders, but this, it declined to do.

The jury was instructed if they found for the plaintiff to return a verdict for such a sum as would justly compensate the persons for whose benefit the suit was brought for such pecuniary benefits as they might believe from the evidence the beneficiaries had a reasonable expectation of receiving from the decedent, if his death had not been so occasioned. They were further told to find a round sum in favor of the plaintiff, and then apportion that sum among all the persons for whom the suit had been brought, stating in their verdict, "how much, if anything, you find for each of said persons." The jury returned a verdict for $15,000, and apportioned it, one-half to the widow, and the remainder equally among the four children, including Mrs. Saunders.

The Court of Civil Appeals upheld this ruling, saying that "the Federal statute expressly authorizes the suit to be brought by the personal representative for the benefit of the surviving wife and children of the deceased, irrespective of whether they were dependent upon him, or had the right to expect any pecuniary assistance from him." This construction of the character of the statutory liability imposed by the act of Congress was erroneous. In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employé for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss. *Michigan Central Railroad* v. *Vreeland*, 227 U. S. 59; *American Railroad* v. *Didricksen*, 227 U. S. 145. In the last cited case, speaking of the Employers' Liability Act, we said (p. 149):

"The cause of action which was created in behalf of the injured employé did not survive his death, nor pass to his representatives. But the act, in case of the death of

such an employé from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employé. The damage is limited strictly to the financial loss thus sustained."

The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss.

It has also been assigned as error that the defense of assumed risk was, in legal effect, denied, because the court overruled a motion to instruct a verdict for the defendant. The defense of assumed risk was submitted to the jury under a full and fair general charge. In addition a number of special requests asked by the railroad company in respect to several aspects of the facts were given. The contention is that upon all of the evidence in the case there was no sufficient evidence of any negligence for which the company was chargeable, in law, and that in such case the death of the decedent must have been due to some assumed risk. We pass this by.

The judgment must be reversed upon the Federal question already considered. Upon another trial the facts may be altogether different and we decline to express any opinion as to their legal effect. *Murdock* v. *City of Memphis*, 20 Wall. 590.

For the cause indicated, the judgment will be

Reversed and the case remanded for further proceedings consistent with this opinion.

SANTA FE, PRESCOTT & PHŒNIX RAILWAY COMPANY *v.* GRANT BROTHERS CONSTRUCTION COMPANY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 147. Argued January 24, 1913.—Decided April 7, 1913.

A rule of law restricting the right of contract which rests on principles of public policy, because of the public ends to be achieved, extends no further than the reason for it and does not apply to contracts wholly outside of and not affecting those ends.

The rule that common carriers cannot secure immunity from liability for their own negligence has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such a case the ordinary rules of law relating to contracts control.

A contract made by a railroad company for construction work is one made outside of the performance of its duty as a common carrier, and a stipulation that the contractor, in consideration of lawfully reduced rates for transportation of supplies and employés, will assume all risk of damage of any kind even if occasioned by the company's negligence, is not void as against public policy. *Balt. & Ohio Ry. Co.* v. *Voight*, 176 U. S. 498, followed; *Railroad Co.* v. *Lockwood*, 17 Wall. 357, distinguished.

In dealing with transportation of supplies and employés of contractors in connection with construction and improvement of its own road, a railroad company does not act as a common carrier; arrangements made in good faith with such contractors for free or reduced rates are not violations of the prohibitions of the Interstate Commerce Act against rebates. See *Matter of Railroad-Telegraph Contracts*, 12 I. C. C. Rep. 10.

Where no rule of public policy denies effect to stipulations in a contract, the highest public policy is found in enforcing the contract as actually made.

Courts are not at liberty to revise contracts. They can only determine what the parties meant by the terms and expressions as used.

In this case *held* that expressions to effect that the contractor assumed "all risk and damage" and the railroad company assumed "no obligation or risk" in a contract between a railroad company and

contractor for construction of roadbed and not in connection with duties as a common carrier, included damage caused by the company's own negligence.

Quære to what extent a contractor can by a stipulation, valid as to himself and in consideration of reduced rates of transportation, exempt a railroad company from liability to his employés for damages sustained by them from negligence of the railroad company while transporting them.

13 Arizona, 186, reversed.

THE facts, which involve the construction of a contract between a railway company and a construction contractor and the liability of the former for materials belonging to the latter destroyed by fire, are stated in the opinion.

Mr. Gardiner Lathrop, with whom *Mr. Robert Dunlap* and *Mr. Paul Burks* were on the brief, for plaintiffs in error.

Mr. Isidore B. Dockweiler, with whom *Mr. A. C. Baker* was on the brief, for defendant in error:

The railroad company was a common carrier of the goods destroyed, and hence, could not by contract absolve itself from liability to the defendant in error for its acts of negligence.

For the true test to determine whether a party is a common carrier, see 1 Hutchinson on Carriers, § 48, 3d ed.; all the elements of which test are found and fully satisfied in the case at bar.

Plaintiff in error undertook to carry goods of the kind destroyed, to wit, miscellaneous merchandise, such as railroads usually carry, and for which it had an established tariff rate,by the methods by which its business was conducted and over its established road.

The transportation was for hire, for the established tariff rate of "one cent per mile per ton" as set forth in the agreement.

Plaintiff in error owed an actionable duty to the defendant in error to transport the latter's goods of the class and kind destroyed.

The plaintiff in error being a common carrier with respect to the goods shipped by defendant in error, then, though the carriage was by special contract, it still remained a common carrier. *Railroad Co.* v. *Lockwood*, 17 Wall. 376; *Liverpool &c. St. Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397; *Mears* v. *N. Y., N. H. & H. R. Co.*, 75 Connecticut, 171.

Plaintiff in error having no right to refuse to carry the goods of defendant in error, could not contract for their carriage in any capacity except as a common carrier. *Liverpool & G. W. S. Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397; 4 Elliott on Railroads, pp. 11, 12; 1 Hutchinson on Carriers, § 44; *C. W. & St. L. R. Co.* v. *Wallace*, 66 Fed. Rep. 506.

The fact that the contract of carriage of the destroyed goods of the contractor was incidental to a contract having for its principal object the construction of a subsidiary line of plaintiff in error cannot change the character of plaintiff in error to that of a private carrier.

Being a common carrier, plaintiff in error could not by contract absolve itself from liability to the shipper for its acts of negligence. *B. & O. S. W. Ry. Co.* v. *Voigt*, 176 U. S. 498; *The Kensington*, 183 U. S. 263.

To hold the railroad company as a common carrier does not render the contract violative of the Interstate Commerce Law.

The Interstate Commerce Commission has construed the statute as not preventing "a common carrier from giving free or reduced rate carriage over its lines to contractors for materials, supplies and men. 12 I. C. C. Rep. 11.

The object of the statute is "to secure just and reasonable charges for transportation," and "to prevent unjust

discrimination in the rendition of services under similar conditions."

The case at bar is an action *ex delicto* and not *ex contractu.*

The contract of carriage did not in terms exempt the railroad company from liability for its acts of negligence, and, therefore, the exemption contracted for was from loss occasioned by the dangers naturally incident to the carriage, and not from damage brought about by the carrier's negligence. *N. J. St. N. Co.* v. *Bank*, 6 How. 344; *Maynard* v. *Syracuse Ry. Co.*, 71 N. Y. 183; 4 Elliott on Railroads, § 1508; 1 Hutchinson on Carriers, § 463 (3d ed.); Monographic Note, 88 Am. St. Rep. 68, p. 119.

The determination of the question of negligence was properly submitted to the jury.

Neither the question of negligence, nor the question whether such negligence was the proximate cause of the loss, properly arises upon this appeal. Those were finally settled below.

The facts of the case being such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter was for the jury, and their verdict will not be disturbed on appeal. *Grand Trunk Ry.* v. *Ives*, 144 U. S. 408; 21 Enc. Law, 498; *Marande* v. *Tex. & Pac. Ry. Co.*, 184 U. S. 173.

The negligence being found, the commission and omission of acts exposing the goods of the contractor to dangers of destruction or loss and failure to safeguard the same from injury, the question of proximate cause became one of fact for the jury, and no independent, intermediate efficient cause appearing, the original wrong must be considered as reaching to the effect and proximate to it. *Mil. & St. P. R. Co.* v. *Kellogg*, 94 U. S. 470; *Aetna Ins. Co.* v. *Boon*, 95 U. S. 117; *Hays* v. *Mich. Cen. R. Co.*, 111 U. S. 228; *The G. B. Booth*, 171 U. S. 450; *Hays* v. *Williams*,

17 Colorado, 472; *Pullman P. C. Co.* v. *Laack*, 143 Illinois, 260.

MR. JUSTICE HUGHES delivered the opinion of the court.

The Grant Brothers Construction Company recovered judgment in the District Court of the Territory of Arizona for $9,061 for the loss of its property by fire on June 6, 1907, between Bouse and Phœnix, Arizona, while in course of transportation on the railroad operated by the Santa Fe, Prescott & Phœnix Railway Company, the plaintiff in error. The judgment was entered upon a verdict of a jury, a motion for a new trial was denied, and the judgment was affirmed by the Supreme Court of the Territory, 13 Arizona, 186.

The Railway Company had been engaged in building, westerly from its main line, a branch railroad known as the Arizona and California Railroad. For this purpose it entered into a contract with the Construction Company for the necessary grading. The property in question consisted of the camp and grading outfit, and supplies, belonging to the Construction Company, which had been used by it in this work, and was being removed by reason of its completion. At the time in question the branch line was operated regularly only as far as Bouse and the property was loaded on cars "at the front" or end of track, about twelve miles west of that station, to be carried to Phœnix. The superintendent, foremen and about fifty workmen of the Construction Company were taken on the cars at the same place for the same destination.

The cars were hauled by the Railway Company to Bouse (where explosives and hay were unloaded), and were there attached to a regular train which brought them to a point known as the A. and C. Junction, where the Arizona and California line joined the main line of the

Railway Company. At this junction (which was about four miles from Wickenburg, a station on the main line in the direction of Phœnix) all the cars containing the outfit of the Construction Company, save one, were cut out of the train and were put upon a side-track. The rest of the train, with the employés of the Construction Company, went on to Wickenburg. This took place late in the evening of June 5, 1907, and about ten o'clock in the morning of the next day, four of the cars left on the side-track were destroyed by fire.

The A. and C. Junction is described as being in an open desert, without a station agent or inhabitants, and without water or fire apparatus. The cars were left without a watchman in charge. The reason given by the conductor for leaving them at this point was that there was no room for the cars at Wickenburg. There was no explanation of the cause of the fire, the only suggestion, as to this, being that before the fire occurred one train passed by, between four and five o'clock in the morning.

At the close of the evidence the Railway Company requested the trial court to direct a verdict in its favor. This request was refused and exception taken; and the sustaining of this ruling is assigned as error. It is contended by the Railway Company that, under its contract with the Construction Company, it was exempt from all liability and, further, that even assuming it to be liable for negligence there was a total failure of proof in that respect.

The principal question relates to the scope and validity of the provision of the contract between the parties as to the liability of the Railway Company.

The facts are these: In November, 1904, the Railway Company issued a call for proposals for the grading of the roadbed, clearing right-of-way, making necessary canals, etc., of the Arizona & California Railroad, for a distance of about forty miles. The Construction Company made a

bid, which was accepted, and a contract was executed accordingly on December 12, 1904.

This contract, after providing for the performance of the described work of grading, etc., contained the following terms with respect to the transportation of supplies, camp and grading outfit and employés of the Construction Company, which were the same as those set forth in the call for bids:

"14. Water will be delivered in cars at the end of the track at the rate of One Dollar and Fifty Cents ($1.50) per 1000 gallons and supplies will be hauled to End of Track, both in the usual manner of construction trains, subject to delays, etc., incident thereto. All risk of loss or damage to be borne by the Contractor.

"15. The Company will furnish a rate of one cent per ton mile from all points on the S. F. P. & P. Road and leased roads for the Contractor, on Camp and Grading Outfit and supplies, corral supplies, etc., except explosives and commissary goods, and return to original shipping points at same rates, on completion of the work. All movements of goods at less than tariff rates to be at consignee's risk of loss and damage.

"16. The Company will also furnish the Contractor's employés . . . a rate of one cent per passenger mile, . . . and return those who have worked until the completion of contract at the same rate. Passengers carried at less than tariff rates will be required to assume all risk of accidents to person and baggage. The plan of movement of these employés and freight is to be according to rules of the General Freight and Passenger Agent.

"17. The Company will also secure for the Contractor similar rates over the Santa Fe Company's Coast Lines, on Camp and Grading Outfit, in carload lots, both to and from the work, and for workmen going to the work in lots of five (5) or more."

After the work covered by this contract had been finished it was agreed that the Construction Company should continue the grading of the road further to the west, upon the same terms and conditions as those stated in the former contract, save that the prices for the work were increased, and it was provided that water should be delivered at the end of track free of cost, except for car-hire, and that men and supplies should be hauled free on the line of the Arizona & California Railroad, between the A. and C. Junction and the end of track. This supplementary agreement, which was evidenced by letters exchanged in November, 1905, also contained an express provision "that the company shall assume no obligation or risk in case of accident or damage to men and supplies."

It was under these conditions that in June, 1907, the Railroad Company,—the grading having been done—took up the men, outfit and supplies of the Construction Company at the end of the track for the purpose of transporting them to Phœnix.

It is alleged in the complaint that the transportation of the property was to be at the contract rate of one cent per ton mile and it is undisputed that this was less than the tariff rates of the Railway Company accorded to the general public.

It is the established doctrine of this court that common carriers cannot secure immunity from liability for their negligence by any sort of stipulation. *Railroad Company* v. *Lockwood*, 17 Wall. 357; *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397; *Baltimore & Ohio &c. Railway Co.* v. *Voigt*, 176 U. S. 498, 507; *Knott* v. *Botany Mills*, 179 U. S. 69, 71; *The Kensington*, 183 U. S. 263, 268. The rule rests on broad grounds of public policy justifying the restriction of liberty of contract because of the public ends to be achieved. The great object of the law governing common carriers was to secure the utmost care in the rendering of a service of the highest importance to the

community. A carrier who stipulates not to be bound to the exercise of care and diligence "seeks to put off the *essential duties* of his employment." It is recognized that the carrier and the individual customer are not on an equal footing. "The latter cannot afford to higgle or stand out and seek redress in the courts. . . . He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business." *Railroad Company* v. *Lockwood, supra,* pp. 378, 379. For these reasons, the common carrier in the prosecution of its business as such is not permitted to drop its character and transmute itself by contract into a mere bailee with right to stipulate against the consequences of its negligence.

Manifestly, this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such case, it is dealing with matters involving ordinary considerations of contractual relation; those who choose to enter into engagements with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service. The rule extends no further than the reason for it. It is apparent that there may be special engagements which are not embraced within its duty as a common carrier although their performance may incidentally involve the actual transportation of persons and things, whose carriage in other circumstances might be within its public obligation. *Baltimore & Ohio &c. Railway Co.* v. *Voigt,* 176 U. S. 498, and cases cited; *Northern Pacific Railway Co.* v. *Adams,* 192 U. S. 440; *Long* v. *Lehigh Valley R. R. Co.,* C. C. A., 2d Circuit, 130 Fed. Rep. 870.

Thus in *Baltimore & Ohio &c. Railway Co.* v. *Voigt, supra,* it was held that an express messenger in charge of

express matter in pursuance of the contract between the express company and the railroad company was not a passenger of the latter within the meaning of the rule of *Railroad Company* v. *Lockwood, supra;* that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him for its negligence; and that such a contract did not contravene public policy. His position was one "created by an agreement between the express company and the railroad company, adjusting the terms of a joint business—the transportation and delivery of express matter. His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company." It was clear that although the messenger was actually carried on the train, and although the railroad company received compensation in connection with its contract for the express business, his relation to the railroad company was "widely different from that of ordinary passengers," and there was no justification for extending the doctrine restricting the freedom of contract to a case which lay entirely outside the reason which supported it.

In constructing, improving or repairing its road, and in building its extensions and branches, the railroad company is providing facilities for its service as a common carrier, but of course is not acting as such. It may do the work itself, if it chooses, or it may make it the subject of contract with another. In the latter case it simply employs an appropriate agency. The haulage by the railroad company of the men, appliances and supplies, required by the contractor for the purpose of the construction or improvement, to or from the point on its line where the work is to be done, is merely incidental to the work itself. The cost of such haulage is obviously an item of expense which must be taken into account in fixing the

terms of the construction contract, and in providing for it over its own line the railroad company may adjust the matter with the contractor as it sees fit. If the railroad company did the work directly it would have to take its employés and the necessary outfit to the place of work, and it may undertake to do the like for the contractor, either free of charge or at reduced rates, as they may agree.

Usually, necessity or proper convenience requires an undertaking by the railroad company, as to such transportation, which it would be under no obligation to assume in any event as a common carrier. Men and supplies must be put down and taken up at points on the line where there is no regular station and where the railroad company would not be bound to accept or to discharge freight or passengers. In a case, like the present one, of the grading of an extension or branch line, it is convenient that the track, laid as the roadbed is prepared for it, should be utilized for the hauling of men and materials to a point as near as possible to the work, although such track is not open to the public and the railroad company as a common carrier has assumed, as yet, no obligation for general transportation over it. This was obviously contemplated in the contract in question; and a construction of the contract, so as to make it apply only to the hauling of camp and grading outfit to stations to which the company was regularly doing business, is wholly inadmissible. The original proposals stated that the Railway Company hoped "to keep the end of the track within four miles of the nearest grading camp." The contract itself provided that water and supplies should "be hauled to end of track, both in the usual manner of construction trains." And, after providing for the reduced rates for outfit, supplies and employés from all points on the line of the Railway Company and for the return of the same to original shipping points at the same rates on completion of the work, the intent is shown by the pro-

vision immediately following that the Railway Company should secure similar rates for the contractor over its coast lines "on camp and grading outfit, in carload lots, *both to and from the work.*" In the supplementary contract it was provided that men and supplies should be hauled "to the end of track free," with the provision that this should only apply on the line of the Arizona and California Railroad, that is, "between A. and C. Junction and the end of the track." When the work was done, the men and outfit were actually taken up by the Railway Company some twelve miles beyond the last regular station on the branch line. The parties plainly intended that the camp and grading outfit should be transported for the benefit of the contractor as near to the work as it reasonably could be, and without regard to regular stations, and that it should be removed in the same way when the grading was completed.

It is clear that in dealing with transportation of this character over its own road, in connection with construction or improvement, a railroad company is not acting in the performance of its duty as a common carrier, and the arrangement for free or reduced-rate carriage for the necessary materials and men used in the work, when it is a part of the contract, entered into in good faith and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions. See *Matter of Railroad-Telegraph Contracts*, 12 I. C. C. Rep. 10, 11.

The parties then were free to make their own bargain as to this transportation and the liability which should attach to it. There is no rule of public policy which denies effect to their expressed intention, but on the contrary as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made. Undoubtedly, it

is not to be lightly concluded that the Railway Company has been relieved from liability for its neglect, but on the other hand, if this was the agreement as fairly interpreted, it is not to be arbitrarily overridden. The parties were on an equal footing. The risk of loss or damage to the grading outfit or supplies from any cause while being transported over the line of the Railway Company, could be assumed by one party or the other as they saw fit. This risk was an item which naturally would enter into the calculations of the parties with respect to the rate to be charged by the Railway Company. We are not at liberty to revise the contract, and the question simply is whether the stipulation against liability in view of the reduced rates covered all losses, those which might be due to the carrier's neglect as well as others.

We entertain no doubt as to what the parties meant. The limitations upon the liability of the Railway Company were first fully stated in the call for proposals and when the bid was accepted in accordance with the terms of the call, the same limitations were inserted in the contract. Thus, it was provided with respect to the supplies to be hauled to the end of track; "All risk of loss or damage to be borne by the Contractor;" again, as to the camp and grading outfits and supplies; "All movements of goods at less than tariff rates to be at consignee's risk of loss and damage;" and with regard to the employés; "Passengers carried at less than tariff rates will be required to assume all risk of accident to person and baggage." Further, in the supplemental agreement, it was stipulated: "the Company shall assume no obligation or risk in case of accident or damage to men and supplies." When we consider the circumstances of the parties and the objects of the contract, we cannot escape the conclusion that these reiterated statements evidence the intention to deal comprehensively with *all* the risks incident to the transportation, not excluding the obvious risk of loss by reason of some neglect in the

operation of the road. The contract was between two corporations and dealt with the familiar transactions of their everyday concerns. The stipulations are in the terse language of business men. The supplemental contract is contained in an informal letter. And, when "all risk of loss or damage" is spoken of, and it is provided that the Railway Company shall assume "no obligation or risk in case of accident or damage," it is evident that they are looking at the matter from a business standpoint and are bargaining for a reduced rate to be charged by the Railway Company on the one hand and an assumption of the entire risk of the transportation by the Construction Company on the other. It is true that general words of exemption have often been found insufficient to cover injuries due to negligence, and a rule imposing such a limitation upon their effect has manifest propriety in those jurisdictions where common carriers, acting as such, are allowed to stipulate against the consequences of their neglect if this is done in explicit terms. But here, to repeat, we are entirely out of the domain governed by the rule of public policy affecting common carriers, and the agreement must be taken according to its actual intent.

It will be observed that the limitation from liability was to apply to the workmen as well as to the goods. We do not need to inquire as to the effect of such an exemption in the case of a workman who had not assented to it. But the provisions as to the workmen throw light upon the intent of the parties with respect to the property. In the supplemental contract both men and supplies were grouped in one stipulation for immunity. The Railway Company, however, would not have been liable in any event for injuries to the workmen save in case of negligence; and in bargaining for a limitation of liability as to the workmen, they evidently had negligence in view. The word "accident" in this connection was manifestly used in its popular sense and not as limited to occurrences beyond the

carrier's control. Further, it will be remembered, that in the supplemental contract, free haulage was given over the branch line and the stipulation, therein repeated, was certainly to protect the carrier from a liability, in the case of injury to the workmen, which otherwise would attach; that is, a liability for negligence.

This point was recognized by the court in *Railroad Company* v. *Lockwood*, 17 Wall. 357, which involved the obligation of a common carrier. The contract for exemption from liability was general, but it related to a drover accompanying his cattle (who, notwithstanding that he had a pass, was held to be a passenger for hire) as well as to the cattle themselves; and with respect to the drover, it was assumed in the course of the opinion that the stipulation included immunity from liability for the company's negligence. And thus the court was brought to the decision of the question whether a common carrier could be permitted to make a stipulation of that sort. The court said: "It is strenuously insisted, however, that as negligence is the only ground of liability in the carriage of passengers, and as the contract is absolute in its terms, it must be construed to embrace negligence as well as accident, the former in reference to passengers, and both in reference to the cattle carried in the train. As this argument seems plausible, and the exclusion of a liability embraced in the terms of exemption on the ground that it could not have been in the mind of the parties is somewhat arbitrary, we will proceed to examine the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence" (*id.*, pp. 362, 363).

The question as to the fair interpretation of language such as is used in the present case, where the railroad company is acting outside the performance of its duty as a common carrier was considered by the Circuit Court of Appeals in the Second Circuit in *Long* v. *Lehigh Valley*

R. Co., 130 Fed. Rep. 870. That was the case of an express messenger who was injured while employed as such in an express car on one of the defendant's trains, owing to the negligence of the defendant's employés. His contract with the express company contained a provision that he assumed "all risk of accidents and injuries" to himself "arising out of such employment," and that he released the express company and the transportation lines on which he was to render service from any claims "arising out of any such accidents or injuries" that might happen to him while so employed. Circuit Judge Wallace in delivering the opinion of the court, after referring to *Baltimore & Ohio &c. Ry. Co.* v. *Voigt*, 176 U. S. 498, said: "It is said that the contract in that case in terms included among the risks assumed by the express messenger accidents and injuries occasioned by negligence, while the contract here does not; and it is urged that, in the absence of such a stipulation, the contract should be construed not to extend to that class of accidents or injuries. This contention would doubtless be sound if the parties contracting had not been treating on terms of equality, as is the case between a common carrier and a shipper of goods or a passenger. But when this is not the case, and no rule of public policy forbids a contract by which one of the parties is exonerated from any risk arising from negligence, there is no reason why the ordinary rules of construction should not obtain, and the contract be given effect according to the intention of the parties. The observations of this court in *McCormick* v. *Shippy*, 124 Fed. Rep. 48, 59 C. C. A. 568, are appropriate: 'There is no question of public policy involved in this contract, as in the case of a common carrier. It is well settled that the parties in such a case have the right to provide by apt language against liability for negligence. . . . The clause must be interpreted to include loss through negligence, because for loss not arising from negligence he would not be liable.'

"So, in this case, the defendant, being merely a private carrier in respect to the plaintiff, owed him merely the duty of ordinary care, and could only have been liable to him for injuries arising from negligence, and the release made in advance must have contemplated accidents and injuries of that character. In *Bates* v. *Railroad Company*, 147 Massachusetts, 255, *S. C.*, 17 N. E. Rep. 633, the agreement between the express messenger and the express company was that the former 'will assume all risk, and [of] accidents and injuries resulting therefrom, and will hold said company free and discharged from all claims and demands in any way growing out of any injuries received by him while so riding.' In *Hosmer* v. *Railroad Company*, 156 Massachusetts, 506, 31 N. E. Rep. 652, the plaintiff was an expressman, and had agreed that, in consideration of the company's allowing him to ride in baggage cars on its trains, he would 'assume all risk of accidents and injuries resulting therefrom.' In both cases the language of the contract, although not expressly including injuries or accidents by negligence, was construed to relieve the railroad company from liability for injuries by negligence. In *Chicago &c. R. Co.* v. *Wallace*, 66 Fed. Rep. 506, *S. C.*, 14 C. C. A. 257, *S. C.*, 24 U. S. App. 589, *S. C.*, 30 L. R. A. 161, the language of the contract was as general as it is in the present case, and the railroad company was exonerated from liability" (130 Fed. Rep. p. 873).

We see no ground whatever for the conclusion that it was not the intention of the parties to give the Railroad Company immunity from negligence in the case of the workmen, and in view of the provisions and purpose of the contract it cannot be held that they had a different intention with respect to the camp and grading outfit and supplies. When they agreed that all movement of this property at less than tariff rates should be at the risk of the Construction Company and later in the supplemental contract that the Railway Company should

assume "no obligation or risk" in the case of damage to supplies, we think it clear that they meant to cover the entire transportation risk, with respect to this property and that losses such as occurred in this case, whether or not attributable to the negligence of the Railway Company were within the stipulated immunity.

It is therefore unnecessary to discuss the assignments of error which are based upon the ruling of the court with respect to the submission to the jury of the question of negligence. Our conclusion is that, upon the facts disclosed at the trial, the Railway Company was entitled to a direction of a verdict in its favor, and the judgment sustaining the recovery by the Construction Company must therefore be reversed.

The judgment is reversed and the case remanded to the Supreme Court of the State of Arizona as the successor of the Territorial Supreme Court, for such further proceedings as may not be inconsistent with this opinion.

GEORGE A. FULLER COMPANY *v.* McCLOSKEY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 176. Submitted March 7, 1913.—Decided April 7, 1913.

The averments in the declaration when taken together, *held* sufficient to allow proof of negligence on the part of one defendant, although one specific charge related exclusively to the other defendant as to whom the case was dismissed.

A modification of the requested charge so as to make it conform to the facts of the case, *held* in this case not to have been error, the jury having been properly instructed by the court on the subject of contributory negligence.

A variance between proof and declaration should be called to the

attention of the trial court when the declaration can be met by an immediate amendment.

A contractor erecting a building arranged with another and independent contractor who was putting in the elevator to use and control the elevator and an operator therefor before it was turned over to the owner; he also arranged to allow his own subcontractor painting the elevator shaft to use the elevator and to signal when and where the elevator was to stop to let the employés off and take them on. *Held* that the contractor was the sole master and was responsible for damages sustained by an employé of the subcontractor resulting from negligence of the operator in failing to respond to signals properly given by such employé.

35 App. D. C. 595, affirmed.

THE facts, which involve the liability of a contractor for personal injuries caused by negligence in operating an elevator, are stated in the opinion.

Mr. Edward S. Duvall, Jr., for plaintiff in error:

It was error in the trial court to decide, as matter of law, under the evidence, that the elevator boy was the servant of the Fuller Company. *Standard Oil Co.* v. *Anderson*, 212 U. S. 215; *Byrne* v. *Kansas City R. R. Co.*, 61 Fed. Rep. 609; *Powell* v. *Construction Co.*, 88 Tennessee, 692; *The Elton*, 142 Fed. Rep. 367; *Rourke* v. *White Moss Colliery Co.*, L. R. 2; C. P. D. 205; *Murrie* v. *Currie*, L. R. 6; C. P. 24; *Donovan* v. *Construction Syndicate*, 1 Q. B. (1893) 629; *Wylie* v. *Palmer*, 137 N. Y. 248; *McInerney* v. *Delaware & Hudson C. Co.*, 151 N. Y. 411; *Delory* v. *Blodgett*, 185 Massachusetts, 126; *D., L. & W. R. Co.* v. *Hardy*, 59 N. J. L. 35; *Parkhurst* v. *Swift*, 31 Ind. App. 521; *Anderson* v. *Boyer*, 156 N. Y. 93; *Connor* v. *Koch*, 63 App. Div. (Sup. Ct. N. Y.) 257. See also *Ches. & O. Ry. Co.* v. *Howard*, 178 U. S. 153; *Guy* v. *Donald*, 203 U. S. 399.

There is no sufficient allegation of negligence against the Fuller Company in the declaration, nor is there any evidence sufficient to support a verdict against that company.

It is an important test of liability whether the company reserve the power not only to direct what shall be done, but how it shall be done. *Railroad Co.* v. *Hanning*, 15 Wall. 649; *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518; *Casement* v. *Brown*, 148 U. S. 622; *B. & O. R. R. Co.* v. *Baugh*, 149 U. S. 368. See also *Morgan* v. *Smith*, 159 Massachusetts, 570; *Geer* v. *Darrow*, 61 Connecticut, 220; *Charlock* v. *Freel*, 125 N. Y. 357; *Bailey* v. *Troy & B. R. Co.*, 57 Vermont, 252; *Johnston* v. *Ott*, 155 Pa. St. 17.

If an independent contractor is employed to do a lawful act, and in the course of the work his servants commit some casual act of wrong or negligence, the employer is not answerable. 2 Kent Com., p. 260; *Reedie* v. *London & N. W. R. Co.*, 4 Exch. 244, 256; *Overton* v. *Freeman*, 11 C. B. 867; *Gayford* v. *Nichols*, 9 Exch. 702, 707; *Peachy* v. *Rowland*, 13 C. B. 182; *Forsyth* v. *Hooper*, 11 Allen, 419; *Hilliard* v. *Richardson*, 3 Gray, 349; *Blake* v. *Ferris*, 1 Seld. 48; *Pack* v. *New York*, 8 N. Y. 222; *De Forrest* v. *Wright*, 5 Michigan, 368; *Painter* v. *Pittsburgh*, 46 Pa. St. 213; *Eaton* v. *European & N. A. R. Co.*, 59 Maine, 520; *McCarthy* v. *Second Parrish*, 71 Maine, 318; *Cunningham* v. *International R. R. Co.*, 51 Texas, 503; *King* v. *N. Y. Cent. R. Co.*, 66 N. Y. 181. See also *Schnurr* v. *Board of Com'rs of Huntington Co.*, 22 Ind. App. 188; *Sullivan* v. *New Bedford Gas & Edison Light Co.*, 190 Massachusetts, 288; *Hooe* v. *Boston & N. St. Ry. Co.*, 187 Massachusetts, 67; *Laugher* v. *Pointer*, 5 B. & C. 560; *Clark* v. *Hannibal &c. R. Co.*, 36 Missouri, 202; *Houser* v. *Metropolitan Railroad Co.* 27 Misc. (N. Y.) 538; *Blake* v. *Ferris*, 5 N. Y. 48; *S. C.*, 55 Am. Dec. 304.

The relation between parties which renders one liable to third persons for the acts of negligence of the other must be that of superior and subordinate, and is based on the control which the superior has the right to exercise over the acts of the subordinate in the performance of his duties, and an employer is not so liable for the acts of an

independent contractor, who is never subject to such control, nor is he liable for the acts of the employés and servants of such independent contractor. *Casement* v. *Brown, supra; Robbins* v. *Chicago*, 2 Black, 418, and 4 Wall. 657; *Hill* v. *Schneider* (N. Y., 1897), 13 App. Div. 299; *Uppington* v. *City of New York*, 165 N. Y. 222; *Boomer* v. *Wilbur*, 176 Massachusetts, 482; *Francis* v. *Johnson*, 127 Iowa, 391.

The burden of proof was on the plaintiff to show that the defendant entered into the contract with the Mackay Company to operate the elevator so that the Mackay Company's employés might stand on top of the elevator, etc. *Pa. R. R. Co.* v. *Jones*, 155 U. S. 333; *Tyler* v. *Pa. R. R. Co.*, 18 App. D. C. 31.

It was McCloskey's duty while on the elevator to exercise proper care for his own safety, and the court erred in refusing to grant the defendant's third prayer in that behalf. *Railroad Company* v. *Jones*, 95 U. S. 443.

Assuming that there was any evidence tending to show that Locke was the servant of the Fuller Company, the question should have been submitted to the jury to decide under all the evidence under proper instruction. *Driscoll* v. *Towle*, 181 Massachusetts, 416; *D., L. & W. R. Co.* v. *Hardy*, 59 N. J. L. 35; *Daley* v. *Boston & Albany R. Co.*, 147 Massachusetts, 101; *Connor* v. *Koch*, 63 App. Div. (Sup. Ct. N. Y.) 257.

Mr. S. V. Hayden and *Mr. Hayden Johnson* for defendant in error.

Mr. Justice Hughes delivered the opinion of the court.

This action was brought by Wilson A. McCloskey, the defendant in error, to recover damages for personal injuries caused by alleged negligence in the operation of an

elevator in the Hibbs Building in this District. At the time of the accident McCloskey, who will be called the plaintiff, was engaged in painting the elevator shaft and for this purpose was riding on top of the elevator. The action was brought against the Otis Elevator Company, and the plaintiff in error, George A. Fuller Company. Without objection, a verdict was directed in favor of the Otis Elevator Company, but the case against the George A. Fuller Company was submitted to the jury who found a verdict in favor of the plaintiff. The judgment on this verdict was affirmed by the Court of Appeals of the District and the case comes here on writ of error. 35 App. D. C. 595.

The facts appearing upon the trial are succinctly stated in the opinion of the court below, in which the George A. Fuller Company is described as the defendant, as follows:

"The defendant company contracted with William B. Hibbs to erect for him an office building on 15th Street is this city. The work was to be completed by a time certain. This contract did not include the installation of an elevator. That work was provided for in a contract between Hibbs and the Otis Elevator Company. The elevator company installed its elevator long before the completion of the building. This elevator, down to the time of the injury to the plaintiff, had not been turned over to the owner of the building, but was operated by an employé of the Otis Company, who was paid and generally controlled by that company. After its installation the defendant company entered into an arrangement with the elevator company by which it became entitled to use this elevator in the prosecution of its work, paying to the elevator company three dollars per day, which was to cover the wages of the caretaker or operator aforesaid, the Otis Company reserving the primary right to use the elevator. Under this arrangement the defendant

company was to have no control over the elevator operator other than to notify him when to start and when to stop his machine.

"The defendant company entered into a subcontract with the Robert E. Mackay Company of New York for the painting required by its contract with Mr. Hibbs. The plaintiff was an employé of the Mackay Company. The elevator shaft was included in this subcontract. To paint this it was of course necessary that some means be provided whereby workmen could ascend and descend the shaft. Therefore the Mackay Company entered into an agreement with the defendant company by which the defendant company agreed to furnish the Mackay Company, for use in painting said shaft elevator, power and operator at any time that the elevator company or the defendant company did not want them. Nothing whatever was said about the arrangement between the elevator company and the defendant company, the agreement between the Mackay and the defendant company proceeding upon the theory that the equipment and elevator were under the control of the defendant company. The Mackay Company was not to have, and in fact did not have, any control over the operator other than to direct him when to start and when to stop his elevator while thus temporarily used as a movable staging.

"Upon the day of the accident plaintiff and another workman were on the roof of the elevator touching up the walls of the shaft. They had worked down until the floor of the car was on a level with the first floor of the building. To finish the walls of the shaft between the first and second floors of the building, the space then occupied by the body of the car, it became necessary to get under the car. To do this it was necessary for the painters to be taken to the next or second floor landing. The plaintiff was standing on the rim or ledge around the top of the car and facing the centre of the car. He had

a paint box and brush in his hands. The other painter was on another side of the top with his back to the plaintiff. This rim or ledge was about six and one-half inches wide. Plaintiff called to the elevator operator to take him and the other painter up to the second floor and let them off there. There was evidence before the jury that when the car had reached a point where plaintiff had directed that it be stopped, the car paused and suddenly started again, throwing plaintiff off his balance, which he was unable to regain until the car has reached the fifth floor, where he was caught in the weights which passed the car at that point."

The contention based upon the asserted insufficiency of the declaration is without merit. So far as appears the evidence was received without any objection upon this ground, and the assignment of error rests solely upon the refusal of the trial court to grant a general prayer that the court should instruct the jury that "under the pleadings and all the evidence" their verdict should be for the Fuller Company. It is urged that there is no sufficient averment of the negligence of this company and attention is directed to the allegation of the declaration that the plaintiff "requested the said defendant, Otis Elevator Company, its servants and employés to stop said elevator at the second floor, so that he might get off and alight therefrom." It is manifest, however, from the other allegations of the declaration that the plaintiff intended to charge, and did charge, negligence on the part of both defendants. The attention of the trial court was not called to any particular in which the declaration was deemed to be insufficient as against the Fuller Company and no mention was made of the specific point now raised. If this point had been suggested it is apparent that, in view of the allegations contained in the declaration, such variance as there was between pleading and proof could properly have been met by an immediate amendment and the case could

then have been submitted to the jury precisely as it was submitted.

It is also assigned as error that the trial court improperly modified one of the requests of the Fuller Company for instruction upon the subject of contributory negligence. The requested instruction with the modification made by the trial court, which appears in the words italicized, was as follows: "If the Jury find from all the evidence that the accident to the plaintiff was occasioned wholly or in part by reason of the fact that he had placed himself in an exposed and dangerous position on *the ledge around* the top of the elevator car, *with reference to obeying the signals to stop at the second floor, if you find such signals were given* when he might readily have placed himself in a safe and secure position, the verdict should be for the defendant the George A. Fuller Company, regardless of any supposed negligence on the part of the elevator operator and regardless of whether the operator was a servant of the Fuller Company or not." The court undoubtedly added these words because the evidence showed that the plaintiff had asked the operator to stop at the second floor and there was no danger from the weights until the elevator reached the fifth floor. The fact that the plaintiff intended to go only to the second floor and had signaled accordingly was properly to be taken into consideration in passing upon the question whether in the circumstances he acted with reasonable prudence. The court in other portions of the charge correctly instructed the jury on the subject of contributory negligence and there is not the slightest ground for the conclusion that there was any doubt as to the meaning of the court in the words used in modifying the defendant's request, or that any prejudicial error was committed.

The principal argument for reversal is based on the ruling of the trial court that Locke, the operator of the elevator, was the servant of the Fuller Company. The

court below approved this ruling and we find no error in its conclusion. So far as Locke's employment was concerned, there was no dispute as to any matter of fact and the question of the liability of the Fuller Company for his negligence, if he was negligent in the operation of the elevator, was one of law. It cannot be said that, under the arrangement between the Fuller Company and the Mackay Company, Locke was transferred to the employment of the latter. The Fuller Company had contracted for the construction of the building. It had made a subcontract with the Mackay Company which covered the painting of the elevator shaft. It was convenient in doing this that the top of the elevator should be used as a movable platform. But the Fuller Company needed the elevator from time to time for other purposes; and it was important to it that the elevator shaft should be kept free of obstructions and that the elevator should continue to be at its command. Accordingly, the Fuller Company agreed to furnish to the Mackay Company the use of the elevator and the service of the operator, for a specified sum per hour, when the elevator was not otherwise required. The Fuller Company was thus aiding in the prosecution of the work which it had contracted with the owner of the building to perform, and in providing the use of a facility to a subcontractor it secured the doing of the work at the smallest inconvenience to itself. It must be concluded that the operating of the elevator under this arrangement with the Mackay Company was an operating of it by the Fuller Company. It is true that the employés of the Mackay Company were to give the signals for starting and stopping the elevator, but this did not make the operator who received them, the servant of the Mackay Company. These signals simply notified him as to what was required from time to time in the course of the service which the Fuller Company had agreed to provide.

The court below followed the decision of this court in the case of *Standard Oil Co.* v. *Anderson*, 212 U. S. 215. There the plaintiff was employed as a longshoreman by a master stevedore, who was acting under a contract with the defendant, the Standard Oil Company, in loading a ship with oil. The plaintiff was working in the hold where, without fault on his part, he was struck by a load of cases containing oil which was unexpectedly lowered. The ship was alongside a dock belonging to the defendant, and the cases of oil were conveyed from the dock to the hatch by means of tackle, guy ropes and hoisting ropes furnished and rigged by the stevedore. The motive power was supplied by a winch and drum owned by the defendant and placed on its dock. The work of loading was done by employés of the stevedore except that the winch was operated by a winchman in the general employ and pay of the defendant. The stevedore paid the defendant an agreed sum for the hoisting. The winch was placed where it was impossible to determine the proper time for hoisting and lowering the cases of oil, and the winchman necessarily depended upon signals from an employé of the stevedore stationed on the deck of the ship. The negligence consisted in lowering a draft of cases before the signal was received. The court held that the winchman remained the servant of the defendant and affirmed a judgment recovered against the defendant for his negligence. With respect to the argument based on the fact that the winch was to be operated for the stevedore, according to the orders of his employés, Mr. Justice Moody, in delivering the opinion of the court, said: "Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil. But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be coöperation and coördination, or there will be chaos.

The giving of the signals under the circumstances of this case was not the giving of orders, but of information, and the obedience to those signals showed coöperation rather than subordination, and is not enough to show that there has been a change of masters" (*id.*, p. 226).

In the present case, the Fuller Company obtained the use of the elevator, and the operator, from the Otis Company, and paid therefor. But the Otis Company had nothing to do with the arrangement with the Mackay Company. To this transaction, and to the employing of the top of the elevator as a movable platform for the painters, the Otis Company was a stranger. The Fuller Company, having obtained the use of the elevator, agreed to supply it to the Mackay Company and undertook to furnish that company the necessary service in operating it; it asserted control for this purpose, and assumed the duty of operating with proper care.

Judgment affirmed.

HEBERT *v.* CRAWFORD, TRUSTEE, AND LEBLANC.

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

No. 83. Submitted December 9, 1912.—Decided April 7, 1913.

Whatever may be the legal rights of one claiming legal or equitable title to an asset, the fact that the bankrupt and his trustee had physical possession thereof gives the bankruptcy court control of the *res* and authority to administer it.

A petition to determine title to property in the possession of the bankrupt and his trustee may, as in this case, operate as an attachment, and thus bring the property into the custody and under the exclusive jurisdiction of the bankruptcy court.

A finding in a summary proceeding that the trustee has received physical possession of the property involved is conclusive against him and is not subject to collateral attack by third persons. *Noble* v. *Union River Logging Company*, 147 U. S. 173.

While the state court has jurisdiction to determine as between partners whether one is entitled to use the assets of his partnership to satisfy an order made in a summary proceeding in the bankruptcy court, and also whether the receiver received the same, it may not determine title to property in the possession of the trustee or who is entitled to possession thereof.

THE facts, which involve the rights of the trustee in bankruptcy and others in a crop of rice grown by the bankrupt and the jurisdiction of the state and Federal courts of the controversies arising thereover, are stated in the opinion.

Mr. Frederick S. Tyler and *Mr. A. D. Lipscomb* for appellants.

Mr. Horace Chilton and *Mr. U. F. Short* for appellees.

MR. JUSTICE LAMAR delivered the opinion of the court.

This conflict of jurisdiction, between state court and Bankruptcy Court, with injunction and counter-injunction, grew out of a controversy as to who was in possession of a crop of rice, when Moore & Bridgeman, who had planted it, filed their petition on July 16, 1906, to be adjudged bankrupts. If the rice was then in their possession the Bankruptcy Court had jurisdiction to administer it as assets of the estate, and to determine all claims to the property. *Babbitt* v. *Dutcher*, 216 U. S. 102. *Bryan* v. *Bernheimer*, 181 U. S. 188. *Bardes* v. *Hawarden Bank*, 178 U. S. 524.

The firm of Beaumont Mills claimed, however, that, for value and in good faith, they had acquired the title and possession of the rice on June 15, 1906, thirty days before the petition in bankruptcy was filed; that they had

employed Moore & Bridgeman to harvest and deliver it, and that LeBlanc, who was soon thereafter elected trustee, used labor, teams and machinery of the bankrupts in harvesting and threshing the crop. The Beaumont Mills paid him, as trustee, for these services and for hauling and delivering the rice to them at their warehouse. This they claim did not affect the jurisdiction of the state court of any controversy as to the ownership and possession of the crop.

Creditors of the bankrupts, on the other hand, denied the title of the Beaumont Mills, insisting that the crop belonged to Moore & Bridgeman, and that the delivery by LeBlanc, trustee, was a conversion to his own use and that of the Beaumont Mills, of which firm he was a member. These creditors thereupon instituted summary proceedings in the Bankrupt Court to charge him with its value. On that hearing two members of the firm of Beaumont Mills were sworn and testified as witnesses in his behalf. The District Court found in favor of the creditors and on December 17, 1907, entered an order reciting that the rice was the property of Moore & Bridgeman; that it came into the possession of LeBlanc, as trustee; that he improperly delivered it to the Beaumont Mills and was chargeable with $11,651, its value. The court thereupon directed that he pay that sum into the Registry of the court within ten days. That judgment was affirmed (166 Fed. Rep. 689).

LeBlanc was without funds with which to comply with this order and claimed that, under the circumstances, he had the right to withdraw $11,651—the value of the rice—from the funds of the Beaumont Mills and deposit it in the Registry of the court. The other members of the firm resisted this claim and accordingly instituted proceedings against him in the state court to prevent his carrying his threat into execution. In March, 1909, a temporary injunction was issued restraining him from withdrawing

partnership assets for the purpose of paying the money into the Bankrupt Court.

The creditors of Moore & Bridgeman contended that they were not concerned with the suit between the partners or the source from which LeBlanc secured the money to pay the judgment rendered against him on December 17, 1907. They therefore pressed for a compliance with that order, and to avoid attachment for contempt, LeBlanc, in disobedience of the Injunction, drew $11,651 from the bank account of the Beaumont Mills, paid the firm's money to the clerk of the Bankrupt Court, who deposited it with the Gulf Bank and Crawford, elected to succeed LeBlanc as trustee of Moore & Bridgeman.

The Beaumont Mills, at once, filed a Supplemental Petition in the state court making the Bank and Crawford, Trustee, defendants, and praying judgment against both of them for the partnership money in their hands, and for other and further relief. Crawford, in turn, immediately brought this bill, in the Bankrupt Court, to enjoin the Beaumont Mills from prosecuting their suit against him in the state court. He insisted that the Bankrupt Court had jurisdiction of the *res* and was, alone, authorized to determine his right to retain the $11,651 paid over to him as Trustee. He contended also that the order of December 17, 1907, in the Summary Proceedings was not only conclusive that the Bankrupt Court had jurisdiction of the *res*, but he also insisted that as the Beaumont Mills had taken part in that litigation, they were bound by the finding that the crop belonged to Moore & Bridgeman. A decree was rendered in Crawford's favor by the District Court. It was affirmed by the court of Appeals and is brought here by the Beaumont Mills for review.

Crawford's contention must, in part, be sustained. For whatever may have been the legal or equitable rights of the Beaumont Mills under their contracts with Moore & Bridgeman, and under the Bill of Sale of June 15, 1906, it

still appears that, first, Moore & Bridgeman and, later, LeBlanc, as trustee, engaged in gathering, threshing, hauling and delivering the rice. This physical possession, under the decision in *Murphy* v. *Hofman Co.*, 211 U. S. 562, and cases cited, gave the Bankrupt Court control of the *res*, and authority to administer it along with all other property in their physical possession when their petition was filed. That petition operated as an attachment and brought the rice into the custody of the Bankrupt Court.

"Where property was in the possession of the bankrupt at the time of the appointment of a receiver . . . the bankruptcy court had jurisdiction to determine the title to it (569). . . . When the court of bankruptcy, through the act of its officers, such as referees, receivers or trustees, has taken possession of a *res* . . . it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and its possession cannot be disturbed by the process of another court." *Murphy* v. *Hofman Company*, 211 U. S. 562, 569, 570, and authorities. Nor was this jurisdiction lessened because LeBlanc, trustee, after gathering the crop delivered the rice into the possession of Beaumont Mills at their warehouse. "The court had possession of the property and jurisdiction to hear and determine the interests of those claiming a lien therein or ownership thereof. . . . This jurisdiction can [not] be ousted by a surrender of the property by the receiver, without authority of the court." *Whitney* v. *Wenman*, 198 U. S. 539, 553.

Under these decisions the physical possession of the crop brought the property within the exclusive jurisdiction of the Bankrupt Court. The finding in the Summary Proceeding that LeBlanc had received possession, as trustee, was conclusive against him, and was not subject to collateral attack by third persons. *Noble* v. *Union River Company*, 147 U. S. 165, 173–4, and cases cited.

But that decision was not entered in a suit, in its nature plenary, to try title, and was not binding upon the Beaumont Mills, even though two members of the firm testified as witnesses. It was an order in bankruptcy finding that LeBlanc, having been in possession of the property as trustee, was accountable for its value. But it did not determine what was to be done with the rice, or who owned it, or whether the Beaumont Mills had a title thereto or a lien thereon. All these matters were left open for adjudication by the Bankrupt Court when plenary suits were filed by any person having a claim to the property. Or, since the rice had been withdrawn from the custody of that court, the trustee could institute therein a suit for the rice or its proceeds. He would hold the same when recovered for the benefit of whomsoever might be determined to be entitled thereto in whole or in part.

None of these issues could be settled by LeBlanc. The fact that he was trustee and at the same time a member of the firm of Beaumont Mills, did not give him the right to use partnership assets of any sort for the purpose of satisfying the judgment rendered against himself, and by a wrongful conversion of firm money rectify what had been held to be a wrongful conversion of the bankrupt's rice. There is no claim that the $11,651 had been earmarked or had been set apart as a specific fund to represent that property, or that what LeBlanc delivered to Crawford was the same money that had been received from the sale of the rice two years before. On the contrary, Crawford in his bill insists that the Beaumont Mills "still have the rice or its proceeds," and the answer of the Beaumont Mills avers that the money was checked out by LeBlanc from the firm's bank account and deposited with Crawford.

That being so, LeBlanc was not authorized to draw out this partnership money and hand the same over to Crawford, trustee, even though the latter may have had a

claim against that firm for an equal amount. When LeBlanc threatened to misapply their assets whether $11,651 in money or corn or anything else of equal value, the other partners were entitled to apply for equitable relief, and the state court had jurisdiction to restrain him from using money of the Beaumont Mills to satisfy his personal obligation. As an incident of that jurisdiction the state court could determine the liability of Crawford, trustee, who received such money of the firm with notice that it had been taken in violation of that injunction. *In re Kanter*, 121 Fed. Rep. 984. *In re Spitzer*, 130 Fed. Rep. 879. *In re Mertens*, 147 Fed. Rep. 182. Cf. Act of August 13, 1888 (25 Stat. 433, 436, c. 866). For his representative capacity did not exempt him from liability for wrongfully receiving or retaining these funds paid over in disobedience of an injunction,—since money thus tortiously paid and held did not thereby become a part of the *res* within the exclusive control of the Bankrupt Court.

The fact that the jurisdiction of the two courts is limited, as a result of the Bankrupt Act, makes it impossible for either, without the consent of both parties, to determine the whole controversy in one suit. The state court has the right to try the question as to whether Crawford and the bank received the money with notice that it was partnership assets, and if so, to enter judgment in favor of the Beaumont Mills. But it could not determine who was in possession of the rice on July 16, 1906, or who was entitled to the property or its proceeds. That matter had been drawn within the jurisdiction of the Bankrupt Court by the order of December 17, 1907, and that decision was not subject to review by the state court. The decree must, therefore, be reversed in so far as it enjoins the Beaumont Mills from suing Crawford, trustee, for partnership assets paid into his hands in violation of the state injunction;—but without prejudice to the right of Crawford, trustee, to proceed in the District Court of

the United States against the Beaumont Mills for the recovery of the rice, its proceeds, or its value, and without prejudice to the right of the Beaumont Mills, in such suit, to make any defense or to assert any claim, lien or title to the property by reason of contracts and transactions with Moore & Bridgeman, Moore or others before the petition in bankruptcy was filed.

The decree is reversed and remanded for further proceedings in conformity with this opinion.

LYLE *v.* PATTERSON.

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

No. 167. Argued March 5, 1913.—Decided April 7, 1913.

Quære, whether the benefits of the act of March 3, 1887, providing for settlement of titles of purchasers in good faith from railroad companies not entitled to convey, are confined exclusively to those who purchased prior to that date.

One suing to make a patentee trustee for himself can only recover on the strength of his own equity and not on the defects in defendant's title.

A possessory title to lands of the public domain acquired in good faith from a railroad company afterwards held not to have earned the land, by a purchaser who cultivated and improved the property, is good as against all except the United States, and an attempted entry by another before the land is restored to the public domain and reopened for entry is a trespass and initiates no rights in the property.

Possession, not based on a legal right but secured by violence and maintained with force and arms, cannot furnish the basis of a right enforceable in law.

A preëmption right cannot be initiated without settlement, habitation and improvement, *Homer* v. *Wallace*, 97 U. S. 579, and the same rule

applies to a homestead entry. Neither right can be initiated when the land is in possession of another under color of title.

A naked unlawful trespass cannot initiate a right to any part of the public domain. *Swanson* v. *Sears*, 224 U. S. 182.

176 Fed. Rep. 909, affirmed.

By the act of May 12, 1864, 13 Stat. 72, c. 84, Congress made a land grant to the State of Iowa to aid in the construction of a railroad from Sioux City to the Minnesota line—a distance of about 80 miles. It was provided that the road should be completed within ten years, but that as each ten miles was completed, a patent for one hundred sections should be issued by the Secretary of the Interior to the State, for the benefit of the company building the road. In 1866 the State passed an act under which the Sioux City and St. Paul Railroad was to receive the benefit of the Congressional land-grant. That company began construction in 1872. Several ten mile sections were completed. Patents were accordingly issued to the State and it, in turn, made a number of grants to the Railroad Company. But, because of a controversy as to what had been earned, the State of Iowa refused to convey to the Railroad Company those sections which contained the land involved in this controversy.

This particular tract was sold on May 12, 1887, by the Railroad Company to Pasco, who bought in good faith, believing that the company had earned the right to receive a title thereto. He paid part of the purchase price, promised to pay the balance in ten annual instalments, entered into possession and made valuable improvements. In 1889 he sold his interest to Patterson, who agreed to pay the balance of the purchase money due to the Railroad. Patterson, by himself and tenants, remained in possession until January, 1901. He then sold to Smith and the latter, in March, 1901, conveyed to Thomas Beacom. In May, 1901, the appellant, Lyle, claiming that he had a homestead right in the premises, brought

the present suit against Patterson, Smith and Thomas Beacom to charge them as trustees holding title for his use.

On the trial it appeared that in 1874, 56 miles of the railroad had been constructed, after which the company ceased to build. The road not having been fully constructed within ten years as required by Congress in the act of 1864, the State of Iowa refused to issue grants for land claimed by the Railroad Company, and, by appropriate legislation, the State resumed all the unearned land and relinquished the same to the United States. In 1889 the Government filed in the Circuit Court a bill against the Sioux City and St. Paul Railroad Company asking the court to quiet the title of the United States to land therein described, included in which was the quarter-section sold, in 1887, to Pasco. That suit resulted in a decree in favor of the United States. It was affirmed October 21, 1895 (159 U. S. 349).

On October 22, 1895, the day following the decision in favor of the Government and for the purpose of initiating a homestead right, James Beacom entered upon the land and in the afternoon of the same day Lyle did likewise. He hauled a small hut upon the land, did a little plowing, and slept on the place one or two nights. He left, intending to return, but was prevented from doing so by James Beacom, who, with a drawn pistol and threats of violence, kept him from coming on the land. Subsequently, Lyle did reënter and remained until he was again forced to leave.

On November 18, 1895, shortly after the decision that the land did not belong to the railroad, but to the United States, notice was given by the Department of the Interior that all the land included in the decree would be restored to the public domain and be subject to entry ninety days after publication. Those having rights under the act of 1887, 24 Stat. 556, c. 376, were required to file their claims

within ninety days following. In February and again in March, 1896, Lyle made his homestead application, tendering the necessary fees. Similar applications were made by James Beacom, Hoffman and others. Patterson made his claim under the act of 1887. It was rejected on the ground that after the passage of that act, and with notice of the defective title, he had made a new contract with the Railroad Company as to what should be paid him in the event the Government succeeded in the suit. Hoffman was held to be entitled to the patent. On appeal that decision was reversed by the Commissioner of the Land Office, who ruled in favor of James Beacom. On a further appeal the Secretary of the Interior held that nothing had been done under the new contract to deprive Patterson of the priority given to good faith purchasers under the act of March 3, 1887, and a patent was accordingly issued to him on March 23, 1901. Thereupon Lyle, on May 24, 1901, brought this bill against Patterson, Smith and Thomas Beacom to cancel the patent, or to have the holders of the legal title decreed to hold the land in trust for him. The Circuit Court dismissed the bill, and the decree was affirmed (176 Fed. Rep. 909) by the Circuit Court of Appeals.

Mr. Madison B. Davis and *Mr. Alfred Pizey* for appellant submitted.

Mr. George C. Scott, with whom *Mr. W. D. Boies* and *Mr. William Milchrist* were on the brief, for appellees.

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

The Sioux City and St. Paul Railroad, claiming to have earned the land under the act of May 12, 1864, 13 Stat. 72, c. 84, sold a quarter-section in 1887, to Pasco, who

bought in good faith believing that the company was entitled to a grant from the State. He conveyed his interest to Patterson, who pending the litigation between the United States and the Railroad Company, in reference to the land, made a contract as to the amount to be paid him in the event the company lost the suit. The Government prevailed and the land being specially valuable because of its having been cultivated and improved there was a race to acquire the preëmption right. Lyle and others, claiming to have entered into possession, made applications for a homestead. Patterson, relying on the rights of a good-faith purchaser under the act of March 3, 1887, filed his claim. After a lengthy contest in the Land Department he received a patent. Lyle insists that the action of the Secretary of the Interior was based upon a misconstruction of the law and that Patterson and his assignee should be decreed to hold the title in trust for Lyle as the first entryman.

In the lengthy briefs filed in this court various arguments are presented to show that the benefit of the act of March 3, 1887, 24 Stat. 556, was confined to those who bought before that date, and that Patterson's subsequent contract with the Railroad Company deprived him of the priority he otherwise might have had. It is not necessary to consider these contentions, for even if they were sound it could not avail Lyle in the present suit, since he can only recover on the strength of his equity and not on the defects in defendant's title.

When on October 22, 1895, he made the so-called entry and settlement, the quarter-section was not an open and unoccupied part of the public domain, but in the possession of Thomas Beacom, who had bought from those who, having acquired the property in good faith, cultivated the land and made valuable and permanent improvements thereon. This prior possessory title was good as against all except the United States, and Lyle's entry was

a trespass which neither gave nor initiated any right in the property. The fact that by the threats and violence of another trespasser, he was prevented from continuing his forcible entry and detainer, deprived him of no right in the land, though it does illustrate what would be the result if possession secured by violence and maintained with force and arms could furnish the basis of a right enforceable in law.

Such a claim, originating in trespass, cannot be recognized, for "to create a right of preëmption there must be settlement, inhabitation and improvement by the preemptor, conditions which cannot be met when land is in the possession of another." *Hosmer* v. *Wallace*, 97 U. S. 575, 579. This is equally true of the initiation of a homestead right by settlement. The land here had been cultivated and improved by those who were in possession under a purchase from the Railroad, the apparent owner of the equitable title. Lyle's entry, though made under a pretense of effecting a homestead settlement, was but a naked unlawful trespass which could not initiate a right. *Atherton* v. *Fowler*, 96 U. S. 513, 516; *Swanson* v. *Sears*, 224 U. S. 180, 182. He therefore had no standing in court, and the bill was properly dismissed.

Decree affirmed.

WILSON *v.* SNOW.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 187. Argued March 13, 14, 1913.—Decided April 7, 1913.

The rule that an ancient deed to property in continuous possession of the person producing it proves itself on the theory that the witnesses are dead and it is impossible to produce testimony showing execution by the grantor, is broad enough to admit, without production of the power of attorney, ancient deeds purporting to have been signed by agents.

The other necessary facts being present, and the possession of the property being consistent with its terms and the original records having been lost, a deed, over forty years old containing recitals that it was executed by an administrator under power of sale given by order of the court, will be presumed to have been executed in accordance with such recitals.

Quære, what rule obtains in the District of Columbia as to whether the power to convey given to two persons named in a will may be executed by the survivor when the designation as executors is descriptive of the persons and not of the capacity in which they are to act.

In the District of Columbia a power of sale given to more than one person named in a will as executors, coupled with the active and continuing duty of managing the property, making disposition thereof and changing investments for the benefit of the family of testator, is not a mere naked power to sell, but one that creates a trust which survives and can be executed by the survivor.

Where the duties imposed upon executors are active and render the possession of the estate convenient and reasonably necessary, they will be deemed trustees for the performance of those duties to the same extent as though declared so to be in the most explicit terms.

35 App. D. C. 562, affirmed.

JOHN H. A. WILSON, of Washington County, District of Columbia, by his will, probated March 20, 1858, after providing for the payment of his debts, devised all of his property, real and personal, to his wife, Adelaide Wilson,

during her life of widowhood for the support of herself and his five minor children. In case of her death or marriage the property was bequeathed to the testator's brother, Thomas O. Wilson, in trust for the use of the children.

"And I 'authorize and empower my said brother to exercise his own judgment and prudence in the discharge of the duties hereby confided to him,—and it is my wish and desire that my executrix and executor hereinafter named shall and may at any time they shall deem best and to the advantage of my said wife and children, sell and convey any part or all of my real and personal estate, and invest the proceeds in good stocks or otherwise, as they may consider, best, for the benefit of my said wife and children; in fact, to exercise a sound discretion in the management, disposition and investment of my said estate for the purpose aforesaid, to-wit, for my wife and children."

There was a provision requiring the executrix and executor to care for his servants; . . . "lastly, I do hereby constitute and appoint my dear wife, Adelaide Wilson executrix and my affectionate brother Thomas O. Wilson executor of this my last will and testament."

The will was probated March 20, 1858. Thomas O. Wilson, one of the executors, died September 21, 1858. On March 8, 1865, Adelaide Wilson made a deed, in which, after referring to the will and its probate and the authority conferred upon herself and her deceased brother-in-law as executrix and executor to sell for the benefit of the wife and children of the testator, she by virtue of the authority vested in her by said will, sold the land to Leonard Huyck, his heirs and assigns forever.

After eight mesne conveyances, duly recorded, the property, in February, 1905, was sold to the defendant, Chester A. Snow, he and his predecessors in title having held continuous possession of the property since 1865.

Adelaide Wilson died March 28, 1906, and on October 23, 1906, the children brought this action of ejectment against Snow. He claimed under the deed of the executrix, but was not able to prove that she had ever qualified as such. A witness who was familiar with the records in the Register of Wills' Office, testified that he had found therein the will of John H. A. Wilson, with an endorsement that it had been approved by the Register of Wills and an entry in a book that the will had been approved and filed, but that he found no other entries or papers to indicate that either Adelaide Wilson or Thomas O. Wilson had ever qualified as executors or received letters testamentary; that the bond book for December 30, 1856, to April 20, 1861, was missing and that in that book the bond of the executors would have been recorded if one had been given; that the books containing the returns of executors from 1856 to 1861 are missing; that he is unable to say whether the qualification of executors would be shown by the bond book alone or not; that he finds no docket entry relating to the case. Another witness who had frequent occasion to examine the records of the Probate Office between 1857 and 1860 testified that during that period the Probate Office was conducted in a negligent manner; that the witness during that period, in searching for original papers which had not been recorded, found them in a mass of others piled together in an empty fireplace in the building.

There was a verdict for the defendant. A motion for a new trial was overruled. The case was taken to the Court of Appeals, error being assigned on the refusal to charge that the burden was on the defendant to prove that the executrix had qualified; that there was no evidence that she had qualified; that the recitals in the deed were not evidence against the plaintiffs, and on the further ground that the court erred in refusing to direct a verdict for the plaintiffs. The judgment of the Supreme Court of the District was affirmed by the Court of Appeals of

the District of Columbia and the case brought here by writ of error.

Mr. Charles F. Carusi and *Mr. John C. Gittings*, with whom *Mr. Eugene A. Jones* was on the brief, for plaintiffs in error.

Mr. J. J. Darlington and *Mr. Hugh H. Obear*, with whom *Mr. William F. Mattingly* and *Mr. Charles A. Douglas*, were on the brief, for defendant in error.

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

The plaintiffs, in this action of ejectment, claimed under the will of their father, John H. A. Wilson. The defendant, Charles Snow, claims under a deed executed in 1865 by Adelaide Wilson, the nominated executrix. On the trial there was proof that the will had been probated in 1858, but no record evidence that the executrix had ever taken the oath of office and qualified as such. After showing the loss of certain books and the negligent manner in which the probate office was conducted from 1855 to 1861, the defendant insisted that the recital that the deed had been executed under the power of sale conferred by the will was sufficient to show that the nominated executrix had taken the oath and qualified as such.

The deed was more than 30 years old. The possession of the land had for 40 years been consistent with its terms, and it was therefore, admissible as an ancient deed proving itself on the theory that the witnesses were supposed to be dead, and that it was impossible to produce testimony to show the signing, sealing and delivery by the grantor. This rule has been extended so as to admit ancient deeds purporting to have been signed by agents without the production of the power of attorney,—the same reason

that justified the introduction of an ancient deed, without proof of the signature of the witnesses or grantor, authorizing its admission without proof of the capacity in which, or the power under which, it purported to have been executed. For in many cases it would be quite as impossible to prove the due execution by him as agent as by himself as owner. So that where the other necessary facts are present, and the possession of the land has been consistent with its terms, the ancient deed proves itself, whether it purports to have been signed by the grantor in his own right, as agent under power of attorney, or—the original records having been lost—by an administrator under a power of sale given by order of court, not produced but recited in the deed itself. There are cases which support plaintiffs' contention (*Fell* v. *Young*, 63 Illinois, 106, 110), but the weight of authority sustains the ruling of the court below. In *Baeder* v. *Jennings*, 40 Fed. Rep. 199 (14), 216, 217, Justice Bradley, at Circuit, held that other things concurring, the recitals in an ancient deed were some evidence of the facts recited, and he accordingly admitted the administrator's deed 40 years old, which purported to have been made in pursuance of an order of court which was not produced. A similar ruling was made in *Williams* v. *Cessna*, 43 Tex. Civ. App. 315; 95 S. W. Rep. 1106, where an administrator's deed, executed more than thirty years before the trial, was admitted on the faith of its recitals, proof being made that probate records had been destroyed by fire. In *Willetts* v. *Mandlebaum*, 28 Michigan, 521, a deed reciting that it was made in pursuance of an order in a partition suit, was admitted on proof that the records had been lost, the court holding that the same strict proof was not required of ancient probate proceedings as where they were of recent date.

See, also, *Mumford* v. *Wardwell*, 6 Wall. 423; *Davis* v. *Gaines*, 104 U. S. 386, 398; *Fulkerson* v. *Holmes*, 117

U. S. 389; *Taylor* v. *Benham*, 5 How. 233; *Carver* v. *Jackson*, 4 Pet. 183; *Crane* v. *Morris*, 6 Pet. 598, 611; *Reuter* v. *Stuckart*, 181 Illinois, 529, 540–542; *Buhols* v. *Boudousquie*, 6 Martin (N. S.), 153.

2. The plaintiff, however, insists that, even if the recitals are sufficient to show that Mrs. Wilson had qualified as executrix, her deed could not operate to convey the fee, inasmuch as she could not, by herself, execute the power conferred upon herself and her brother-in-law jointly. It was urged that, in this respect, as in all others relating to the construction of wills, the testator's intention must govern; that he had indicated special confidence in the discretion of his brother, and while contemplating that it might be necessary to sell the property had expressly provided that this could not be done unless both the wife and the brother joined in the deed. It was further argued that this particular testamentary requirement, for the combined discretion of the two, coincided with the general rule that a joint power cannot be exercised by the survivor.

This is true where the power has been given A and B by name, and according to some cases, it is true also where given to A and B, executors. It is not so where the power has been conferred upon A and B, as executors, or where the power is coupled with an interest. These distinctions have given rise to endless controversies and conflicting decisions—a result naturally to be expected where an official title has been treated as a mere means of describing the persons instead of designating the capacity in which they were to act. It is, of course, true that the same persons may be referred to in different capacities in the same will. A and B may be donees of a naked power; or A and B, who are the executors, may be donees of such a naked power, or A and B, executors, may be given a power to be exercised in their official capacity. In Sugden on Powers (144) it was said "that the liberality of modern times will probably induce the courts to hold that in every

case where the power is given to executors, as the office survives so may the power." This prediction has not been altogether fulfilled, though the tendency is to hold that the words "A and B, executors," "A and B, hereinafter named as executors," "my said executors," is not a roundabout means of designating the individuals who are to act, but confer power upon them in their official capacity which may be exercised by the survivor.

The plaintiffs, insisting that the rule contended for by them is a rule of property, argue that the authority to "my executor and executrix hereinafter named" conferred power upon Adelaide Wilson and Thomas O. Wilson *nominatim* and as individuals only—the words executrix and executor being merely descriptive of the persons later referred to by name, rather than designating the capacity in which they were to act. Numerous cases referred to in *Robinson* v. *Allison*, 74 Alabama, 254, are relied on to sustain the contention. Many authorities to the contrary are cited by the defendant in error—among which are *Brassey* v. *Chalmers*, 4 De Gex, McN. & G. 528; *Davis* v. *Christian*, 15 Gratt. 11; *Smith* v. *Winn*, 27 S. Car. 598, where the power was given "executors hereinafter named." *Weimer* v. *Fath*, 43 N. J. L. 1. See also *Gould* v. *Mather*, 104 Massachusetts, 283, 286; *Zebach* v. *Smith*, 3 Binney (Pa.), 69; *Clay* v. *Hart*, 7 Dana, 1; *Wolfe* v. *Hines*, 93 Georgia, 329; *Wood* v. *Sparks*, 18 N. Car. 389.

3. It is unnecessary to attempt to reconcile the authorities or to determine which rule obtains in the District of Columbia. For reading this will as a whole it is clear that the power survived because coupled with an interest. It is true that the will did not specifically give the executors any interest in the land, nor was the word "trust" used by the testator. But the power to sell was coupled with the active and continuing duty of managing the property, making disposition thereof, and changing investments for the advantage of his family. Debts were to be paid

and the executors were to care for the slaves. If in their discretion it became necessary, "my executor and executrix hereinafter named" were to sell all of the property and reinvest the proceeds in good stocks or otherwise; "in fact to exercise a sound discretion in the management, disposition and investment of my said estate [for the benefit and advantage of] my wife and children." This was not a mere naked power to sell, but created an interest or raised a trust which would preserve the power to sell without regard to whether the interest was beneficial to the executors or not. For it is "the possession of a right in the subject over which the power is to be exercised that makes the interest" or creates "an authority coupled with an interest" which "survives for the purpose of effecting the object of the power." *Peter* v. *Beverly*, 10 Pet. 532, 564; *Taylor* v. *Benham*, 5 How. 233; Pomeroy Eq. J. (3d ed.), § 1011.

And even if, as claimed, the power to sell was not mandatory, it was coupled with duties which, though to be exercised at their discretion, could not be arbitrarily disregarded by the executors. The duty of management raised the obligation to care for the property, keep it insured, pay the taxes and collect the rents. Adelaide Wilson and Thomas O. Wilson, whether acting as executors, or as trustees by implication, having accepted the appointment, were bound also to appropriate the income from the land or the dividends from the stock to the maintenance of the family and the education of the minor children. For neglect so to do any one of the *cestui que trust* would have been entitled to maintain a bill against the executors, or trustees, to compel them to discharge the duties for the performance of which full power had been conferred. The rights of the beneficiary would not cease upon the death of either of the representatives, and as the duty to manage survived, and followed the land, so did the coupled power of sale, which was "manifestly subservient and auxiliary

to the execution of the trusts which the testator had seen fit to connect with the administration of his will." *Gould* v. *Mather*, 104 Massachusetts, 283, 286; *Tobias* v. *Ketchum*, 32 N. Y. 319. "For where the duties imposed upon the executors are active and render the possession of the estate convenient and reasonably necessary, they will be deemed trustees for the performance of those duties to the same extent as though declared so to be in the most explicit terms." *Ward* v. *Ward*, 105 N. Y. 68; *Toronto Trust Co.* v. *Chicago &c. R. R.*, 123 N. Y. 37, 44; *Gray* v. *Lynch*, 8 Gill, 404, 423; *Weimar* v. *Fath*, 43 N. J. L. 1.

The duties imposed by the will continued after the death of Thomas O. Wilson and the power to sell was lawfully exercised by Adelaide Wilson, surviving executrix, when she executed the deed to Huyck, the predecessor in title of the plaintiff. The judgment is

Affirmed.

PICO *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 319. Argued February 25, 26, 1913.—Decided April 7, 1913.

Under art. 403, Philippine Penal Code, a person can be guilty of murder with alevosia (treachery) although there may have been no specific intent to kill; and so *held* that one who had his victim bound and then caused him to be violently beaten with an instrument likely to cause death was guilty of murder with *alevosia* even though he did not specifically intend that death should result.

Under the Philippine Penal Code, as at common law, men are presumed to intend the natural consequences of their acts.

An objection that a complaint charging murder with *alevosia* by beating a person to death is defective because it did not allege all the details proved as to the fact that the victim had been bound so as

to make defense impossible, should be made in the lower court where amendments are possible. It comes too late when made in this court for the first time.

The conviction by the Supreme Court of the Philippine Islands for murder with alevosia of one who had caused his victim to be bound and then beaten with an instrument likely to cause death, and a sentence of 17 years, 4 months and 1 day of cadena temporal and the accessories, and an indemnity to the heirs of his victim of 1,000 pesos, being a modification of the sentence of the Court of First Instance of cadena temporal for life and accessories and indemnity, sustained by this court as being in accordance with the evidence, without error of law and not in any manner depriving the defendant of his liberty without due process of law.

15 Phil. Rep. 549, affirmed.

THE facts, which involve the validity of a conviction and sentence for murder in the Philippine Islands, are stated in the opinion.

Mr. Clement L. Bouvé for the plaintiff in error:

The Supreme Court of the Philippines erred in convicting the accused of the crime of murder since the complaint is so formed that it will not support a sentence for murder under the Spanish law. See article 403, Penal Code, Philippine Islands.

As to what "killing a person with alevosia" means, see par. 2, art. 10, Penal Code.

The complaint contains no allegation of such treacherous intent as is necessary to constitute the charge of murder with alevosia. See Viada Codigo Penal, vol. III, pp. 24–25.

The Supreme Court of the Philippine Islands erred in convicting plaintiff in error of murder with treachery, finding as it did as a matter of fact that he did not intend to kill the deceased.

The intent to kill is, under the Spanish law as it is in our own, of the very essence of the crime of murder. Sent., June 13, 1887; Viada Codigo Penal, vol. III, 647; *United States* v. *Dasilva*, 14 Phil. Rep. 413; *United States*

v. *Mercoleta*, 17 Phil. Rep. 317; *United States* v. *Balagtas*, 19 Phil. Rep. 164.

The defenceless situation of the victim, coupled with the intent to kill, does not make the killing murder.

The Supreme Court erred in affirming the finding of the court below that plaintiff in error killed the deceased, in that there is no evidence as a matter of law that deceased died as the result of blows inflicted by plaintiff in error. *Wiborg* v. *United States*, 163 U. S. 652; *Clyatt* v. *United States*, 197 U. S. 207, 222; *Diaz* v. *United States*, 223 U. S. 442.

The testimony, both expert and non-expert, does not sustain the conviction.

The punishment imposed upon plaintiff in error of seventeen years, four months and one day of cadena temporal and the accessory penalties provided by law, constitutes a cruel and unusual punishment within the Eighth Amendment as incorporated into the Philippine Bill of Rights. *Weems* v. *United States*, 217 U. S. 349, 382.

Mr. Solicitor General Bullitt, with whom *Mr. Loring C. Christie* was on the brief, for the United States:

The complaint is sufficient to support a sentence for murder under the Spanish law. Philippine Penal Code, art. 403.

The Supreme Court of the Philippine Islands had the right to modify the judgment of the trial court and to impose upon the defendant the modified sentence. Philippine Penal Code, art. 403; *Ker & Co.* v. *Couden*, 223 U. S. 268, 279.

The evidence sustained the finding that the Chinaman died as the result of the blows inflicted by appellant.

The sentence imposed is not a cruel and unusual punishment in violation of the Philippine Bill of Rights. The punishment was not too great for the crime of murder. *Weems* v. *United States*, 217 U. S. 349, does not control, as

in that case the punishment was disproportionate to the trifling crime involved. The requirement of "painful" labor becomes unobjectionable when properly translated—a fact which did not appear in the *Weems Case*.

The provision for carrying chains and for surveillance for life were annulled upon the American occupation of the Philippines and are no longer imposed. *Chicago & Pac. Ry. Co.* v. *McGlinn*, 114 U. S. 542; *Downes* v. *Bidwell*, 182 U. S. 244, 298; *Forbes* v. *Chuoco Tiaco*, 16 Phil. Rep. 534, 592; *Fremont* v. *United States*, 17 How. 542, 565; *Ortega* v. *Lara*, 202 U. S. 339; *Sanchez* v. *United States*, 216 U. S. 167; *Vilas* v. *Manila*, 220 U. S. 345, 357; Davis on International Law (1903 ed.), 348; Halleck on International Law (3d ed.), 486–490; Risley, Law of War, 136; Instructions of President McKinley to the Philippine Commission, April 7, 1900.

The punishment in this case is in fact fairly proportioned to the crime committed.

The objectionable portions of the punishment may be held invalid without affecting the balance of the punishment.

Mr. Justice Lamar delivered the opinion of the court.

Juan Pico, claiming the right as Patrol to arrest suspicious persons in the Hacienda of Malunó, within the municipality of Ilagan, Province of Isabela, Philippine Islands, on March 1, 1909, entered the house of Eugenio Castellanes in the night time and inquired if there was any one else on the premises. He was told that there was a Chinaman asleep in the next room, and, going there with several attendants, ordered him to get up. Receiving no answer, Pico struck him with a gun. The Chinaman arose and seized the gun as Pico again attempted to strike him. After some altercation, he was overpowered, and Pico ordered his attendants to bind him. This they did, putting a rope around his neck, tying his arms behind

his back, and, in this condition, he was ordered out of the house for the purpose of being taken to the nearby Hacienda, of which Pico was manager. Whether through unwillingness or physical inability resulting from the blow previously inflicted, does not clearly appear, but the Chinaman refused to walk and Pico again struck him several times with the gun. Partly dragged and partly carried, the Chinaman was in a state of collapse when he reached the Hacienda, where, a few hours later, he died. The next morning at 8 o'clock he was buried,—a medical employé on the estate giving a certificate that he had died of heart failure. The suspicion of the authorities having been aroused the body was disinterred, and, as it exhibited signs of external violence, Pico and two of his attendants were arrested, Pico being charged "with the crime of murder, with the qualifying circumstance of alevosia (treachery) as defined and penalized in § 403 of the Penal Code,[1] in that . . . he feloniously ordered his two servants to seize and tie the Chinaman, Go-Siengco, and thus tied and unable to defend himself the said Pico, with the intention of killing the said Chinaman, struck him several blows with a shotgun, as the result of which blows the Chinaman subsequently died."

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[1] Art. 403. The crime of murder is committed by any person who, not falling within the terms of the next preceding article [relating to Parricide], shall kill another under any of the following circumstances:

1. With alevosia.
2. For a price or promise of reward.
3. By means of inundation, fire, or poison.
4. With evident premeditation.
5. With cruelty by deliberately and inhumanly increasing the suffering of the offended party.

Art. 10, § 2. There is treachery (alevosia) when the offender commits any of the crimes against the person, employing means, methods, or forms in the execution thereof which tend directly and specially to insure its execution without risk to himself arising from the defense which the offended party might make.

The evidence for the Government was direct and positive and left no reasonable doubt as to the guilt of the defendant, unless the witnesses for the prosecution were unworthy of belief. Their credibility, though attacked, was sustained by the trial judge, who found the defendant guilty and sentenced him to cadena temporal, to be confined in the Bilibid Prison for the term of his natural life, with accessories named in Art. 54 of the Code, and to pay the heirs of the Chinaman 1,000 pesos. A motion for a new trial was overruled and on appeal the Supreme Court stated that only a question of fact was involved, and that the testimony for the Government, being direct and without elements of untruth, fully supported the findings of the trial court:

"We have only one criticism of the judgment below. We are convinced that the court, in imposing the penalty, should have taken into consideration in favor of the accused the extenuating circumstances described in Article 9, subdivision 3, of the Penal Code, namely, that 'the delinquent had no intention of committing so grave an injury as that which he inflicted.' There not having been present any aggravating circumstance, the penalty should have been imposed in its minimum degree." (15 Phil. Rep. 551.)

1. It is claimed that this finding was in legal effect an acquittal, and several decisions of the Supreme Court of Spain are cited to support the argument that there can be no "murder with alevosia" unless there was a specific intent to kill the person bound. We cannot so construe the Philippine Code. Under it the killing of a human being is parricide, murder or homicide, depending, not always on the intent, but upon the relation of the parties and the circumstances under which and the means by which life was taken. On the trial of a charge of "murder with premeditation," there might be call for proof of a specific intent, but even then that could usually

be established only by external circumstances capable of proof. But in the case of murder with cruelty or with alevosia, the intent would be immaterial, although the accused might claim that he thought that the cruelty would not cause death or that the beating would punish and not destroy the person who was bound. Under the Penal Code of the Philippines, as at common law, men are presumed to intend the natural consequences of their act and cannot escape punishment for taking life on the claim that they had not intended or expected that such consequence would result from what they purposely did.

In this case Pico was not charged with "murder with evident premeditation." As the Chinaman was, at the time, bound and defenseless, Pico was guilty of "murder with the aggravating circumstance of alevosia," punishable by the minimum, medium or maximum penalty, depending on the presence or absence of mitigating or aggravating circumstances, as defined by the Code,[1] which permitted effect to be given to the absence of a specific intent by a mitigation of the punishment. This we understand to be the effect of the decision of the Supreme Court of the Philippine Islands, and not, as claimed, an acquittal of the charge on which Pico was tried. *United States* v. *Brobst*, 14 Phil. Rep. 310; *United States* v. *Candelaria*, 2 Phil. Rep. 104.

The decisions cited by plaintiff in error do not require a reversal, for none of them relate to a case like this, where the accused, having himself ordered his victim to be bound, consciously, intentionally and repeatedly beat him with an instrument likely to produce death.

2. It was also contended that the complaint was defective in failing to allege that the Chinaman had been tied

[1] Art. 78. Aggravating circumstances which in themselves constitute a crime specially punishable by law or which are included by the law in defining a crime and prescribing the penalty therefor shall not be taken into account for the purpose of increasing the penalty.

for the purpose of making defense impossible and so that he might be killed without risk to the accused. This objection comes too late. It was not made in the Supreme Court nor in the trial court, where amendments could have been made even if necessary under the liberal system of criminal pleading authorized by §§ 6, 8, 9, and 10 of the Appendix to the Penal Code of the Philippine Islands.

3. Pico was sentenced by the Supreme Court to 17 years, 4 months and 1 day of cadena temporal, to the accessories provided by law and to indemnify the heirs of the deceased by the payment of 1,000 pesos. In the record there is an assignment of error that this was cruel and unusual punishment (*Weems* v. *United States*, 217 U. S. 349), but on the argument the contention was abandoned in open court, and the point will therefore not be considered. In other assignments complaint was made that Pico was deprived of his liberty without due process of law,—because the evidence was insufficient to prove beyond a reasonable doubt that the Chinaman died as a result of the blows inflicted by Pico; because the Supreme Court refused to pass upon the credibility of witnesses in the trial court; because he was refused a new trial on the ground of newly discovered evidence, and because one of the witnesses admitted to have given false testimony. We find no error of law. The evidence fully sustained the conviction, and the judgment is

Affirmed.

SWEENEY *v.* ERVING.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 60. Argued February 28, 1913.—Decided April 7, 1913.

Where the rule of *res ipsa loquitur* applies, it does not have the effect of shifting the burden of proof.

Res ipsa loquitur means that the facts of the occurrence warrant an inference of negligence, not that they compel such an inference, nor does *res ipsa loquitur* convert the defendant's general issue into an affirmative defense.

Even if the rule of *res ipsa loquitur* applies, when all the evidence is in it is for the jury to determine whether the preponderance is with the plaintiff.

Where the terms of a request to charge are self-contradictory and confusing, that reason is in itself a sufficient ground for the trial court to reject it.

A medical specialist, called on to operate upon the patient of another physician who has assumed the responsibility of advising the operation, does not, as a matter of law on the facts disclosed in this case, undertake the responsibility of making a special study of the patient's condition or of giving advice as to possibility of injury resulting therefrom.

35 App. D. C. 57, affirmed.

THE facts, which involve the liability of a medical specialist for injuries caused by burns resulting from an X-ray operation performed by him on the patient of another physician, are stated in the opinion.

Mr. Lorenzo A. Bailey for plaintiff in error:

Expert testimony was not essential in order to prove negligence, as in cases against physicians and surgeons. *Vaughan* v. *Menlove*, 3 Bing. N. C. 468, 475; *Oceanic Steam Nav. Co.* v. *Aitken*, 196 U. S. 589, 596.

The injury to plaintiff was caused by an agency in the

possession of the defendant and under his exclusive management and control. From this arises the presumption of negligence on his part and the burden then devolves upon him to overcome that presumption, if he can, by evidence sufficient to satisfy the jury that the injury was not caused by negligence on his part. *Res ipsa loquitur* applies. *Kohner* v. *Capital Traction Co.*, 22 App. D. C. 181, 187, 190; *Shockley* v. *Tucker*, 127 Iowa, 456, 458; *Heuslin* v. *Wheaton*, 91 Minnesota, 219; Wigmore, Evid., § 2509; *Hicherson* v. *Neely*, 21 Ky. L. R. 1257; *Sauers* v. *Smits*, 95 Pac. Rep. 1097; *Gannon* v. *Gas Co.*, 145 Missouri, 502; *Von Treba* v. *Laclede Gaslight Co.*, 209 Missouri, 648; *Brown* v. *Consolidated Light Co.*, 109 S. W. Rep. 1032; *Moglia* v. *Nassau Electric R. Co.*, 111 N. Y. Supp. 70; *Gurdon & Ft. S. Ry. Co.* v. *Calhoun*, 86 Arkansas, 76; *Mitchell* v. *C. & A. Ry. Co.*, 132 Mo. App. 143; *Eaton* v. *N. Y. C. & H. R. Co.*, 109 N. Y. S. 419; *Anderson* v. *McCarthy Dry Goods Co.*, 49 Washington, 398.

If the plaintiff's condition was such as to predispose her to dangerous consequences from the operation, that fact does not relieve the defendant from liability for his negligent act which produced such consequences. *Mo., K. & T. Ry. Co. of Texas* v. *Byrd*, 89 S. W. Rep. 991; *Mullin* v. *Flanders*, 73 Vermont, 95; *Sauers* v. *Smits*, 95 Pac. Rep. 1098; *Baute* v. *Haynes*, 31 Ky. L. R. 876.

Mr. A. S. Worthington and *Mr. Charles L. Frailey* for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

The plaintiff in error, who was likewise the plaintiff below, sued the defendant in error in the Supreme Court of the District of Columbia to recover damages for personal injuries, sustained, as was alleged, through his negligence in the making of certain X-ray tests upon her

body with the use of apparatus owned and operated by him. The defendant pleaded the general issue—"not guilty." Upon the trial, plaintiff adduced evidence tending to prove that she was under treatment by Dr. Kerr, a surgeon of the City of Washington, for the fracture of a rib, claimed by her to have been caused by the negligence of a railway company; that the company denied the existence of such fracture, and, at its request, she submitted to an X-ray diagnosis by Dr. Grey, a specialist; that his diagnosis and the radiograph made by him failed to disclose a fracture; that thereupon Dr. Kerr arranged with the defendant, Dr. Erving, a specialist in the use of the X-ray for diagnostic purposes, for an X-ray diagnosis to be made by him; that in pursuance of this arrangement she went four times to the defendant's office, the first time at Dr. Kerr's request, and on three subsequent occasions at defendant's request; that on the occasion of each visit, defendant subjected her to several exposures of the X-ray in the effort to obtain a satisfactory picture; that upon her first visit, and before any exposure, she told defendant that her employer had told her that the X-ray was dangerous, in reply to which defendant assured her that there was no more danger to her than to himself, and defendant's wife, who was his assistant in the X-ray work, and who was then present, assured the plaintiff that the defendant and his wife had never had an accident in all their experience, and had no more reason to have one in her case than in the thousand and more exposures previously made by them; that plaintiff felt no bad effects from the operation by Dr. Grey, nor from the operations by the defendant until her fourth visit; that during one of the exposures at the fourth visit, she felt bad effects and a sense of faintness, and about five hours later her back, which was the portion exposed to the X-ray in all the operations by the defendant, was red and irritated; that in the operation by Dr. Grey it was the

front part of the body that was exposed to the X-ray; that about two weeks after her fourth visit to the defendant, finding her back was burned and the injury developing, she returned to him and informed him of it, that he was the first physician who saw the burn, and he treated it from that time for two or three weeks; that since then, although treated by other physicians and in hospitals, the injury has not been cured, in consequence of which the plaintiff has not been able to work; that the injury is an X-ray burn, and caused and continues to cause much suffering. Plaintiff having rested, the defendant introduced evidence tending to prove that both he and his wife had had long experience in the use of the X-ray machine; that the machine to which the plaintiff was exposed by defendant was an excellent machine, in good condition; that on plaintiff's first visit she was told by defendant's wife, in the hearing of defendant, that while she and her husband had subjected many person to X-ray exposures, and had never had any ill results, it was impossible, by the use of any degree of care, to prevent occasional X-ray burns from the use of the apparatus; that at none of the visits of the plaintiff to the office of defendant for the purpose of being exposed to the X-ray apparatus did she make any complaint of ill effects from the exposure. Defendant himself testified fully respecting the character of his machine and the manner in which it has been used at each of the plaintiff's visits, and the length of each exposure and the result thereof. Thereupon several practicing physicians of experience testified as experts (having qualified by showing an acquaintance with the literature of the subject and also some practical experience in the use of the X-ray apparatus). Upon the basis of the defendant's testimony respecting the character of his X-ray apparatus and the manner of its use upon the plaintiff and the duration of the several exposures to which she was subjected, the experts testified that the machine

was a good one of its kind, and that the manner in which it had been used upon the plaintiff was in accordance with the practice of careful and prudent X-ray operators, and was as safe as exposures to the X-ray apparatus could be made; and each of these witnesses further testified that according to his experience and reading it was not possible in the use of the X-ray apparatus to guard absolutely against a resultant burn.

The case was submitted to the jury under instructions from the court, and they rendered a verdict in favor of the defendant. The plaintiff appealed to the Court of Appeals, where there was an affirmance (35 App. D. C. 57), and she sued out this writ of error.

The assignments of error present in effect but two questions—

1. The plaintiff requested the trial court to instruct the jury as follows:

"If you believe upon the evidence that in the course of the operation of the X-ray apparatus by the defendant the plaintiff was burned, that fact is of itself evidence of negligence on his part, and casts upon him the burden of proving, if he can, by a preponderance of evidence, that the plaintiff's injury was not caused, in whole or in part, by his negligence, and in such case, unless you find by a preponderance of the evidence that said injury was not caused in whole or in part by the defendant's negligence, your verdict should be for the plaintiff."

The trial judge refused this request, and on the contrary instructed the jury—"That the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that the burn upon her back was caused by negligence on the part of the defendant in the manner in which he subjected her to exposure by the X-ray."

The contention in behalf of the plaintiff is that since the injury to the plaintiff was caused by an agency in the

possession of the defendant and under his exclusive management and control, there arises from this, coupled with the fact that personal injury resulted therefrom to the plaintiff, a presumption of negligence on defendant's part, upon the doctrine of *res ipsa loquitur*, and that the burden is thereby imposed upon him to overcome that presumption by a preponderance of evidence sufficient to satisfy the jury that the injury was not caused by negligence on his part. As will be seen, this contention includes two propositions; the first, that the case is a proper one for the application of the doctrine, *res ipsa loquitur;* the second, that the application of this doctrine relieves the plaintiff from the burden of proof and imposes that burden upon the defendant. These two propositions were coupled together in the requested instruction, and, upon familiar principles, no legal error was committed by the trial court in refusing the request, if either part of it was not well founded in law.

In the view we take of the matter, it is not necessary to pass upon the question whether the evidence presented a case for the application of the rule *res ipsa loquitur;* for the reason that in cases where that rule does apply, it has not the effect of shifting the burden of proof.

The general rule in actions of negligence is that the mere proof of an "accident" (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened,

it may fairly be found to have been occasioned by negligence.

The doctrine has been so often invoked to sustain the refusal by trial courts to non-suit the plaintiff or direct a verdict in favor of the defendant, that the application of the rule, where it does apply, in raising a question for the jury, and thus making it incumbent upon the defendant to adduce proof if he desires to do so, has sometimes been erroneously confused with the question of the burden of proof. But in the requested instruction now under consideration the matter was presented in no equivocal form. Plaintiff's insistence was not merely that the evidence of the occurrence of the injury under the circumstances was evidential of negligence on defendant's part, so as to make it incumbent upon him to present his proofs; the contention was that it made it necessary for him to prove by a preponderance of the evidence that there was an absence of negligence on his part.

In *Stokes* v. *Saltonstall* (1839), 13 Pet. 181, 190, which was an action against a stage-coach owner to recover damages for an injury sustained by a passenger through the upsetting of the coach, the trial court instructed the jury that—"The facts that the carriage was upset, and the plaintiff's wife injured, are *prima facie* evidence that there was carelessness, or negligence, or want of skill on the part of the driver, and throw upon the defendant the burden of proving that the accident was not occasioned by the driver's fault;" and also, that it was incumbent on the defendant to prove that the driver was a person of competent skill and good habits, and that he acted on the occasion in question "with reasonable skill, and with the utmost prudence and caution." The judgment was sustained by this court against the contention (p. 193), that although the facts of the overturning of the coach and the injury sustained were *prima facie* evidence of negligence, they did not throw upon the defendant the burden of

proving that the overturning and injury were not occasioned by the driver's default, but only that the coachman was a person of competent skill in his business, that the coach was properly made, the horses steady, etc. A reading of the report shows that the case turned upon the high degree of care owing by carrier to passenger, and that the court did not rule that the circumstances of the occurrence shifted the burden of proof upon the main issue. Such is the effect that has uniformly been given to the decision. *New Jersey R. & T. Co.* v. *Pollard*, 22 Wall. 341, 346, 350; *Pennsylvania Co.* v. *Roy*, 102 U. S. 451, 455; *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, 554, 555; *Gleeson* v. *Virginia Midland R. Co.*, 140 U. S. 435, 443, 444; *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 663.

In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff.

Such, we think, is the view generally taken of the matter in well-considered judicial opinions.

Kay v. *Metropolitan St. Ry. Co.*, 163 N. Y. 447, was an action by passenger against carrier, and the New York Court of Appeals said (p. 453): "In the case at bar the plaintiff made out her cause of action *prima facie* by the aid of a legal presumption (referring to *res ipsa loquitur*), but when the proof was all in the burden of proof had not

shifted, but was still upon the plaintiff. . . . If the defendant's proof operated to rebut the presumption upon which the plaintiff relied, or if it left the essential fact of negligence in doubt and uncertainty, the party who made that allegation should suffer, and not her adversary. The jury were bound to put the facts and circumstances proved by the defendant into the scale against the presumption upon which the plaintiff relied, and in determining the weight to be given to the former as against the latter, they were bound to apply the rule that the burden of proof was upon the plaintiff. If, on the whole, the scale did not preponderate in favor of the presumption and against defendant's proof, the plaintiff had not made out her case, since she had failed to meet and overcome the burden of proof." The rule thus declared has since been adhered to in the courts of New York. *Hollahan* v. *Metropolitan St. Ry. Co.*, 73 N. Y. App. Div. 164, 169; *Adams* v. *Union Ry Co.*, 80 N. Y. App. Div. 136, 139; *Dean* v. *Tarrytown &c. R. Co.*, 113 N. Y. App. Div. 437, 439. A similar view appears to be entertained in New Hampshire. *Hart* v. *Lockwood*, 66 N. H. 541; *Boston & Maine R. Co.* v. *Sargent*, 72 N. H. 455, 466. The same rule has been followed in a recent series of cases in the North Carolina Supreme Court. *Womble* v. *Grocery Co.*, 135 N. Car. 474, 481, 485; *Stewart* v. *Carpet Co.*, 138 N. Car. 60, 66; *Lyles* v. *Carbonating Co.*, 140 N. Car. 25, 27; *Ross* v. *Cotton Mills*, 140 N. Car. 115, 120; 1 L. R. A. (N. S.) 298, 301. In the *Stewart Case* the court said (138 N. Car. 66): "The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor. Whether the defendant introduces evidence or not, the plaintiff in this case will not be entitled to a verdict unless he satisfies the jury by the preponderance of the evidence that his injuries were caused by a defect in the elevator, attributable to the defendant's negligence. The law attaches no special weight, as proof, to the fact of an acci-

dent, but simply holds it to be sufficient for the consideration of the jury, even in the absence of any additional evidence."

2. The sole remaining question is raised by the refusal of the trial court to instruct the jury, as prayed by the plaintiff, in the following terms: "If you believe upon the evidence that in the ordinary and careful operation of the X-ray apparatus upon a woman by an operator having the requisite knowledge and skill enabling him to operate it with the utmost degree of safety there is a possibility, which could not be foreseen by such an operator, of injury to the woman by reason of her condition or of any matter tending to predispose her to injury in consequence of such operation and that such possibility was known to the defendant or by proper inquiry or study should have been known to him, it was his duty to inform the plaintiff of such possibility before he operated upon her; and if you further believe upon the evidence that he failed to perform such duty, or that in the performance of the operation he failed to exercise the skill and care required of him as such operator, and that the plaintiff was thereby injured, your verdict should be for the plaintiff." The terms of this request are self-contradictory and confusing—dealing, as it does, with a possibility of injury to the plaintiff "which could not be foreseen" by the defendant, and combining inseparably with it the hypothesis that "such possibility was known to the defendant or by proper inquiry or study should have been known to him"—and for this reason alone it was properly rejected by the trial court. But, besides this, it does not appear that there was any evidence on which the jury could properly base a finding that there was danger of injury to the plaintiff by reason of her condition or of any other matter tending to predispose her to such injury; nor to sustain a finding that such possibility was known to the defendant, or by proper study or inquiry should have been known to him. Nor could it be

said, as matter of law, that defendant had undertaken any duty requiring him to make special study or inquiry respecting plaintiff's condition or the possibility of injury to her, or to advise her of such possibility of injury; for there was testimony, already referred to, that would have warranted a finding that Dr. Kerr had assumed the responsibility of advising the plaintiff respecting the propriety of her submitting to the operation.

No error being found in the record, the judgment is

Affirmed.

DONNELLY *v.* UNITED STATES.[1]

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 97. Argued December 18, 1912.—Decided April 7, 1913.

From an early period Congress has accorded to the Executive a large discretion about setting apart and reserving portions of the public domain in aid of particular public purposes.

Section 2 of the act of April 8, 1864, conferring power on the Executive to set apart reservations for Indians, was a continuing power and was not exhausted by the first order establishing reservations thereunder.

The extension of the Hoopa Valley Reservation made by Executive Order of October 16, 1891, including a tract of country in California one mile in width on each side of the Klamath River, was lawfully established pursuant to the act of 1864.

In view of the history of the case, the custom of the Klamath Indians for whose benefit the Hoopa Valley Reservation was established, the Government ownership of the territory and its acquisition from Mexico under the Treaty of Guadalupe Hidalgo, as well as the statutes, and decisions of the courts, of California to the effect that the Klamath River is a non-navigable stream, *held* that such reservation included the bed of the Klamath River.

What are navigable streams within the meaning of the local rules of

[1] See also p. 708, *post.*

property is for the determination of the States; and where a State by statute enumerates the navigable streams within its borders those not enumerated are non-navigable in law.

The prime requisites for the validity of a mining claim are discovery of a valuable mineral deposit, an actual taking possession thereof, and the performance of the requisite amount of development work; where the record does not disclose facts showing the existence of these elements a finding cannot be supported that valid rights against the Government existed.

The creation and maintenance of a school district by the State of California within the public domain and not in section 16 or 36 could not impair the right of the Federal Government to dispose of that domain.

The words "sole and exclusive jurisdiction" as used in § 2145, Rev. Stat., do not mean that the United States must have sole and exclusive jurisdiction over the Indian country in order that such section may apply to it; those words are used in order to describe the laws of the United States which by that section are extended to the Indian country. *In re Wilson*, 140 U. S. 573.

The term "Indian country" as used in §§ 2145, 2146, Rev. Stat., is not confined to lands to which the Indians retain their original right of possession, but includes those set apart out of the public domain as reservations for, and not previously occupied by, the Indians.

The killing of an Indian by one not of Indian blood, when committed upon an Indian reservation within the State of California, is punishable, under §§ 2145 and 5339, Rev. Stat., in the Federal courts.

Hearsay evidence with a few well-recognized exceptions, is excluded by courts that adhere to the principles of the common law.

After reviewing numerous authorities, *held* that, in this case, the court properly excluded hearsay evidence relating to the confession of a third party, then deceased, of guilt of the crime with which defendant was charged.

In this country there is a great and practically unanimous weight of authority in the state courts against admitting evidence of confessions of third parties made out of court and tending to exonerate the accused.

THE facts, which involve the validity of a conviction and sentence of a white man for murder of an Indian on the Klamath River within the Hoopa Valley Reservation, are stated in the opinion.

Mr. John F. Quinn, with whom *Mr. W. F. Clyborne* was on the brief, for plaintiff in error:

To give the United States court jurisdiction the indictment must allege that plaintiff in error was an Indian. *Draper* v. *United States*, 164 U. S. 241.

Federal courts have jurisdiction of offenses committed within the limits of the Hoopa Valley Indian Reservation only under § 9 of the act of 1885, which act distinctly provides that Indians shall be amenable to the courts of the United States for the commission of the crime of murder against the person of an Indian or other person. But only Indians can be proceeded against under this act. See § 5339, Rev. Stat.

The crime charged was not committed within the limits of any of the places enumerated in that section and consequently the United States courts would not have jurisdiction as the Hoopa Valley Reservation is not a place under the exclusive jurisdiction of the United States.

The State, not the United States, has jurisdiction of the crime of murder committed within the limits of an Indian reservation within the boundaries of a State by a white person against a white person. *United States* v. *McBratney*, 104 U. S. 621; *United States* v. *Draper*, 164 U. S. 240; *United States* v. *Kagama*, 118 U. S. 385.

It is not charged in the indictment that the reservation or the place of the alleged crime is Indian country. This reservation is not and never has been Indian country since California became part of the United States.

In order to be Indian country the Indians must retain their original title to the soil, and this extension does not include any land to which the original Indian title has never been extinguished. *Bates* v. *Clark*, 95 U. S. 204, 209; *United States* v. *Celestine*, 215 U. S. 285.

There is no treaty with any tribe of Indians as to the jurisdiction over the land involved in this case. Neither is there any treaty or act of Congress defining it to be

or giving it the character of Indian country. Under the act of 1864 and the executive orders the United States simply set apart for the purposes of an Indian reservation land to which it already had title. If an Indian reservation within a State is Indian country, the Federal courts would have had jurisdiction in the *Draper* and *McBratney Cases*, under the act of June 30, 1834, and as amended in 1864 (§ 2145, Rev. Stat.), and under *Westmoreland* v. *United States*, 155 U. S. 547, which held that the court had jurisdiction of a white person. The only way in which the *Draper* and *McBratney Cases* can be reconciled with the *Westmoreland Case* is that an Indian reservation within the boundaries of a State is not Indian country.

It is essential to allege in the indictment and prove on the trial that the accused is an Indian. *United States* v. *Hadley*, 99 Fed. Rep. 437; *United States* v. *Logan*, 105 Fed. Rep. 240; *State* v. *Campbell*, 53 Minnesota, 354.

The United States never reserved any jurisdiction over the land included within the Hoopa Reservation either in the act admitting California into the Union or in any other act. Neither did the State of California at any time cede to the United States any jurisdiction over such land or disclaim in any manner jurisdiction over the same.

No treaty or other compact was ever entered into between the United States or any band or tribe of Indians in reference to such land. The State of California had absolute criminal jurisdiction over this land for 41 years, and even if an Indian had killed another Indian on the land mentioned in the indictment on October 15, 1891, or any time prior thereto, the state and not the Federal courts would have had jurisdiction.

The executive order of President Harrison issued October 16, 1891, creating the extension to the Hoopa Valley Reservation, is absolutely void, not being authorized by any act of Congress. There is now no legal extension to the Hoopa Valley Reservation and there

can be none until there is an act of Congress authorizing it.

But even if the extension of the reservation was lawfully created, the alleged crime was committed on the Klamath River which is outside the limits of the extension. The description excludes the river, and even if the order had attempted to include it, it would have been void to that extent, as California was admitted into the Union upon the condition that the navigable rivers should be public highways as to the citizens of all States. 9 Stat. 453; *Lux* v. *Haggin*, 69 California, 335.

The Klamath River is a navigable stream and the alleged crime occurred at a point on the river where it was actually used for the purposes of commerce.

The court will take judicial notice that the tide ebbs and flows on the Klamath near its mouth. See *United States* v. *La Vengeance*, 3 Dall. 297; *The Apollon*, 9 Wheat. 374; *Peyroux* v. *Howard*, 7 Pet. 341; 1 Greene Ev., § 6.

As the Klamath River flows into the Pacific Ocean, the court will take judicial notice that it is a tidal river at least near its mouth.

President Harrison recognizing then the sovereignty of the States over navigable waters purposely excluded the Klamath River from the limits of the reservation he attempted to create by his executive order of October 16, 1891.

The alleged crime was committed on the Klamath River. The Government's testimony proves this.

It was the theory of the Government at the trial as before stated that Chickasaw was shot while in bathing and that his slayer occupied the clump of willows on the sand or gravel bar when he fired the fatal shot.

The alleged crime took place below ordinary high water. A river is composed of its banks, bed, and water. It requires bed, shores, and banks, as well as water, to con-

stitute a river. *Ravenwood* v. *Fleming*, 22 W. Va. 52; *Ellis* v. *Gerbing*, 22 L. R. A. (N. S.) 337.

Prior to the attempted establishment of the reservation a mining claim had been located and a school district established at the place where the crime was alleged to have been committed, so that, under the executive order, that particular place was excepted from the reservation.

There was error in excluding evidence as to the confession of Joe Dick. See where Wigmore on Evidence in §§ 1476 *et seq.* attacks the principle that would accept declarations against a pecuniary or a proprietary interest, but not a penal interest and shows the injustice of prohibiting the confession of a person, deceased or otherwise, unavailable as witness, of a crime for which another person is being tried.

There was error in denying motion for a new trial and in arrest of judgment.

Mr. Assistant Attorney General Denison for the United States:

Crimes by whites against Indians within Indian country are crimes against the United States subject to the jurisdiction of its courts. *United States* v. *Bridleman*, 7 Fed. Rep. 898; *United States* v. *Barnhart*, 22 Fed. Rep. 285; *United States* v. *Ewing*, 47 Fed. Rep. 809; *United States* v. *Hunter*, 21 Fed. Rep. 615; *United States* v. *Loving*, 34 Fed. Rep. 715; *United States* v. *Mullin*, 71 Fed. Rep. 682; *United States* v. *Crook*, 179 Fed. Rep. 391; *United States* v. *Payne*, 22 Fed. Rep. 426; *McKnight* v. *United States*, 130 Fed. Rep. 659; *United States* v. *Sutton*, 215 U. S. 291; *Hallowell* v. *United States*, 221 U. S. 317; *United States* v. *Howard*, 17 Fed. Rep. 638; *United States* v. *Stocking*, 87 Fed. Rep. 857.

See *contra*, *United States* v. *Logan*, 105 Fed. Rep. 240, and *semble*, *United States* v. *Hadley*, 99 Fed. Rep. 437; *United States* v. *Ward*, 42 Fed. Rep. 320.

Revised Statutes, § 2145, applies to crimes either by or against Indians within the Indian country. *United States* v. *McBratney*, 104 U. S. 621 and *Draper* v. *United States*, 164 U. S. 240, decided merely that crimes by whites against whites were subjects of state jurisdiction, but left open the question here involved as to crimes by or against Indians.

These latter crimes, being a part of the intercourse between the two races, are fundamentally within the scope of regulation by Congress rather than by the States. *Worcester* v. *Georgia*, 6 Pet. 515, 557, and see act of July 22, 1790, c. 33; 1 Stat. 137; of March 1, 1793, 1 Stat. 329; of May 19, 1796, 1 Stat. 469; of March 3, 1799, 1 Stat. 743; of March 30, 1802, 2 Stat. 139; of March 3, 1817, 3 Stat. 383; of June 30, 1834, 4 Stat. 729; of March 27, 1854, 10 Stat. 269, 270; §§ 2145, 2146, Rev. Stat.

The protection of the Indians from crimes by whites intruding on their reservations is a part of the Federal function founded both on the prevention of Indian outbreaks, *Worcester* v. *Georgia*, 6 Pet. p. 552, and the duty of the United States to protect the Indians as its wards. See *Kagama* v. *United States*, 118 U. S. 375; *United States* v. *Rickert*, 188 U. S. 432, 437; *Jones* v. *Meehan*, 175 U. S. 10; *Matter of Heff*, 197 U. S. 488, 498; *Rainbow* v. *Young*, 161 Fed. Rep. 835; *Heckman* v. *United States*, 224 U. S. 413; *United States* v. *Sutton*, *supra*. This is implied in the very fact of the creation of the reservation for the exclusive and undisturbed use of the Indians. *Worcester* v. *Georgia*, *supra*; *Rainbow* v. *Young*, 161 Fed. Rep. 835. See also Rev. Stat., § 2114, and the other sections under the titles "Government and protection of Indians," and "Government of Indian country."

The act of March 3, 1885, does not repeal Rev. Stat., § 4215; *Re Wilson*, 140 U. S. 575, but merely repeals *pro tanto*, § 2146, by which theretofore all crimes by Indians against Indians had been left to the exclusive con-

trol of the Indian tribes themselves. *Worcester* v. *Georgia*, *supra*, and statutes, *supra;* see *Kagama* v. *United States*, 118 U. S. 375, explaining the effect of *Crow Dog*, 109 U. S. 556. See also *Gon-shay-ee, Petitioner*, 130 U. S. 343; *In re Wilson*, 140 U. S. 575, p. 578; *United States* v. *Whaley*, 37 Fed. Rep. 145; *United States* v. *Ewing*, 47 Fed. Rep. 809; *Ex parte Hunt*, 157 Fed. Rep. 130; *Re Blackbird*, 109 Fed. Rep. 139; *Goodson* v. *United States*, 7 Oklahoma, 117; *Ex parte Hart*, 157 Fed. Rep. 130; *United States* v. *King*, 81 Fed. Rep. 625; *United States* v. *Cardish*, 145 Fed. Rep. 242.

An "Indian Reservation" is "Indian Country," even though the reservation has been carved out of the public domain. *In re Wilson*, 140 U. S. 575; *United States* v. *Thomas*, 151 U. S. 577; *United States* v. *Leathers*, 6 Sawyer, 17; *United States* v. *Martin*, 14 Fed. Rep. 821; *United States* v. *Bridleman*, *supra*.

The extension of the Hoopa Valley Reservation was lawful. It was an extension, not only of the Hoopa Valley Reservation, but of the Klamath River Reservation, and so came within the express language of the act of April 8, 1864. See 33 L. D., p. 205.

In any event, the executive had the power to set apart the reservation. *In re Wilson*, 140 U. S. 575; *Spalding* v. *Chandler*, 160 U. S. 394, 403; *United States* v. *Leathers*, 6 Sawyer, 17; *United States* v. *Grand Rapids R. Co.*, 154 Fed. Rep. 131; *Gibson* v. *Anderson*, 131 Fed. Rep. 39, 41; *United States* v. *Martin*, 14 Fed. Rep. 817, 821; *United States* v. *Payne*, 8 Fed. Rep. 883, 887; 14 Ops. Atty. Gen. 181; 17 Ops. Atty. Gen. 258; 26 Ops. Atty. Gen. 92; 28 Ops. Atty. Gen. 143.

The reservation was at least *de facto*, and therefore Indian country. *Worcester* v. *Georgia*, 6 Pet. 515; *Fellows* v. *Blacksmith*, 19 How. 366; *Kagama* v. *United States*, 118 U. S. 375, 384; *Spalding* v. *Chandler*, 160 U. S. 394, 403, 404.

Congress was advised of its creation and has continued its appropriation undisturbed.

The point that the place of the crime was covered by a valid mining claim, and was, therefore, not within the reservation, is not properly raised by the bill of exceptions. *Allis* v. *United States*, 155 U. S. 117; *Thiede* v. *Utah*, 159 U. S. 71; *United States* v. *Hough*, 103 U. S. 71; *Union Ins. Co.* v. *Smith*, 124 U. S. 405; *Shelp* v. *United States*, 81 Fed. Rep. 694; *Richardson* v. *United States*, 181 Fed. Rep. 1.

The fact that there is nothing in the record to show otherwise does not prove the mining claim had been made good or "was valid." *Black* v. *Elkhorn Mining Co.*, 163 U. S. 445, p. 450; *Belk* v. *Meagher*, 104 U. S. 279, p. 282; *Spalding* v. *Chandler*, 160 U. S. 394, at 404–405; *M., K. & T. Ry.* v. *Roberts*, 152 U. S. 114, 116, 118; *Gillis* v. *Downey* (C. C. A., 8th Cir.), 85 Fed. Rep. 483, 489.

The place of the crime was not excluded from the extension because of the existence of a state school district; that point is not sound on the merits, nor was it properly raised. *United States* v. *Thomas*, 151 U. S. 577, p. 583, and cases there cited. *Beecher* v. *Weatherby*, 95 U. S. 517, 525.

The point that the river bed was not within the reservation is not properly raised in the record. *Columbia R. R. Co.* v. *Hawthorne*, 144 U. S. 202; *Bogk* v. *Gassert*, 149 U. S. 17; *Union Pacific Ry. Co.* v. *Daniels*, 152 U. S. 684; *Perovich* v. *United States*, 205 U. S. 86, 91.

Nor is it sound on the merits. California acts of February 24, 1891, c. 14, and March 11, 1891, c. 92; *Caldwell* v. *County of Sacramento*, 79 California, 347, 349; *Leovy* v. *United States*, 177 U. S. 621, pp. 634–635, *semble.*

The exclusion of the testimony of William Norris to the effect that one Joe Dick, since deceased, had confessed his own guilt of the murder, may present a grave and doubtful question, see Wigmore on Evidence, §§ 1476 and 1477; *United States* v. *Mulholland*, 50 Fed. Rep. 413,

collecting the authorities, but the evidence was properly excluded.

Mr. Justice Pitney delivered the opinion of the court.

Plaintiff in error was convicted in the Circuit Court of the United States for the Northern District of California, upon an indictment for murder, and, having been sentenced to life imprisonment, sues out this writ of error. The indictment charged him with the murder of one Chickasaw, an Indian, within the limits of an Indian reservation known as the Extension of the Hoopa Valley Reservation, in the County of Humboldt, in the State and Northern District of California. The evidence tended to show that Chickasaw, who was an Indian and a member of the Klamath Tribe, was shot through the body and mortally wounded while he was in or near the edge of the water of the Klamath River, at a place within the exterior limits of the Extension.

The trial proceeded upon the theory that the crime was committed within the river bed and below ordinary high-water mark—a theory favorable to the plaintiff in error, in that it furnishes the basis for one of the principal contentions made in his behalf. The indictment does not allege, nor did the Government undertake to prove, that plaintiff in error was of Indian blood; there was evidence tending to show that he was a white man; and the trial judge instructed the jury in effect that this question was immaterial. It was contended that the Circuit Court was without jurisdiction, first, because the place of the commission of the alleged offense was not within the limits of the Extension of the Hoopa Valley Reservation, but was upon the Klamath River, and therefore outside of those limits; and, secondly, because it did not appear that the defendant was an Indian. These contentions, having been overruled below, are renewed here, and some other

jurisdictional questions are raised. In addition, it is contended that the Circuit Court erred in refusing to permit the plaintiff in error to introduce evidence tending to show that one Joe Dick, a deceased Indian, had confessed just before his death that it was he who had shot and killed the Indian Chickasaw.

The bounds of the Hoopa Valley Reservation were first established by executive order of President Grant, dated June 23, 1876, made under authority of "An act to provide for the better organization of Indian affairs in California;" approved April 8, 1864; 13 Stat. 39, c. 48. The reservation, as thus delimited, comprised a tract of country in Humboldt County, about 89,000 acres in extent, lying on both sides of the Trinity River, above its junction with the Klamath. Exec. Ord. Ind. Reserv. (ed. 1912), p. 38; 1 Kappler, 815.

What is known as the Extension of the Hoopa Valley Reservation was made by executive order of President Harrison, dated October 16, 1891, and included "a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley Reservation to the Pacific Ocean," with a proviso to be mentioned hereafter. Exec. Ord. Ind. Reserv. (ed. 1912), p. 39; 1 Kappler, 815. The extension as thus described took in the original Klamath River Reservation (established by President Pierce in 1855; Ex. Ord. Ind. Reserv. 1912, p. 41), that extended along the river for a distance of twenty miles from the ocean. This portion was, by act of June 17, 1892, 27 Stat. 52, c. 120, opened to settlement, entry and purchase. The *locus in quo* is not within the part thus opened, but is at a point higher up the river.

The indictment and conviction are based upon § 2145, Rev. Stat., providing that certain general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of

the United States, except the District of Columbia, "shall extend to the Indian country," and upon § 5339, Rev. Stat., which enacts that any person who commits murder in any place under the exclusive jurisdiction of the United States shall suffer death. These sections, together with § 2146, Rev. Stat., and § 9 of an act of March 3, 1885, 23 Stat. 362, 385, c. 341, being all pertinent to the discussion that follows, are set forth in the margin.[1]

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[1] EXTRACTS FROM REVISED STATUTES.

SEC. 2145. Except as to crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country.

SEC. 2146. The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

SEC. 5339. Every person who commits murder . . . within any fort, arsenal, dock yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States . . . shall suffer death.

ACT OF MARCH 3, 1885, SEC. 9.

That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the

The record presents the following questions, and it will be assumed that, in view of the course taken at the trial, they must all be answered favorably to the Government in order that the conviction may be sustained.

(1) Was the Extension of the Hoopa Valley Reservation lawfully established?

(2) Does it include the bed of the Klamath River?

(3) Is the place of the homicide, for particular reasons to be mentioned, not a part of the reservation?

(4) Is the Extension (if lawfully established) "Indian country" within the meaning of § 2145, Rev. Stat.?

(5) Is the killing of an Indian by one who is not of Indian blood, when committed upon an Indian reservation within the State of California, punishable in the Federal courts?

(6) Was the evidence offered to show an alleged confession by Joe Dick properly excluded?

1. It is contended in behalf of the plaintiff in error that the authority conferred upon the Executive by Congress in the act of April 8, 1864 (13 Stat. 39, c. 48), was exhausted in the creation by President Grant of the Hoopa Valley Reservation in 1876. Section 2 of that act provides as follows: "Sec. 2. *And be it further enacted,* That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said State, to be retained by the United States for the purposes of Indian Reservations, which shall be of suitable extent for the accommodation of the Indians of said State, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended; *Provided,* That at least one of said tracts shall be located

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same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States. 23 Stat. 362, 385, c. 341.

in what has heretofore been known as the northern district; . . . *and Provided, further,* That said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian Reservations heretofore set apart in said state, and that in case any such reservation is so included, the same may be enlarged to such an extent as in the opinion of the President may be necessary, in order to its complete adaptation to the purposes for which it is intended."

The terms of this enactment show that Congress intended to confer a discretionary power, and from an early period Congress has customarily accorded to the Executive a large discretion about setting apart and reserving portions of the public domain in aid of particular public purposes. *Wolcott* v. *Des Moines Co.*, 5 Wall. 681, 688; *Grisar* v. *McDowell*, 6 Wall. 363, 381; *In re Wilson*, 140 U. S. 575, 577; *Spalding* v. *Chandler*, 160 U. S. 394, 404. See also *United States* v. *Leathers*, 6 Sawy. 17, 21; *United States* v. *Martin*, 14 Fed. Rep. 817, 821; *McFadden* v. *Mountain View Co.*, 97 Fed. Rep. 670, 673; *Gibson* v. *Anderson*, 131 Fed. Rep. 39, 41; *United States* v. *Grand Rapids &c. R. R. Co.*, 154 Fed. Rep. 131, 135; 17 Opinions Atty. Genl. 258; Act of February 8, 1887 (24 Stat. 388, c. 119), referred to in *In re Wilson*, 140 U. S. 575.

We have made a somewhat exhaustive examination of the history of the Indian reservations of California and what has been done by the executive and legislative departments of the Federal Government respecting them, and as a result we are convinced, first, that the situation of Indian affairs in that State in the year 1864 was such that Congress could not reasonably have supposed that the President would be able to accomplish the beneficent purposes of the enactment if he were obliged to act, once for all, with respect to the establishment of the several new reservations that were provided for, and were left

powerless to alter and enlarge the reservations from time to time in the light of experience. To mention but one obstacle that must have been within the contemplation of Congress: the Klamath and Hoopa or Trinity Indians were at war with the forces of the United States at the time of the passage of the act of 1864, and had been so for some years. Indian Report, 1864, pp. 123, 127, 130, 133, 134–138. Secondly, beginning shortly after its passage, and continuing for a period of at least thirty years thereafter, Congress and the Executive practically construed the act of 1864 as conferring a continuing authority upon the latter, and a large discretion about exercising it.

Congress itself recognized the Hoopa Valley Reservation as lawfully existing, at least as early as July 27, 1868 (15 Stat. 198, 221, c. 248), when it appropriated money "to pay the settlers of Hoopa Valley for their personal property left upon the Hoopa Valley Reservation at the time the Government took possession;" and also "for removing the Indians from Smith's River Reservation to Hoopa Valley and Round Valley Reservations . . . and the Smith River Reservation is hereby discontinued;" and again, in the following year, (act of April 10, 1869, 16 Stat. 13, 37, c. 16), when it appropriated money for the pay of a miller upon the Hoopa Valley Reservation, and "to supply a deficiency for removing the Indians from Smith's River Reservation to Hoopa Valley and Round Valley Reservations." Yet no formal executive order had as yet been made setting aside the Hoopa Valley Reservation or fixing its bounds; and its status as a reservation rested upon a mere public notice given by the Superintendent of Indian Affairs for California, under date August 21, 1864, to the effect that under the act of April 8, 1864, and under instructions from the Interior Department, he had located a reservation in the Hoopa Valley, and that settlers should not make further improvements upon their

places (Rep. Ind'n Com'r, 1864, pp. 123, 138; Exec. Ord. Ind. Reserv., 1912, p. 38; 1 Kappler, 815).

In the year following President Harrison's order the Extension was reported upon by the Indian agent to the Commissioner of Indian Affairs as being occupied by the Lower Klamath Tribe. House Executive Documents, 2d Sess., 52d Cong., 1892–1893, Vol. 13 (Indian Report), p. 230. And a similar report was made in the year 1894. House Executive Documents, 3d Sess., 53d Cong., 1894–1895, Vol. 15 (Indian Report), p. 117. These reports were officially communicated by the Secretary of the Interior to Congress, and there is nothing to show any disapproval of the status of the Extension as an Indian reservation.

But, further, the Hoopa Valley Reservation was only one of four that were authorized by the act of 1864. Other reservations established thereunder were known as the Tule River, Round Valley, and Mission Reservations. Upon the question of practical construction, the action taken by the Executive and by Congress respecting these is as significant as that taken with respect to the Hoopa Valley Reservation itself. A sufficient summary of their history is given in *Crichton* v. *Shelton*, 33 L. D. 205, 209, 213. The executive orders respecting them are to be found in Exec. Ord. Ind. Reserv. 1912, pp. 43, 55, 61, etc. It will be seen that Presidents Grant, Hayes, Garfield, Arthur, Cleveland, and Harrison, successively, acted with respect to one or more of these reservations upon the theory that the act of 1864 conferred a continuing discretion upon the Executive; orders were made for altering and enlarging the bounds of the reservations, restoring portions of their territory to the public domain, and abolishing reservations once made and establishing others in their stead; and in numerous instances Congress in effect ratified such action. In view of all this, we feel bound to hold that President Harrison's order of Octo-

ber 16, 1891, extending the Hoopa Valley Reservation, was within the authority of the act of 1864.

2. Does the reservation include the bed of the Klamath River? The descriptive words of the order are "a tract of country one mile in width on each side of the Klamath River and extending," etc. It seems to us clear that if the United States was the owner of the river bed, a reasonable construction of this language requires that the river be considered as included within the reservation. Indeed, in view of all the circumstances, it would be absurd to treat the order as intended to include the uplands to the width of one mile on each side of the river, and at the same time to exclude the river. As a matter of history it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing. The reports of the local Indian agents and superintendents to the Commissioners of Indian Affairs abound in references to fishing as their principal subsistence, and the river is described as running in a narrow canyon through a broken country, the Indians as dwelling in small villages close to its banks. (Indian Reports, 1856, p. 238; 1857, p. 391; 1858, pp. 286–287; 1859, p. 437; 1861, p. 147; 1864, p. 122; 1866, p. 238; 1885, p. 264; 1888, p. 10; 1892, p. 230; 1894, p. 117; and see 33 L. D. 216.)

Upon the question of Government ownership, it is a matter of history that the entire territory in question was a part of the public domain that was transferred by Mexico to the United States in the year 1848 by the treaty of Guadalupe Hidalgo. February 2, 1848, 9 Stat. 922; *United States* v. *Kagama*, 118 U. S. 375, 381.

By act of September 9, 1850, 9 Stat. 452, c. 50, California was admitted into the Union "on an equal footing with the original States in all respects whatever." By § 3 of the same act it was provided: "That the said State of California is admitted into the Union upon the express

condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned; . . . and that all the navigable waters within the said State shall be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor."

It is insisted that the Klamath is a navigable river; and there is evidence in the record tending to show that the stream is navigable in fact, at certain seasons, from Requa (near its mouth) up to and above the *locus in quo*. But, in the view we take of the present case, the question of its navigability, in fact or in law, is immaterial except as it bears upon the title of the United States to the bed of the stream. The present question is whether that bed was a part of an Indian reservation, and that depends upon the question of ownership. The jurisdiction to punish the plaintiff in error for the murder of an Indian upon the reservation depends upon other considerations, as will appear hereafter.

In passing upon the effect of the act admitting Alabama into the Union, this court held, in *Pollard's Lessee* v. *Hagan*, 3 How. 212, that the State had the same rights, sovereignty, and jurisdiction over the navigable waters as the original States, and could exercise all the powers of government which belong to and may be exercised by them, excepting with respect to control over public lands owned by the United States; and that the title of the navigable waters, and the soil beneath them, was in the State and subject to its sovereignty and jurisdiction. In *Genesee Chief* v. *Fitzhugh*, 12 How. 443, it was settled that for purposes of admiralty jurisdiction the tidal test, prevailing in England for determining what is navigable

water, is not applicable to this country. In *Barney* v. *Keokuk*, 94 U. S. 324, 338, it was held that it is for the States to establish for themselves such rules of property as they may deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent thereto. The court, speaking through Mr. Justice Bradley, said (94 U. S. 338): "The confusion of navigable with tide water, found in the monuments of the common-law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. *Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.* In our view of the subject the correct principles were laid down in *Martin* v. *Waddell*, 16 Pet. 367; *Pollard's Lessee* v. *Hagan*, 3 How. 212; and *Goodtitle* v. *Kibbe*, 9 *Id.* 471. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genesee Chief*, 12 *Id.* 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. *It properly belongs*

to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States in which the lands were situated."

The doctrine thus enunciated has since been adhered to. *Packer* v. *Bird*, 137 U. S. 661, 669; *Hardin* v. *Jordan*, 140 U. S. 371, 382; *Shively* v. *Bowlby*, 152 U. S. 1, 40, 58; *St. Anthony Falls Water Power Co.* v. *Water Commissioners*, 168 U. S. 349, 358; *Scott* v. *Lattig*, 227 U. S. 229, 243.

The question of the navigability in fact of non-tidal streams is sometimes a doubtful one. It has been held in effect that what are navigable waters of the United States, within the meaning of the act of Congress, in contradistinction to the navigable waters of the States, depends upon whether the stream in its ordinary condition affords a channel for useful commerce. *The Montello*, 20 Wall. 430; *Leovy* v. *United States*, 177 U. S. 621, 632; *United States* v. *Rio Grande*, 174 U. S. 690, 698; *South Carolina* v. *Georgia*, 93 U. S. 4, 10; *The Parsons*, 191 U. S. 17, 28.

But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several States. Thus the State of California, if she sees fit, may confer upon the riparian owners the title to the bed of any navigable stream within her borders.

Now, a California statute of April 23, 1880, c. 122, Laws 1880, p. 136,[1] declared the Klamath River to be navigable from its mouth to the town of Orleans Bar, which is above the *locus in quo*. But this was repealed by act of February 24, 1891, c. 14, Laws 1891, p. 10; and by an act of March 11, 1891, c. 92, Laws 1891, p. 96 (Political Code, § 2349), an enumeration was made of all

[1] See p. 708, *post*.

the navigable rivers of the State. This is held by the Supreme Court of that State to be exclusive, so that no other rivers are navigable under the laws of California. *Cardwell* v. *County of Sacramento*, 79 California, 347, 349. The Klamath River is not among those thus enumerated, and it must therefore be treated as not navigable in law. And it will be observed that it was thus placed in the category of non-navigable streams prior to President Harrison's order of October 16, 1891, by which the Extension of the Hoopa Valley Reservation was established.

In the important case of *Lux* v. *Haggin* (1886), 69 California, 255, 335, 337, the Supreme Court of California, after pointing out that upon the admission of that State into the Union "upon an equal footing" with the original thirteen States, she became seised of all the rights of sovereignty, jurisdiction, and eminent domain which those States possessed, and that under § 3 of the act of Admission (9 Stat. 452, c. 50) the lands of the United States not reserved or purchased for fortifications, etc., are held as are held the lands of private persons, with the exception that the State cannot interfere with the primary disposal of them nor tax them, and that the navigable waters are common highways, free to the inhabitants of the State and to citizens of the United States—proceeded to declare that whether this act did or did not operate as an immediate transfer of the property in non-navigable rivers to the Federal Government, the legislature of the State, on April 13, 1850, passed an act adopting the common law of England, so far as not repugnant to or inconsistent with the Constitution of the United States or the constitution or laws of the State of California, as the rule of decision in all courts of the State, and that in view of the subsequent judicial history of the State this act must be held to have operated, at least from the admission of the State into the Union, as a transfer to all riparian proprietors, including the United States, of the property of the State,

if any she had, in the non-navigable streams and the soil beneath them. The authority of this decision was recognized in *Packer* v. *Bird*, 137 U. S. 661, 669. We are not able to find that the doctrine declared in it has since been departed from by the courts of the State.

It thus appears, from the course of legislation and adjudication by the appropriate authorities of California, not only that the Klamath River has been placed in the category of non-navigable streams, but that the title of the United States to the bed of it where it runs through the public lands has been distinctly recognized. In short, by the acts of legislation mentioned, as construed by the highest court of the State—(a) the act of 1850, adopting the common law and thereby transferring to all riparian proprietors (or confirming in them) the ownership of the non-navigable streams and their beds, and (b) the acts of February 24 and of March 11, 1891, declaring in effect that the Klamath River is a non-navigable stream—California has vested in the United States, as riparian owner, the title to the bed of the Klamath, if in fact it be a navigable river. If in fact it be non-navigable, it is obvious that the same result flows from the mere adoption of the common law.

From this it results that whether the river be or be not navigable in fact, the river bed is to be deemed as included within the Extension of the Hoopa Valley Reservation.

3. But the order establishing the Extension as a reservation (Exec. Ord. Ind. Reserv. 1912, p. 39, 1 Kappler, 815), contained the proviso—"That any tract or tracts included within the above described boundaries, to which valid rights have attached under the laws of the United States, are hereby excluded from the reservation as hereby extended."

Upon the trial a certified copy of a notice of the location of a "mining claim" filed October 20, 1888, in the Recorder's office of Humboldt County, was introduced in

evidence, wherein notice was given by eight persons named therein—"that the undersigned, having complied with the requirements of Chapter A of Title 32, of the Revised Statutes of the United States, and the local customs, laws, and regulations, have located twenty acres each of placer mining ground, situated in the County of Humboldt and State of California, and described as follows." Then followed a description showing exterior limits conforming to legal subdivisions of the public lands; and from other evidence it appeared that the land thus claimed bordered upon, but did not include, the river at the *locus in quo*. There is no other evidence respecting this mining claim or location excepting the testimony of a witness to the effect that there was "a mine" in the vicinity of the Indian village where the crime occurred; the character or location of the mine not being otherwise described.

It is doubtful whether there is any evidence that would have supported a finding that the crime was committed elsewhere than within the river bed. Waiving this point, however, we will consider the effect of the mining location, upon the theory that the crime may have occurred within the limits of the claim.

By § 2329, Rev. Stat., placer claims are "subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims." By § 2330, "two or more persons, or associations of persons, having contiguous claims . . . may make joint entry thereof; but no location of a placer-claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys." By § 2331, placer-claims upon surveyed lands, and conforming to legal subdivisions, require no further survey or plat, and no such location shall include more than twenty acres for each individual claimant. By § 2332, where such per-

sons or associations have held and worked their claim for a period equal to the time prescribed by the statute of limitations for mining-claims by the local law, evidence of such possession and working shall establish a right to patent, in the absence of adverse claim. The circumstances, conditions, and proceedings referred to in § 2329 are those set forth in the preceding sections beginning with § 2318. The chief requirements are,—the discovery of a valuable mineral deposit within the limits of the claim (§§ 2318-2320); the claimants must be citizens of the United States, or must have declared their intention to become such (§§ 2319, 2321); "the location must be distinctly marked on the ground so that its boundaries can be readily traced" (§ 2324); and a certain amount of work must be done in accordance with local regulations, and "on each claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year" (§ 2324).

The prime requisites are, the discovery of a valuable mineral deposit, an actual taking possession thereof, and the performance of the requisite amount of development work. *Erhardt* v. *Boaro*, 113 U. S. 527, 535; *Black* v. *Elkhorn Mining Co.*, 163 U. S. 445, 450; *Chrisman* v. *Miller*, 197 U. S. 313, 321.

The history of the legislation of Congress upon the subject, and the effect thereof, are referred to in numerous decisions of this court, among them *Belk* v. *Meagher*, 104 U. S. 279, 284; *St. Louis Smelting Co.* v. *Kemp*, 104 U. S. 636, 649; *Gwillim* v. *Donnellan*, 115 U. S. 45, 50; *Del Monte Mining Co.* v. *Last Chance Mining Co.*, 171 U. S. 55, 75, etc. See also *Jennison* v. *Kirk*, 98 U. S. 453, 457; *Chambers* v. *Harrington*, 111 U. S. 350, 353; *Hammer* v. *Garfield Mining Co.*, 103 U. S. 291, 299; *Dahl* v. *Raunheim*, 132 U. S. 260; *Clipper Mining Co.* v. *Eli Mining Co.*, 194 U. S. 220, 227.

Of course, under this legislative scheme, a mining claim may be abandoned by failure to do the required development work. *Chambers* v. *Harrington*, 111 U. S. 350, 353; *Black* v. *Elkhorn Mining Co.*, 163 U. S. 445, 450; *Erhardt* v. *Boaro*, 113 U. S. 527, 535.

The evidence in the record is altogether too meagre and indefinite to furnish support for a finding that at the time of the Executive Order of October 16, 1891, or at any time, valid rights had attached to the placer-claim above referred to.

Next, it appears from the evidence that prior to October, 1891, the Board of Supervisors of Humboldt County created a school district which included within its bounds the place where the homicide occurred, and that after October, 1891, the county created, out of the district mentioned, a second school district, which included the place in question. It was in evidence that this school district was maintained by the county, and not by the Government, down to the time of the trial herein. From this it is argued that the State and county had assumed jurisdiction over the land on each side of the Klamath River for school purposes before the enlargement of the Hoopa Valley Reservation, and that the State still exercises the right to maintain a school there.

But we are clear that the creation and maintenance of such a school district by the State could not in anywise impair the title of the United States to the lands included in such district, or limit the authority of the United States over such lands when set apart for an Indian reservation. The Act of Admission, September 9, 1850; 9 Stat. 452, c. 50, § 3 provided— "That the said State of California is admitted into the Union upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of

the United States to, and right to dispose of, the same shall be impaired or questioned;" etc. By act of March 3, 1853, 10 Stat. 244, 246, c. 145, § 6, Congress granted to the State for the purposes of public schools sections 16 and 36 in each township. And by act of July 23, 1866, 14 Stat. 218, 220, c. 219, § 6, Congress gave to the State "the right to select for school purposes other lands in lieu of such sixteenth and thirty-sixth sections as were settled upon prior to survey, reserved for public uses, covered by grants made under Spanish or Mexican authority, or by other private claims," etc. It affirmatively appears, however, that the *locus in quo* was not within either the sixteenth or the thirty-sixth section, and it does not appear that it was selected by the State as "lieu" lands. Therefore the existence of the state school district is without present significance. For, as was pointed out in the *Wilson Case*, 140 U. S. p. 578, the words "sole and exclusive jurisdiction," as employed in § 2145, Rev. Stat., do not mean that the United States must have sole and exclusive jurisdiction over the Indian country in order that that section may apply to it; the words are used in order to describe the laws of the United States which by that section are extended to the Indian country.

4. It is contended for plaintiff in error that the term "Indian country" is confined to lands to which the Indians retain their original right of possession, and is not applicable to those set apart as an Indian reservation out of the public domain, and not previously occupied by the Indians.

Sections 2145 and 2146 are found in Title XXVIII of the Revised Statutes, which title relates to Indians, and within chap. 4, the sub-title of which is "Government of Indian Country." Section after section in that chapter contains provisions of law applicable only to Indian country, and yet the act contains no definition of that term. In the Indian Intercourse Act of June 30, 1834, 4

Stat. 729, c. 161, the first section defined the "Indian country" for the purposes of that act. But this section was not reënacted in the Revised Statutes, and it was therefore repealed by § 5596, Rev. Stat. *Ex parte Crow Dog*, 109 U. S. 556, 561; *United States* v. *LeBris*, 121 U. S. 278, 280; *Clairmont* v. *United States*, 225 U. S. 551, 557. Under these decisions the definition as contained in the act of 1834 may still "be referred to in connection with the provisions of its original context that 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." With reference to country that was formerly subject to the Indian occupancy, the cases cited furnish a criterion for determining what is "Indian country." But "the changes which have taken place in our situation" are so numerous and so material, that the term cannot now be confined to land formerly held by the Indians, and to which their title remains unextinguished. And, in our judgment, nothing can more appropriately be deemed "Indian country," within the meaning of those provisions of the Revised Statutes that relate to the regulation of the Indians and the government of the Indian country, than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation.

5. Is the killing of an Indian by a person not of Indian blood, when committed upon an Indian reservation within the limits of a State, cognizable in the Federal courts?

It is insisted by plaintiff in error that § 9 of the act of March 3, 1885 (set forth in full in the marginal note, above), which declares that "all such Indians committing any of the above crimes (including murder) against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be

subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States"—constitutes the only legislation of Congress providing for punishing the crime of murder when committed upon an Indian within the limits of an Indian reservation. The argument is that this act operated to repeal § 2145, Rev. Stat., which extended to the Indian country certain general laws of the United States as to the punishment of crimes. This argument is plainly untenable. The act of 1885, of itself, provides for the punishment of crimes committed by Indians only. So far from impliedly repealing § 2145, Rev. Stat., it manifestly repeals in part the limitation that was imposed by § 2146 upon the effect of § 2145.

It was pointed out by this court in *Ex parte Crow Dog* (1883), 109 U. S. 556, 571, that "The provisions now contained in §§ 2145 and 2146 of the Revised Statutes were first enacted in § 25 of the Indian Intercourse Act of June 30, 1834, 4 Stat. 729, 733, c. 161. Prior to that, by the act of May 19, 1796, 1 Stat. 469, c. 30, and the act of March 30, 1802, 2 Stat. 139, c. 13, offenses committed by Indians against white persons, and by white persons against Indians, were specifically enumerated and defined, and those by Indians against each other were left to be dealt with by each tribe for itself, according to its local customs. The policy of the government in that respect has been uniform." The point decided was that certain general expressions in the treaty with the Sioux Indians made in 1868 had not the effect of impliedly repealing the express limitation contained in § 2146. As a result, Crow Dog went unpunished by the Federal authority for the murder of Spotted Tail, another Indian. And this no doubt was one of the causes that led to the enactment of § 9 of the act of March 3, 1885, 23 Stat. 385, as was pointed out in *United States* v. *Kagama*, 118 U. S. 375,

383, where § 9 was sustained as valid and constitutional in both its branches, namely, that which provides for the punishment of the crimes enumerated when committed by Indians within the Territories, and that which provides for the punishment of the same crimes when committed by an Indian on an Indian reservation within a State of the Union; and see *In re Wilson*, 140 U. S. 575, 578.

Section 2145, Rev. Stat., in connection with § 5339, plainly includes within its terms the offense of murder committed against the person of an Indian within an Indian reservation by a person not of Indian blood, but it is contended that the admission of California into the Union "on an equal footing with the original States," without any express reservation by Congress of governmental jurisdiction over the public lands contained within her borders, conferred upon the State undivided authority to punish crimes committed upon those lands, even when set apart for an Indian reservation, excepting crimes committed by the Indians. Reference is made to the cases of *United States* v. *McBratney*, 104 U. S. 621, and *Draper* v. *United States*, 164 U. S. 240, where it was held, in effect, that the organization and admission of States qualified the former Federal jurisdiction over Indian country included therein by withdrawing from the United States and conferring upon the States the control of offenses committed by white people against whites, in the absence of some law or treaty to the contrary. In both cases, however, the question was reserved as to the effect of the admission of the State into the Union upon the Federal jurisdiction over crimes committed by or against the Indians themselves. (104 U. S. 624; 164 U. S. 247.) Upon full consideration we are satisfied that offenses committed by or against Indians are not within the principle of the *McBratney* and *Draper Cases*. This was in effect held, as to crimes committed *by* the Indians, in the *Kagama Case*,

118 U. S. 375, 383, where the constitutionality of the second branch of § 9 of the act of March 3, 1885, 23 Stat. 385, was sustained upon the ground that the Indian tribes are the wards of the nation. This same reason applies—perhaps *a fortiori*—with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood.

The result is that, in our opinion, the offense with which the plaintiff in error was charged was punishable in the Federal courts under §§ 2145 and 5339, Rev. Stat.

6. The only remaining question arises out of the exclusion by the trial judge of testimony offered by the plaintiff in error for the purpose of showing that one Joe Dick, an Indian, since deceased, had confessed that it was he who had shot Chickasaw. Since the circumstances of the crime, as detailed in the evidence for the Government, strongly tended to exclude the theory that more than one person participated in the shooting, the Dick confession, if admissible, would have directly tended to exculpate the plaintiff in error. By way of foundation for the offer, plaintiff in error showed at the trial that Dick was dead, thereby accounting for his not being called as a witness, and showed in addition certain circumstances that, it was claimed, pointed to him as the guilty man, viz., that he lived in the vicinity and therefore presumably knew the habits of Chickasaw; that the human tracks upon a sand bar at the scene of the crime led in the direction of an acorn camp where Dick was stopping at the time, rather than in the direction of the home of the plaintiff in error; and that beside the track there was at one point an impression as of a person sitting down, indicating, as claimed, a stop caused by shortness of breath, which would be natural to Dick, who was shown to have been a sufferer from consumption.

Hearsay evidence, with a few well recognized exceptions, is excluded by courts that adhere to the principles of the common law. The chief grounds of its exclusion are, that the reported declaration (if in fact made) is made without the sanction of an oath, with no responsibility on the part of the declarant for error or falsification, without opportunity for the court, jury, or parties to observe the demeanor and temperament of the witness, and to search his motives and test his accuracy and veracity by cross-examination, these being most important safeguards of the truth, where a witness testifies in person, and as of his own knowledge; and, moreover, he who swears in court to the extra-judicial declaration does so (especially where the alleged declarant is dead) free from the embarrassment of present contradiction and with little or no danger of successful prosecution for perjury. It is commonly recognized that this double relaxation of the ordinary safeguards must very greatly multiply the probabilities of error, and that hearsay evidence is an unsafe reliance in a court of justice.

One of the exceptions to the rule excluding it is that which permits the reception, under certain circumstances and for limited purposes, of declarations of third parties made contrary to their own interest; but it is almost universally held that this must be an interest of a pecuniary character; and the fact that the declaration, alleged to have been thus extra-judicially made, would probably subject the declarant to a criminal liability is held not to be sufficient to constitute it an exception to the rule against hearsay evidence. So it was held in two notable cases in the House of Lords— *Berkeley Peerage Case* (1811), 4 Camp. 401; *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85, 103, 109; 8 Eng. Reprint, 1034, 1042,—recognized as of controlling authority in the courts of England.

In this country there is a great and practically unanimous weight of authority in the state courts against ad-

mitting evidence of confessions of third parties made out of court and tending to exonerate the accused. Some of the cases are cited in the margin.[1] A few of them (*West* v. *State*, 76 Alabama, 98; *Davis* v. *Commonwealth*, 95 Kentucky, 19; and *People* v. *Hall*, 94 California, 595, 599) are precisely in point with the present case, in that the alleged

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[1] Alabama—*Smith* v. *State*, 9 Alabama, 990, 995; *Snow* v. *State*, 54 Alabama, 138; *Snow* v. *State*, 58 Alabama, 372, 375; *Alston* v. *State*, 63 Alabama, 178, 180; *West* v. *State*, 76 Alabama, 98; *Owensby* v. *State*, 82 Alabama, 63, 64.

California—*People* v. *Hall*, 94 California, 595, 599.

Georgia—*Lyon* v. *State*, 22 Georgia, 399, 401; *Daniel* v. *State*, 65 Georgia, 199, 200; *Kelly* v. *State*, 82 Georgia, 441, 444; *Delk* v. *State*, 99 Georgia, 667, 671; *Lowry* v. *State*, 100 Ga. 574; *Robinson* v. *State*, 114 Georgia, 445, 447.

Indiana—*Bonsall* v. *State*, 35 Indiana, 460, 463; *Jones* v. *State*, 64 Indiana, 473, 485; *Hauk* v. *State*, 148 Indiana, 238, 262; *Siple* v. *State*, 154 Indiana, 647, 650.

Kansas—*State* v. *Smith*, 35 Kansas, 618, 621.

Kentucky—*Davis* v. *Commonwealth*, 95 Kentucky, 19.

Louisiana—*State* v. *West*, 45 La. Ann. 928, 931.

Maryland—*Munshower* v. *State*, 55 Maryland, 11, 19.

Massachusetts—*Commonwealth* v. *Chabbock*, 1 Massachusetts, 143; *Commonwealth* v. *Felch*, 132 Massachusetts, 22; *Commonwealth* v. *Chance*, 174 Massachusetts, 245, 251.

Missouri—*State* v. *Evans*, 55 Missouri, 460; *State* v. *Duncan*, 116 Missouri, 288, 311; *State* v. *Hack*, 118 Missouri, 92, 98.

New York—*Greenfield* v. *People*, 85 N. Y. 75, 87; *People* v. *Schooley*, 149 N. Y. 99, 105.

North Carolina—*State* v. *May*, 15 N. C. (4 Dev.) 328, 332; *State* v. *Duncan*, 28 N. C. (6 Ired.) 236, 239; *State* v. *White*, 68 N. C. 158; *State* v. *Haynes*, 71 N. C. 79, 84; *State* v. *Bishop*, 73 N. C. 44, 46; *State* v. *Beverly*, 88 N. C. 632.

Oregon—*State* v. *Fletcher*, 24 Oregon, 295, 300.

Tennessee—*Wright* v. *State*, 17 Tennessee, (9 Yerg.) 342, 344; *Rhea* v. *State*, 18 Tennessee, (10 Yerg.) 257, 260; *Peck* v. *State*, 86 Tennessee, 259, 267.

Texas—*Wood* v. *State* (Texas Crim. App.), 26 S. W. Rep. 625.

Vermont—*State* v. *Marsh*, 70 Vermont, 288; *State* v. *Totten*, 72 Vermont, 73, 76.

declarant was shown to be deceased at the time of the trial. In *West* v. *State* the defendant offered to prove by a witness that he heard one Jones say on his death bed that he had killed Wilson, the deceased. The Supreme Court sustained the ruling of the trial judge excluding the evidence. In *Davis* v. *Commonwealth*, the offer excluded was to prove by a witness that one Pearl confessed to him on his death bed that he had killed the person for whose murder Davis was on trial. The Court of Appeals of Kentucky affirmed the conviction. In *People* v. *Hall* it appeared that defendant and one Kingsberry were arrested together for an alleged burglary, attempted to escape, were fired upon and wounded by one of the captors; that a physician was sent for to treat them, and that Kingsberry died from the effects of his wound before any complaint was filed against either of the parties. "In his own behalf the defendant offered to prove that after a careful examination the physician was satisfied that Kingsberry's wounds were necessarily fatal, and that he so informed him at the time; that Kingsberry admitted to the physician that he fully realized that he was mortally wounded and was on the point of death, and had given up all hope of ever getting well; that he was conscious of death, and that thus having a sense of impending death, and without hope of reward, he made a full, free, and complete confession to said physician in relation to this alleged crime, stating that he himself had planned the entire scheme, and that Hall had nothing to do with it and was not connected with the guilt, and was in all respects innocent of any criminal act or intent in the matter." This evidence was excluded, and the Supreme Court of California sustained the ruling, saying: "The rule is settled beyond controversy that in a prosecution for crime the declaration of another person that he committed the crime is not admissible. Proof of such declarations is mere hearsay evidence, and is always excluded, whether

the person making it be dead or not" (citing cases that are among those included in the note).

We do not consider it necessary to further review the authorities, for we deem it settled by repeated decisions of this court, commencing at an early period, that declarations of this character are to be excluded as hearsay.

Mima Queen and Child v. *Hepburn* (1813), 7 Cranch, 290, 295, 296, 297, was a suit in which the petitioners claimed freedom, and certain depositions were rejected by the trial court as hearsay. This court, speaking through Chief Justice Marshall, said: "These several opinions of the court (meaning the trial court) depend on one general principle. The decision of which determines them all. It is this: that hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge. . . . It was very justly observed by a great judge [1] that 'all questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded.' One of these rules is that 'hearsay' evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover combine to support the rule that hearsay evidence is totally inadmissible. . . . The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the

[1] The reference is to the opinion of Lord Kenyon, C. J., in *The King* v. *Eriswell* (1790), 3 T. R. 721.

introduction of fresh exceptions to an old and well-established rule; the value of which is felt and acknowledged by all. If the circumstance that the eye witnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained. . . . This court is not inclined to extend the exceptions further than they have already been carried."

This decision was adhered to in *Davis* v. *Wood* (1816), 1 Wheat. 6, 8; *Lessee of Scott* v. *Ratliffe* (1831), 5 Pet. 81, 86; *Ellicott* v. *Pearl* (1836), 10 Pet. 412, 436, 437; *Wilson* v. *Simpson* (1850), 9 How. 109, 121; *Hopt* v. *Utah* (1883), 110 U. S. 574, 581. And see *United States* v. *Mulholland*, 50 Fed. Rep. 413, 419.

The evidence of the Dick confession was properly excluded.

No error appearing in the record, the judgment is

Affirmed.

Mr. Justice Van Devanter concurs in the result.

Mr. Justice Holmes, with whom concur Mr. Justice Lurton and Mr. Justice Hughes, dissenting.

The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make any one outside of a court of justice believe that Donnelly did not commit the crime. I say this, of course, on the supposition that it should be proved that the confession really was made, and that there was no ground for connecting Donnelly with Dick.—The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive

law. There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man, *Mattox* v. *United States*, 146 U. S. 140; and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight. The history of the law and the arguments against the English doctrine are so well and fully stated by Mr. Wigmore that there is no need to set them forth at greater length. 2 Wigmore, Evidence, §§ 1476, 1477.

McLAUGHLIN BROTHERS *v.* HALLOWELL.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 149. Argued January 27, 1913.—Decided April 7, 1913.

An order of the United States Circuit Court remanding the cause to the state court is not reviewable here, *Missouri Pacific Ry.* v. *Fitzgerald*, 160 U. S. 556, nor can this object be accomplished by indirection.

Where the state court, in denying a second petition for removal, simply bows to the decision of the Federal court when it remanded the record after the first attempt to remove, it does not deny any Federal right of the petitioner within the meaning of § 709, Rev. Stat.

Where the second petition to remove presents no different question from that presented by the first, it is proper for the state court to follow the decision of the Federal court remanding the record and deny the petition.

In this case it does not appear that any different questions were presented on the second petition than on the first, and if any Federal right of the petitioner to remove was denied, it was denied by the Federal and not by the state court.

Whether individual members of a copartnership should be joined as defendants or substituted for the copartnership in a suit brought against the partnership under a state law permitting copartnerships to be sued as entities is a question of local law only cognizable in this court so far as it may affect the right to remove.

This court, having no jurisdiction to review the remanding order of the Circuit Court which the state court followed in denying a second petition to remove, refrains from expressing any opinion upon the correctness of that order.

Writ of error to review 121 N. W. Rep. 1039, dismissed.

THE facts, which involve the jurisdiction of this court under § 709, Rev. Stat., to review a decree of the state court denying a second petition for removal of the cause from the Federal court, are stated in the opinion.

Mr. Edgar A. Morling, with whom *Mr. Charles A. Clark* and *Mr. William H. Morling* were on the brief, for plaintiffs in error.

Mr. Denis M. Kelleher, with whom *Mr. William S. Kenyon* and *Mr. Maurice O'Connor* were on the brief, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This writ of error is sued out under § 709, Rev. Stat., and brings up a judgment of the Supreme Court of Iowa affirming a judgment of the District Court of one of the counties of that State in an action brought by the defendants in error against "McLaughlin Brothers, a Copartnership," named among the plaintiffs in error. The individual plaintiffs in error, John R. McLaughlin and James B. McLaughlin, who allege themselves to be "sole

members of the copartnership," were not named as defendants at the inception of the action. Their relation to it will appear from what follows.

It is claimed by the plaintiffs in error that they were entitled to remove the cause to the appropriate Federal Circuit Court on the ground of diversity of citizenship (there being no question that the matter in dispute, exclusive of interest and costs, exceeded $2,000), and that the decision of the state court deprived them of the right of removal. The cause was once removed to the Federal court and by that court remanded. A subsequent petition for removal was refused by the County District Court. It is the decision of the Supreme Court in affirming the judgment of the District Court, notwithstanding such refusal, that is now assigned for error. The circumstances of the case are peculiar and require a somewhat particular recital.

The action was commenced by petition filed by defendants in error in the District Court naming as defendant "McLaughlin Brothers, a copartnership," and claiming three thousand dollars damages for breaches of warranty in the sale of certain horses. The petition alleged (*inter alia*) that defendant was a non-resident of the State of Iowa, and that it was a partnership, with headquarters at Columbus, Ohio, and with a branch at Emmetsburg, Iowa. The transactions out of which the alleged causes of action arose were stated to have occurred in Iowa, and the alleged contracts to have been made in that State. At the same time the plaintiffs filed in the District Court an attachment bond, and caused a writ of attachment to be issued to the Sheriff of the county, who, according to the record, "thereunder garnisheed the United States Express Company, by serving on such garnishee notice of garnishment, and made return of such service."

Thereafter the defendants filed a petition and bond for removal of the cause into the United States Circuit Court

for the Northern District of Iowa, upon the ground of diversity of citizenship. The opening words of the petition were— "Come now the above named defendants, and respectfully show to the court that they are a copartnership composed of John R. McLaughlin and James B. McLaughlin, sole partners in and members of said copartnership, doing business at the City of Columbus, in the State of Ohio. That at the time of the commencement of this action, and ever since and now, the said copartnership, McLaughlin Brothers, and the said James B. McLaughlin, and John R. McLaughlin, and each of them, were and are residents, citizens, and inhabitants of the State of Ohio; . . . that the plaintiffs hereinabove named, and each of them, at the time of the commencement of this action, were and still are residents, citizens and inhabitants of the State of Iowa, and not of the State of Ohio." The remaining averments were in the usual form. The cause was removed accordingly.

After some time the Federal court made an order remanding it, the substance of which is as follows, viz.: "The Court, being advised in the premises, finds that this court has not jurisdiction of said cause, and sustains said motion (for a remand). It is ordered and adjudged that said cause be and the same is hereby remanded to the District Court of Iowa in and for Pocahontas County, from whence the same came, this court not having jurisdiction by reason of lack of evidence in the transcript filed herein, that said defendant had been served with notice of said proceedings."

The record shows that after a duly authenticated copy of this order had been filed in the District Court, "John R. McLaughlin and James B. McLaughlin appeared in said cause"—but without previous leave of the court—and filed a written motion setting up—"That they are the sole members and partners in the above-mentioned firm of McLaughlin Brothers, and the sole parties defendant

in interest herein, and that they are the parties and the sole parties that are sued under the firm name of McLaughlin Brothers;" and then, after averring diversity of citizenship, and that the matter in dispute exceeded two thousand dollars, the motion proceeded as follows: "That these parties are entitled to have this action tried in the Circuit Court of the United States in and for the Northern District of Iowa; that the only effect of maintaining this action against these defendants in their partnership name is to prevent a removal of the action to the said United States Circuit Court; wherefore the said John R. McLaughlin and James B. McLaughlin move the court, (1), for an order herein substituting these defendants in their individual names as sole parties defendant herein, and permitting them to appear herein and answer and defend in their said individual names; (2) if the foregoing is overruled, then that an order be made joining the said John R. McLaughlin and James B. McLaughlin as parties defendant herein, in their individual names, and permitting them to appear, answer and defend in their individual names."

Upon the same date, "The said defendants, McLaughlin Brothers, appeared in said cause and filed therein their application for substitution of parties," etc., adopting the statements and allegations contained in the motion of the individuals as above quoted, and thereupon moving the court that the said individuals be either substituted in place of the defendants, McLaughlin Brothers, as sole defendants, or else joined as co-defendants with the firm.

And at the same time the partnership and the individuals filed a petition, in the name of the individuals, for the removal of the cause to the United States Circuit Court, upon the same ground of diversity of citizenship that was set up in the first petition for removal. A proper bond was also filed.

To this second petition for removal and to the accom-

panying motions for substitution, etc., the plaintiffs in the action filed written objections, based in part upon the ground that the individual partners were not parties to the action and not entitled to make a motion for substitution or to be joined as parties; that the plaintiffs were entitled to bring their action against the copartnership without joining as defendants the members of the firm, and they having exercised this option the members of the firm were not, as against the plaintiffs' objection, entitled to be either substituted or joined as parties; and that the individual partners were not entitled to have the action tried in the Circuit Court of the United States. The District Court sustained these objections, and denied the several motions and the petition for removal.

Thenceforward the action appears to have proceeded in the District Court as against the partnership alone. "A Plea to Jurisdiction and Answer" was filed, which repeated the averments upon which the petitions for removal had been based, set up the filing of those petitions and bonds and the several applications for substitution or joinder of the individuals as parties defendant, and averred that by reason of the premises the state court had no jurisdiction to proceed further. Answer was at the same time made to the merits, and the action was thus brought to an issue.

There appears to have been a trial, resulting in a directed verdict for the defendants and a judgment thereon, from which the plaintiffs appealed to the Supreme Court of Iowa, where there was a reversal and award of a new trial. The transcript of the record as presented here is silent on the subject, but we are referred to the report of the case on the first appeal, 136 Iowa, 279.

Upon the second trial the defendants offered evidence to support the averments of the plea to the jurisdiction, which was overruled as irrelevant. A motion to direct a verdict in favor of defendant on the ground that because

of the proceedings for removal the District Court had no jurisdiction was likewise overruled. There was a verdict and consequent judgment for the plaintiffs for $3,755.02, which upon appeal was affirmed by the Supreme Court of Iowa (121 N. W. Rep. 1039), and the present writ of error was sued out.

Except for the opinion delivered by the Supreme Court upon the second appeal there is nothing in the record to show what questions were raised in that court. After referring to the first appeal, as reported in 136 Iowa, 279, which admittedly raised no question of Federal right, the opinion proceeds as follows: "But one new question is here presented, and that arises on the following facts: This action was commenced in December, 1903. It was transferred to the United States Circuit Court upon the defendants' application, where it was remanded to the state court, because of want of jurisdiction of the Federal court. In January, 1905, the defendants filed an application in the District Court for the substitution of John R. and James B. McLaughlin as defendants. This was denied, and since such denial both trials have taken place and more than three years elapsed, and the defendants now appeal from the order denying substitution. There was no right of substitution. The statute, Code, § 3468, expressly provides that a partnership may sue or be sued as a distinct legal entity. (Citing cases.) Under this statute the plaintiffs had the absolute right to sue the partnership alone or to join in such suit the individual members of the partnership. They chose the former course, and they cannot be deprived of such right upon the application of the partnership, or of the individual members thereof. (Citing cases.) The plaintiffs clearly had the right to sue McLaughlin Brothers, the partnership, alone. This they could not do in the Federal Court, and the case was therefore not removable. *Ex parte Wisner*, 203 U. S. 449."

It is contended here that the state court deprived the plaintiffs in error of a Federal right by giving such effect to the local Code as to cut off the right of removal.

The statute under which plaintiffs brought their action is as follows:

"Actions may be brought by or against a partnership as such, or against all or either of the individual members thereof, or against it and all or any of the members thereof; and a judgment against the firm as such may be enforced against the partnership property, or that of such members as have appeared or been served with notice. A new action may be brought against the members not made parties, on the original cause of action." Code, 1897, § 3468.

The gist of the argument for the plaintiffs in error is that this section, whatever its effect upon the practice of the state courts, cannot interfere with a right of removal to the Federal courts given by the act of Congress; that the real parties in interest as defendants in the state court were the individual partners, and since they were citizens of Ohio, while the plaintiffs in the state court were citizens of Iowa, the defendants had the right of removal although sued in the partnership name; that the order of the Federal Circuit Court remanding the cause after the first removal was limited in its effect because based upon lack of evidence in the transcript that plaintiffs in error had been served with notice of the proceedings; and that the defendants, on thereafter appearing and filing motions for substitution, etc., were entitled to renew the application for removal, and, since they did this, the state court ought to have admitted the individual partners as defendants in order to enable them to assert the right of removal that is alleged to result from their interest in the suit and the diversity of citizenship between them as individuals and the plaintiffs; and that in denying the applications of the plaintiffs in error made in this behalf after the re-

manding order was filed the state court deprived them of a Federal right.

We are confronted, at the outset, with the question of the jurisdiction of this court to review the action of the state court in the premises.

That the order of the United States Circuit Court remanding the cause to the state court is not reviewable here is settled by *Missouri Pacific Ry. Co.* v. *Fitzgerald*, 160 U. S. 556. In that case this court declared (at p. 582):—"If the Circuit Court remands a cause and the state court thereupon proceeds to final judgment, the action of the Circuit Court is not reviewable on writ of error to such judgment. A state court cannot be held to have decided against a Federal right when it is the Circuit Court, and not the state court, which has denied its possession. The Supreme Court of Nebraska rightly recognized the courts of the United States to be the exclusive judges of their own jurisdiction and declined to review the order of the Circuit Court. As under the statute a remanding order of the Circuit Court is not reviewable by this court on appeal or writ of error from or to that court, so it would seem to follow that it cannot be reviewed on writ of error to a state court, the prohibition being that 'no appeal or writ of error from the decision of the Circuit Court remanding such cause shall be allowed.' And it is entirely clear that a writ of error cannot be maintained under § 709 in respect of such an order where the state court has rendered no decision against a Federal right but simply accepted the conclusion of the Circuit Court."

It is fundamental that plaintiffs in error, being debarred from bringing the remanding order under the review of this court, cannot accomplish the same object by indirection. And if the state court in denying the second petition for removal did no more than bow to the decision and order of the Federal court when it remanded the

record, it did not deny any Federal right of the plaintiffs in error within the meaning of § 709, Rev. Stat. That it was proper to deny the second petition if it presented no different question from that presented by the first is plain. *St. Paul & Chicago R. R. Co.* v. *McLean*, 108 U. S. 212, 217; *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U. S. 207, 217.

This brings us to the question whether between the filing of the first petition for removal and the second there had been any change in the situation, presenting the right of removal upon a better ground than that which was overruled by the United States Circuit Court when it remanded the cause. As already mentioned, the insistence is that the remanding order was based upon the fact that the defendants had not been served with notice of the proceedings; and it is insisted that this difficulty was obviated by the subsequent appearances and motions. In order to pass upon this contention we should first examine the state practice.

Under the Iowa Code, 1897, § 3514, action in a court of record is commenced by serving the defendant with a notice, informing him of the name of the plaintiff, that a petition is, or by a date named therein will be, filed in the office of the clerk of the court wherein action is brought, naming it, and stating in general terms the cause of action, and that unless the defendant appears and defends before a stated time his default will be entered and judgment or decree rendered against him. The sections following provide the method of making personal and substituted service and, in case of absent defendants, service by publication in certain cases. By § 3541 it is prescribed that the mode of appearance may be by delivering to the plaintiff or the clerk of the court a written memorandum of appearance signed by the defendant or his attorney; or by entering an appearance in the appearance docket or judge's calendar, or by announcing to the court an

appearance, which shall be entered of record; or "by an appearance, even though specially made, by himself or his attorney, for any purpose connected with the cause, or for any purpose connected with the service or insufficiency of the notice; and an appearance, special or other, to object to the substance or service of the notice, shall render any further notice unnecessary, but may entitle the defendant to a continuance," etc.

By §§ 3876 to 3878 it is provided that the plaintiff in a civil action may cause the property of the defendant not exempt from execution to be attached at the commencement or during the progress of the proceedings, but if this be done subsequent to the commencement of the action a separate petition must be filed, and "in all cases the proceedings relative to the attachment are to be deemed independent of the ordinary proceedings and only auxiliary thereto." The grounds upon which an attachment may be procured are, that the defendant is a foreign corporation, or acting as such, or is a non-resident of the State, or is about to remove his property out of the State, or has disposed or is about to dispose of his property with intent to defraud his creditors, etc., etc. By § 3897, property of defendant in the possession of another, or debts due to defendant, may be attached by garnishment. By § 3924, if judgment is rendered for the plaintiff in any case in which an attachment has been issued, the court is to apply in satisfaction thereof any money seized by or paid to the sheriff under the attachment, and the proceeds of sales of other attached property. Subsequent sections provide for the mode of giving notice to a garnishee, and for obtaining a judgment against him. By § 3947 such judgment shall not be entered until the principal defendant shall have had ten days' notice of the garnishment proceedings. Section 3948 permits the defendant in the main action to set up by a suitable pleading filed in the garnishment proceedings, facts

showing that the debt or the property with which it is sought to charge the garnishee is exempt from execution or for any other reason is not liable for plaintiff's claim.

The state courts have held that the effect of § 3541 is to subject a defendant who comes into court for any purpose connected with the cause (even under a "special" appearance) to the general jurisdiction of the court. *Des Moines Branch &c.* v. *Van*, 12 Iowa, 523; *Robertson* v. *Eldora R. Co.*, 27 Iowa, 245, 248; *McFarland* v. *Lowry*, 40 Iowa, 467; *Johnson* v. *Tostevin*, 60 Iowa, 46; *Lesure Lumber Co.* v. *Mutual Fire Ins. Co.*, 101 Iowa, 514, 519; *Locke* v. *Chicago Chronicle Co.*, 107 Iowa, 390, 395; *Rummelhart* v. *Boone*, 126 N. W. Rep. 338, 339. As to whether this is "due process of law" in the state courts within the meaning of the Fourteenth Amendment, see *York* v. *Texas*, 137 U. S. 15; *Kauffman* v. *Wooters*, 138 U. S. 285. As to the applicability of the rule of practice to the Federal courts under the Conformity Act (Rev. Stats., § 914), see *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 208; *Mexican Central Ry.* v. *Pinkney*, 149 U. S. 194, 203.

With respect to § 3468, permitting actions to be brought against a partnership as such, or against all or either of the individual members thereof, or against the partnership and all or any of the members thereof, and declaring that a judgment against the firm as such may be enforced against the partnership property, or that of such members as have appeared or been served with notice, the courts of Iowa have construed this as dealing with the partnership as an entity distinct from the individual members, and as conferring upon the plaintiffs the option of suing the partnership alone instead of joining in the suit the individual members of the firm. In so holding in the present case the Supreme Court of Iowa did but follow previous decisions of the same court. *Brumwell* v. *Stebbins*, 83 Iowa, 425, 428; *Ruthven* v. *Beckwith*, 84 Iowa, 715, 717; *Baxter* v. *Rollins*, 110 Iowa, 310.

The United States Circuit Court, in remanding the cause, followed its previous decision in *Ralya Market Co.* v. *Armour*, 102 Fed. Rep. 530. This likewise was an action brought under § 3468 of the Code of Iowa against a co-partnership, without service upon the individual partners. It was remanded on the ground that in that form the cause was not removable for the reason that it was not an action of which the Federal court could have taken jurisdiction originally if brought in the first instance in that court; and this because citizenship within the meaning of the Federal Constitution could not be predicated of a partnership, and so there could be no diversity of citizenship. Two decisions of this court were relied upon as authority for this view, *Chapman* v. *Barney*, 129 U. S. 677, 682; *Great Southern Hotel Co.* v. *Jones*, 177 U. S. 449, 454. (And see *Thomas* v. *Board of Trustees*, 195 U. S. 207, 211.) At the same time the court said (102 Fed. Rep. at p. 534): "If the partners had applied to the State court to be substituted as defendants in place of the firm, so that the suit would then have been only against the individuals, partners doing business under the firm name, the case might possibly then have been removable, as it would have been then pending against the individuals only, and the citizenship of the defendants could then have been shown to be different from that of the plaintiff." And see *Bruett & Co.* v. *Austin Drainage Excavator Co.*, 174 Fed. Rep. 668, 672.

It is clear, therefore, that the Federal court, in remanding the present case, did so upon the ground that the individual members of the firm had not been joined as parties, and that under the Iowa practice of suing the partnership as a separate entity there was, within the meaning of the Removal Act, no diversity of citizenship. And it is equally plain that the clause—"This court not having jurisdiction by reason of lack of evidence in the transcript filed herein that said defendant had been served

with notice of said proceedings," was inserted in order to enable the partners to apply to the state court to be substituted as defendants in the place of the firm, and then raise the question whether the action in its changed form was removable, as the opinion just cited intimated that it might be. Of this opportunity the defendants availed themselves, as already shown.

The construction we have placed upon the qualifying clause quoted from the remanding order is evidently correct from what has already been said. Such was the construction placed upon it by the subsequent conduct of the defendants in the state court. And the same construction is, in effect, conceded in their briefs in this court, which state that "the order remanding the cause upon the first removal was upon the specific ground of lack of evidence in the transcript that plaintiffs in error had been served with notice of the proceedings." And again,—"The case having been remanded solely because of absence of notice, the defendants on appearing and filing motions for a substitution were entitled to renew their applications for removal." And still again,—"The plaintiffs in error sought by motion for substitution, in accordance with the suggestion in *Ralya Market Co.* v. *Armour*, 102 Fed. Rep. 530, to eliminate this question,"—referring to the question of "the supposed inability of the Federal court to entertain an action against a partnership, which has been the constant claim of the defendants in error in the lower courts, and which plaintiffs in error sought to obviate."

The clause quoted from the remanding order hardly admits, we think, of the construction that the reason for denying the jurisdiction was that the copartnership defendant (as distinguished from the individual partners), had not been served with notice of the suit or of the attachment proceedings; for such non-service, if it rendered the proceedings defective, was not waived by the pres-

entation of a petition for removal, but on the contrary, was one of the very matters that might be adjudicated upon by the Circuit Court; (*Goldey* v. *Morning News*, 156 U. S. 518, 523; *Wabash Western Ry.* v. *Brow*, 164 U. S. 271, 279; *Clark* v. *Wells*, 203 U. S. 164, 171; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437, 441; *Davis* v. *C., C. C. & St. L. Ry.*, 217 U. S. 157, 174). And it is unreasonable to construe the remanding order as meaning that service of notice upon the copartnership defendant was necessary to initiate the proceeding so as to make it a "suit" within the meaning of § 3514 of the State Code, as distinguished from an "independent" or "auxiliary" proceeding by attachment within the meaning of § 3877, (see *In re Receivership of Iowa & Minnesota Construction Co.*, 6 Fed. Rep. 799, 801; *Long* v. *Long*, 73 Fed. Rep. 369, 372; *Bank* v. *Turnbull & Co.*, 16 Wall. 190, 195), because it would seem clear that notice to the copartnership, as such, sufficient at least to constitute the proceeding a suit or controversy within the meaning of the state practice, and so as to bring it within the reach of the Removal Act, was evidenced by the filing of the first petition for removal, which, as above stated, was made in the name of the copartnership, and set forth an appearance by the copartnership for the purpose of asserting the right of removal; and, as we have seen, such an appearance, under § 3541 of the Code, rendered further notice unnecessary, so far as the requirements of the state practice were concerned.

Having, as already pointed out, no jurisdiction to review the remanding order, we intend no expression of opinion upon the correctness of the grounds upon which it was based, and have dealt thus at length with the construction of its language only because we are concerned with the effect that was given and ought properly to have been given to it by the state court.

Whatever construction may be placed upon it, we

cannot see that the plaintiffs in error by the subsequent proceedings gave themselves any better right to removal than that which was asserted by the first petition, was then acceded to by the state court, and was overruled by the Circuit Court in remanding the cause.

Reliance is placed upon *Powers* v. *Chesapeake & Ohio Ry.*, 169 U. S. 92, 100, and *Fritzlen* v. *Boatmen's Bank*, 212 U. S. 364, 372. But those cases dealt with a change in the situation in the state court after an order of remand had been made, and resulting from subsequent dealings or conduct of the parties in which the opposing party participated. They are not pertinent here, where there was no change in the situation of the parties on the record, and merely an unsuccessful application to change it, made by the parties asserting the right of removal, and opposed, and successfully opposed, by the other parties.

The mere entry of appearances in the state court, after the filing of the remanding order, made no substantial change in the situation, for reasons that have been indicated. And whether the state court, at the instance of the defendants, should have admitted the individual members of the partnership as additional parties, or should have substituted them in place of the firm as sole defendants, is a question of local law and practice, the decision of which by the state court does not concern us, saving so far as it may affect the right of the defendant firm or the individual partners thereof to have the cause heard and determined in the Federal court. If, therefore, the action of the state court in refusing to allow the substitution is reviewable upon the present writ of error, it is only because the application for such substitution was made as a step towards the assertion of the right of removal. But, from what has been said, it is sufficiently clear that the grounds, and the only grounds, set up as the basis alike for the motion for substitution and the second petition for removal are the same grounds that were

alleged in the first petition for removal; that is to say, that John R. McLaughlin and James B. McLaughlin were the sole members and partners of the firm of McLaughlin Brothers, and the sole parties interested as defendants, and that they and their firm were citizens, residents, and inhabitants of the State of Ohio, while the plaintiffs were citizens, residents, and inhabitants of the State of Iowa. In short, if the defendants were entitled to have the proceedings moulded in aid of their asserted right of removal, they were entitled to have the cause removed without any modification of the proceedings. The state court having refused to change the character of the action, the situation was precisely the same as when the first petition for removal was filed, and the court properly held itself bound by the remanding order.

Therefore, if any Federal right of the plaintiffs in error was denied, it was denied by the United States Circuit Court, and not by the state court.

In discussing the matter we have assumed, in favor of the plaintiffs in error, that the question here dealt with was raised by them in the Supreme Court of Iowa; a matter that is not entirely clear, since the opinion makes no reference to the second petition for removal, and aside from the opinion the record does not disclose what questions were raised.

We have also assumed that the second petition for removal was filed in due season, and was not subject to certain other objections raised against it by the defendants in error. We must not be understood as having passed upon these questions.

Writ of error dismissed.

McCOACH, COLLECTOR OF INTERNAL REVENUE, *v.* MINEHILL & SCHUYLKILL HAVEN RAILROAD COMPANY.

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

No. 670. Argued January 14, 15, 1913.—Decided April 7, 1913.

The corporation tax is imposed upon the doing of corporate business and with respect to the carrying on thereof and not upon the franchises or property of the corporation irrespective of their use in business. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 145.

A railway corporation which has leased its railroad to another company operating it exclusively but which maintains its corporate existence and collects and distributes to its stockholders the rental from the lessee and also dividends from investments is not doing business within the meaning of the Corporation Tax Act. *Park Realty Company Case sub Flint* v. *Stone Tracy Co.*, 220 U. S. 171, distinguished, and *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, followed.

Quære whether such a corporation would be subject to the tax if it exercised the power of eminent domain or other corporate powers for the benefit of the lessee.

192 Fed. Rep. 670, affirmed.

THE facts, which involve the construction of the provisions of the Corporation Tax Act as to what constitutes doing business by a corporation so as to subject it to the tax, are stated in the opinion.

Mr. Solicitor General Bullitt for petitioner:

The Minehill Company was "engaged in business" and was therefore subject to the Federal corporation tax.

The Corporation Tax Law is intended to tax the privilege of doing business with the advantages of corporate organization. Section 38, act of August 5, 1909; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 145, 146, 151, 171.

The business engaged in, done, and carried on by the Minehill Company includes stockholders' meetings, election of officers, etc.; declaration of dividends, corporate

reports, etc.; collection of rentals, revenue, dividends, interest, and management of finances and invested funds; payment of taxes; maintenance of offices, clerical force, etc.; preservation of corporate franchises, existence, etc. *Arrowsmith* v. *Nashville &c. R. R. Co.*, 57 Fed. Rep. 165; *Lewis, Receivers, &c.* v. *G., N. & P. R. R. Co.*, 16 Phila. 608; *P. R. R. Co.* v. *Sly*, 65 Pa. St. 205; *Snyder* v. *B. & O. R. R. Co.*, 210 Pa. St. 500; Elliott on Railroads, par. 461, note 91; 3 Thompson on Corporations, § 2516.

The foregoing activities constitute a "doing of business" within the meaning of the Corporation Tax Law. They involve continuity of business without interruption by death or dissolution; transfer of property interests by the disposition of shares of stock; advantages of business, controlled and managed by corporate directors; general absence of individual liability; keeping alive corporate existence; investment and reinvestment of surplus assets.

The present case is controlled by the various real estate cases of *Cedar Street Co.* v. *Park Realty Co.; Lacroix* v. *Motor Taximeter Cab Co.; Mitchell* v. *Clark Iron Co.*, all decided in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; and it is not controlled by *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187. There are decided points of difference between the Minehill Co. and the Minneapolis Syndicate.

The lower courts erred in assuming that the Reading Railway was paying taxes upon the $252,612 rental, whereas in fact the Reading Railway was allowed to deduct that amount from its gross profits in determining the net profit upon which it should pay taxes.

Mr. George Wharton Pepper, with whom *Mr. Wm. B. Bodine, Jr.*, and *Mr. Eli Kirk Price* were on the brief, for respondent.

Mr. E. Parmalee Prentice, Mr. George Welwood Murray and *Mr. Charles P. Howland*, by leave of the court, filed a brief as *amici curiæ*.

MR. JUSTICE PITNEY delivered the opinion of the court.

The Minehill & Schuylkill Haven Railroad Co., the respondent herein (called for convenience the Minehill Company), sued the petitioner, who is Collector of Internal Revenue at Philadelphia, to recover certain taxes for the years 1909 and 1910 paid under protest by that company under the Corporation Tax Act of 1909. The United States Circuit Court held that the company was not "engaged in business" within the meaning of the act, and that therefore the taxes had been illegally assessed, and rendered judgment for their recovery. 192 Fed. Rep. 670. The Circuit Court of Appeals affirmed the judgment, and the case comes here upon certiorari.

The facts appear from the plaintiff's statement of claim and the defendant's affidavit of defense, which latter was overruled as insufficient. They may be summarized as follows: The Minehill Company was incorporated by an act of the legislature of the State of Pennsylvania, approved March 24, 1828 (P. L., p. 205), for the purpose of constructing and operating a railroad, with appropriate powers, including the power of eminent domain. Under this charter a railroad was built and for many years operated. Under the authority of general acts of the legislature, approved respectively April 23, 1861 (P. L., p. 410), and February 17, 1870 (P. L., p. 31), the Minehill Company, in the year 1896, leased its entire railroad, with all side-tracks, extensions, and appurtenances of every kind, and all rolling stock and personal property of every description in use or adapted for use in, upon, or about the railroad (excepting some property intended to have been described in a schedule annexed to the lease, but which is not described, no such schedule having been annexed), and also—"All the rights, powers, franchises (other than the franchise of being a corporation), and privileges which may now, or at any time

hereafter during the time hereby demised, be lawfully exercised or enjoyed in or about the use, management, maintenance, renewal, extension, alteration, or improvement of the demised premises, or any of them," unto the Philadelphia & Reading Railway Company for a term of nine hundred and ninety-nine years from January 1, 1897, at a yearly rental of $252,612, that being equivalent to six per centum upon the capital stock of the Minehill Company.

The lessee agreed to keep the road in good order and repair, keep it in public use and efficiently operate it, and return it to the lessor company at the expiration or other determination of the lease. The Minehill Company agreed during the term of the lease to maintain its corporate existence and organization, and that when requested by the lessee it would "put in force and exercise each and every corporate power, and do each and every corporate act which the Minehill Company might now, or at any time hereafter, lawfully put in force or exercise, to enable the Railway Company (the lessee) to enjoy, avail itself of, and exercise, every right, franchise, and privilege in respect of the use, management, maintenance, renewal, extension, etc., of the property demised, and of the business to be there carried on." It was provided that upon default in the payment of the rent reserved, or in the performance of certain other covenants, the lessor might declare the lease forfeited and reënter and repossess the demised premises. The lease further provided that the lessee might, under certain circumstances, abandon certain railway lines, "whenever it shall be found legally practicable to abandon so much of the said lines of railroad, without working a forfeiture or any impairment of the chartered rights and franchises of the Minehill Company as to its railroads, or any part thereof, or without creating any liability on the part of the Minehill Company or the Railway Company, to the public or the Commonwealth, for

the non-user of such portions of the railroad lines." In the event thus provided for the abandoned rails, machinery, etc., are to be sold and the proceeds turned over to the Minehill Company, and the annual rental proportionately reduced.

Pursuant to this lease the entire railroad and all property connected therewith was turned over to the Reading Company, and since then has been operated by that company, and the Minehill Company has not carried on any business in connection with the operation of it. It has, however, maintained its corporate existence and organization by the annual election of a president and board of managers, and this board has annually elected a secretary and treasurer. It receives annually from the Reading Company the fixed rental called for by the lease, and it receives annually sums of money as interest on its bank deposits, and also maintains a "contingent fund," from which it receives annual sums as interest or dividends. And it annually pays the ordinary and necessary expenses of maintaining its office and keeping up the activities of its corporate existence, including the payment of salaries to its officers and clerks. It keeps and maintains at its offices, stock books for the transfer of its capital stock, and this stock is bought and sold upon the market. The annual income from the contingent fund appears to be about $24,000, its annual payments for state taxes about as much, and its expenditures for corporate maintenance about $5,000.

The Corporation Tax Law (act of August 5, 1909, § 38; 36 Stat., c. 6, pp. 11, 112–117), provides:

"That every corporation . . . organized for profit and having a capital stock represented by shares . . . and engaged in business in any state . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation . . . equivalent to one per centum upon the

entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations . . . subject to the tax hereby imposed. . . .

"Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, . . . received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, . . ."

In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, the question of the constitutionality of this act was presented here for decision. Upon the preliminary question of interpretation the court said (pp. 145, 146):

"It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof, in a sum equivalent to one per centum upon the entire net income over and above $5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization it may be described generally as a tax upon the doing of business in a corporate capacity. . . . The income is not limited

to such as is received from property used in the business, strictly speaking, but is expressly declared to be upon the entire net income above $5,000 from all sources, excluding the amounts received as dividends on stock in other corporations, joint stock companies or associations, or insurance companies also subject to the tax. In other words, the tax is imposed upon the doing of business of the character described, and the measure of the tax is to be the income, with the deduction stated, received not only from property used in business, but from every source."

In discussing the constitutional question, reference was first made to the case of *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, which held the income tax provisions of the act of August 27, 1894 (28 Stat., c. 349, pp. 509, 553, § 27, etc.), to be unconstitutional because amounting to a direct tax within the meaning of the Constitution, and because not apportioned according to population as required by that instrument. Attention was called (220 U. S. 148) to the expressions used by Mr. Chief Justice Fuller, speaking for the court in the *Pollock Case*, upon the rehearing, as to the distinction between a tax upon the income derived from real estate and from invested personal property, on the one hand, and an excise tax upon business privileges, employments, and vocations, upon the other. Reference was also made to the interpretation put upon the decision in the *Pollock Case* in *Knowlton* v. *Moore*, 178 U. S. 41, 80, and in *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, and it was held (p. 150) that the corporation tax law of 1909 "does not impose direct taxation upon property solely because of its ownership, but the tax is within the class which Congress is authorized to lay and collect under Art. I, § 8, cl. 1 of the Constitution, and described generally as taxes, duties, imposts and excises, upon which the limitation is that they shall be uniform throughout the United States."

In applying this principle to the several cases then *sub judice*—in some of which the validity of the tax was challenged by the stockholders of certain real estate companies whose business was principally the holding and management of real estate—the court dealt, among others (220 U. S. 170), with the Park Realty Co., organized to "work, develop, sell, convey, mortgage or otherwise dispose of real estate; to lease, exchange, hire or otherwise acquire property; to erect, alter or improve buildings; to conduct, operate, manage or lease hotels, apartment houses, etc.; to make and carry out contracts in the manner specified concerning buildings . . . and generally to deal in, sell, lease, exchange or otherwise deal with lands, buildings and other property, real or personal," etc. At the time the bill was filed in that case the business of the Park Realty Company related only to the management and leasing of one hotel. Others of the realty companies that were before the court were engaged in more extensive business transactions. The court held (p. 171):

"We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law."

Another case argued and decided at the same time, but separately reported, is *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187. In this case the court held that the corporation was not doing business in such wise as to make it subject to the tax imposed by the act of 1909, because while originally organized for and engaged in the business of letting stores and offices in a building owned by it, and collecting and receiving rents therefor, it had afterwards

made a lease of all lands belonging to it to certain trustees for a term of 130 years, and then had caused its articles of incorporation, which had been those of a corporation organized for profit, to be so amended as to confine the purpose of the corporation to the ownership of the lands in question, subject to the lease, and "for the convenience of its stockholders to receive, and to distribute among them, from time to time, the rentals that accrue, under said lease, and the proceeds of any disposition of said land." The court said (p. 190):

"The corporation involved in the present case, as originally organized and owning and renting an office building, was doing business within the meaning of the statute as we have construed it. Upon the record now presented we are of opinion that the Minneapolis Syndicate, after the demise of the property and reorganization of the corporation, was not engaged in doing business within the meaning of the act. It had wholly parted with control and management of the property; its sole authority was to hold the title subject to the lease for 130 years, to receive and distribute the rentals which might accrue under the terms of the lease, or the proceeds of any sale of the land if it should be sold. The corporation had practically gone out of business in connection with the property and had disqualified itself by the terms of reorganization from any activity in respect to it."

The precise question presented by the present record is whether the Minehill Company is "doing business" in the sense in which the realty companies concerned in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 170, were doing business, or had gone out of business in substantially the same sense that the Minneapolis Syndicate had done so.

From the facts as stated above it is entirely clear that the Minehill Company was not, during the years of 1909 and 1910, engaged at all in the business of maintaining or operating a railroad, which was the prime object of its

incorporation. This business, by the lease of 1896, it had turned over to the Reading Company. If that lease had been made without authorization of law, it may be that for some purposes, and possibly for the present purpose, the lessee might be deemed in law the agent of the lessor; or at least the lessor held estopped to deny such agency. But the lease was made by the express authority of the State that created the Minehill Company, conferred upon it its franchise, and imposed upon it the correlative public duties. The effect of this legislation and of the lease made thereunder was to constitute the Reading Company the public agent for the operation of the railroad and to prevent the Minehill Company from carrying on business in respect of the maintenance and operation of the railroad so long as the lease shall continue. And it is the Reading Company, and not the Minehill Company, that is "doing business" as a railroad company upon the lines covered by the lease and is taxable because of it. The Corporation Tax Law does not contemplate double taxation in respect of the same business.

The Government points out that by the terms of the act the Reading Company is allowed to deduct from its gross income the $252,612 paid annually to the Minehill Company for rentals under the lease, with the result that, unless the latter company is held to be "doing business" as a railroad company, both lessor and lessee entirely escape from taxation on $252,612 of income. But an examination of the act shows that this is the precise result intended by Congress. "Net income shall be ascertained by deducting from the gross amount of the income . . . (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, *including all charges such as rentals or franchise payments*, required to be made as a condition to the continued use or possession of the property." The deduction of rentals is not confined

to such as are paid to companies that are subject to the tax imposed by the act; and yet the suggestion that it might be so confined was present in the mind of the draftsman, for below there is a provision for deducting "(fifth) all amounts received . . . as dividends upon stock of other corporations . . . *subject to the tax hereby imposed.*" In short, Congress said, and intended to say, as to rentals paid for the use or possession of property and franchises employed by the lessee company in a business taxable under the act,—Let there be a deduction by the lessee of the amount of such rentals, whether the lessor is within the reach of the taxing scheme or not.

We conclude that the Minehill Company was not taxable with respect to the railroad business.

It should be mentioned that there is nothing in the record to show that during the taxing years in question the company exercised its power of eminent domain, or put in force any other special corporate power, in aid of the business of the lessee. We therefore do not pass upon the question whether, if it should do so, it would be taxable under the act in question. We cannot, however, agree with the contention made in behalf of the Government that because the Minehill Company retains its franchise of corporate existence, maintains its organization, and holds itself ready to exercise its franchise of eminent domain, or other reserved powers, if and when required by the lessee, and ready to resume possession of the property at the expiration of the lease, it is therefore to be treated as doing business, in respect of the railroad, within the meaning of the Corporation Tax Law. As to these matters the case is governed by what was said by the court in *Flint* v. *Stone Tracy Co.*, 220 U. S. 145,—"It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or

insurance business and with respect to the carrying on thereof." And again, p. 150,—"The tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed."

There remains to be considered the fact that the Minehill Company has a considerable amount of personal assets known as its "contingent fund," in the form of investments (the amount and particulars are not specified), from which it derives an annual income of about $24,000; that it keeps a deposit in bank, receives and collects interest upon such deposit, and distributes the income thus received, as well as the rentals received from the Reading Company (after payment of expenses and taxes), to its stockholders in the form of dividends.

In our opinion the mere receipt of income from the property leased (the property being used in business by the lessee and not by the lessor) and the receipt of interest and dividends from invested funds, bank balances, and the like, and the distribution thereof among the stockholders of the Minehill Company, amount to no more than receiving the ordinary fruits that arise from the ownership of property. The ground of the decision in the *Pollock Case* was that a tax upon income received from real estate and invested personal property (as distinguished from income received from the transaction of business) was in effect a direct tax upon the property itself, and therefore invalid unless apportioned according to population. In the *Flint Case*, in sustaining the act of 1909 as a tax upon the privilege of doing business in corporate form, against the objection that it includes within its reach the income of real estate and personal property not used in the business and not the subject of taxation, the court said (220 U. S. 163): "The measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable."

And again, after referring to previous decisions (220 U. S. 165): "It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed. . . . The tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equality upon all corporations. Some corporations do a large business upon a small amount of capital; others with a small business may have a large capital. A tax upon the amount of business done might operate as unequally as a measure of excise as it is alleged the measure of income from all sources does. Nor can it be justly said that investments have no real relation to the business transacted by a corporation. The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige."

In short, the inclusion of income derived from property in arriving at the measure of the tax to be imposed with respect to the doing of corporate business was sustained largely because the property not used in the business, and the income from such property, have a fair relation to the business itself, and may contribute materially to its proper and economical conduct. But that reasoning furnishes

no support for the contention that the mere receipt of income from property, and the payment of organization and administration expenses incidental to the receipt and distribution thereof, constitute such a business as is taxable within the meaning of the act of 1909. The distinction is between (a) the receipt of income from outside property or investments by a company that is otherwise engaged in business; in which event the investment-income may be added to the business-income in order to arrive at the measure of the tax, and (b) the receipt of income from property or investments by a company that is not engaged in business except the business of owning the property, maintaining the investments, collecting the income and dividing it among its stockholders. In the former case the tax is payable; in the latter not.

And so, upon the whole, we think the court below correctly held that the present case is governed by *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, and that the taxes under consideration were unlawfully imposed.

Judgment affirmed.

MR. JUSTICE DAY, with whom concur MR. JUSTICE HUGHES and MR. JUSTICE LAMAR, dissenting.

I am unable to concur in the opinion of the majority of the court. It seems to me that, applying the principles laid down in the *Corporation Tax Cases*, 220 U. S. 107, the Minehill & Schuylkill Haven Railroad Company is a corporation doing business within the meaning of the law and subject to the tax.

We are advised by a brief filed by an *amicus curiæ* that the decision in this case will affect a number of cases now pending, and, owing to its importance as affecting the public revenue, I feel justified in briefly stating the grounds of my dissent.

The corporation tax is imposed under the terms of the

law upon every corporation organized for profit, having a capital stock represented by shares and engaged in business in any State. Every such corporation is subject to a special excise tax with respect to the carrying on or doing of business, equivalent to one per cent. upon the entire net income over and above $5,000 received by it from all sources during the taxing year. This tax, it was held in 220 U. S., was constitutionally imposed, and rests upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organization. As was said in that case, doing business is a very comprehensive term, embracing about everything in which a person can be employed, and the definition of business as "that which occupies the time, attention and labor of men for the purpose of a livelihood or profit" was adopted and approved. As is said in the majority opinion, the precise question in this case is, Was the Minehill Company doing business in the sense in which the term is employed in the law or had it gone out of business in such substantial sense that it was no longer subject to the law?

I do not care to restate the facts which are developed fully in the majority opinion. It therein appears that the Minehill Company, while it has leased its railroad for a term of years, still maintains corporate organization, keeps an office and an office force and collects the rentals from the lessee company and distributes the sums among its shareholders. It has also agreed to keep up its corporate organization, and, if necessary, to use its corporate powers for the benefit of the lessee. And its activities do not stop here. The affidavit in defense filed by the collector, which I understand the Pennsylvania practice takes as true, shows that the company receives annually sums of money as interest on deposits and maintains a contingent fund from which it also receives annual sums as dividends. The return discloses that the amount of dividends re-

ceived for the year ending December 31, 1909, as interest on deposits and from its contingent fund was $24,471.07. The nature and amount of the investments are not specified in the record, but they must be very considerable, in view of the annual income derived.

We are therefore brought to the direct question, Is a live corporation which, though it has leased its railroad property for a term of years, maintains and has agreed to maintain its corporate organization, collects and distributes an annual rental of $252,612, keeps and maintains an office and an office force at large expense, deposits money upon interest and receives and distributes the earnings thereof, invests a large fund which, together with interest on deposits, yields over $24,000 a year, doing business within the meaning of the Corporation Tax Act? The amount of business done is utterly immaterial. The doing of any business with the advantages which inhere in corporate organization brings the corporation within the terms of the act. Such was the ruling in the *Flint Case,* after full consideration by this court of the terms and scope of the law.

It is said, however, that this case is controlled by the ruling in the *Zonne Case,* which was decided at the same time as the *Flint Case,* 220 U. S. 187. It seems to me that the present case is quite unlike that one. There the corporation which owned a piece of real estate had leased it for a term of 130 years at an annual rental of $61,000 and had at the same time amended its corporate organization so as to limit its powers to the sole purpose of holding the title to the lands leased and of receiving and distributing among its stockholders the rentals that accrued under the lease and the proceeds from any disposition of the land. This was the whole extent of its activity, and the amounts derived therefrom represented its entire income. In that case the court held that the corporation had practically gone out of business and had disqualified

itself from any activity in respect thereof, and therefore did not come within the scope of the act.

In the present case the corporation has not disqualified itself from business activity. It maintains a considerable force in active employment and, entirely apart from the receipts from the railroad lease, so deposits and invests its funds as to create, in these days of low interest upon good investments, an annual income of over $24,000, as appears by its return. The amount derived from investments depends upon the exercise of judgment and the efficiency of management. If business includes everything that occupies the time, attention and labor of men for profit, it seems to me that these facts show that the Minehill Company is carrying on business in the present instance.

I am unable to agree that a corporation whose officers and agents are engaged in its behalf in selecting banks in which to deposit large sums of money, in passing upon and choosing securities in which corporate funds are to be invested, and then in distributing the interest and profits accruing therefrom among its stockholders, is not engaged in doing business in the sense that the corporation in the *Zonne Case* was not.

I think the present case is much nearer the ruling made by this court in the *Corporation Tax Cases* in the matter of the realty companies therein involved. Take, for instance, the Park Realty Company. That corporation was organized to work, develop, sell and convey real estate; to lease, exchange, hire or otherwise acquire property; to erect, alter or improve buildings; to conduct, operate, manage or lease hotels, etc. It appeared that at the time of the imposition of the tax the sole business or property owned by the Realty Company was the Hotel Leonori. It was leased for 21 years at an annual rental of $55,000. The corporation was engaged in no business, except the management and lease of that hotel property,

and was in receipt of no other income than that derived from its rental, and has no assets other than that property and the income thereof. It was held to be doing business within the meaning of the act. The Minehill Company, it seems to me, is doing more and a greater variety of business than was attributed to the Park Realty Company as the basis of the assessment upon it. Others of the realty companies held taxable in the *Corporation Tax Cases*, it seems to me, were engaged in as little business activity as is the corporation herein involved.

With deference to the majority opinion, I think the Minehill Company, upon the facts here adduced, is engaged in business and ought to be held liable to the tax.

McGOWAN, EXECUTRIX OF McGOWAN, *v.* PARISH, EXECUTRIX OF PARISH.

IN THE MATTER OF THE APPLICATION FOR ALLOWANCE OF AN APPEAL FROM A DECREE OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. —. Submitted January 13, 1913.—Decided April 14, 1913.

An appeal lies from a decree of the Court of Appeals of the District of Columbia under subd. 6 of § 250 of the Judicial Code where the construction of a law of the United States of general application was drawn in question and was considered and passed upon; and so *held* that an appeal should have been allowed in this case as § 3477, Rev. Stat., is such a statute and the case is not so frivolous as to deprive of the right of appeal allowed by § 250.

Appeal from 40 Wash. Law Rep. 726, allowed.

THE facts, which involve the construction of the provisions of § 250 of the Judicial Code regulating appeals to

this court from judgments and decrees of the Court of Appeals of the District of Columbia, are stated in the opinion.

Mr. Nathaniel Wilson and *Mr. J. J. Darlington* for the applicants.

Mr. Holmes Conrad and *Mr. Leigh Robinson* for Parish.

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

In a controversy with the United States, the executrix of Joseph W. Parish ultimately recovered a judgment for a large sum of money. *Parish* v. *MacVeagh*, 214 U. S. 124. Claiming to be entitled to a lien or liens upon the proceeds of the claim and to be the equitable owners of one-tenth of the amount awarded, because of services rendered as attorneys at law, under express contracts made with Joseph W. Parish, a suit in equity was commenced in the Supreme Court of the District of Columbia, by Jonas H. McGowan and Elijah V. Brookshire, against the executrix of Parish and the then Secretary of the Treasury and the Treasurer of the United States to enforce said alleged lien or liens. A restraining order issued, but before answer an interlocutory decree was entered by consent of the defendant executrix, by which the restraining order was dissolved and $41,000 of the sum owing by the United States to the Parish estate was collected and deposited with a trustee "to the credit of this cause and subject to the further order of this court herein, and subject to the determination by this court in this cause whether any amount, and if so what amount, is justly due the complainants, or either of them, for professional services rendered by them, or either of them, for or in respect of the matters described in the bill of complaint."

The case thereafter proceeded solely against the executrix of Parish. Soon afterwards McGowan died and his executrix was substituted. The defendant executrix answered, and the objections therein raised to the case made by the plaintiff were thus summarized by the judge before whom the case was ultimately heard:

"(1) That the plaintiffs' claims, if any, are barred by their failure to have the same passed and approved by the probate court within the time limited by the statute.

"(2) That the lien asserted by the plaintiffs is in violation of the Revised Statutes, section 3477.

"(3) That even taking the contract of McGowan as it read, he had not fulfilled its condition and is therefore entitled to nothing.

"(4) That the plaintiffs totally abandoned the prosecution of the claim and voluntarily relinquished all rights they may have had under their contracts.

"(5) That in any view of the case the plaintiffs are entitled to nothing more than the reasonable value of their services."

The section of the Revised Statutes referred to is in the margin.[1]

[1] All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.

The trial judge disposed of the case in an elaborate opinion. Considering whether the lien asserted by the plaintiff was in conflict with Rev. Stat., § 3477, it was held that all question on that subject had been waived by the consent to the interlocutory decree, which reserved only the question of indebtedness and the amount thereof. The case was deemed to be analogous to that presented in *Price* v. *Forrest*, 173 U. S. 410, 423, 424, where the scope and effect of Rev. Stat., § 3477, was considered; and it was in effect decided that the statute would not be contravened by adjudicating upon the alleged contract rights of the parties in respect to the fund on deposit. On appeal the Court of Appeals reversed the decree of the Supreme Court, and among other things explicitly decided that the contracts relied upon were repugnant to § 3477 and were absolutely void. It was, however, also held that, putting aside the question of contract lien and assuming that there was an agreement to pay a contingent fee, no lien operative upon the fund existed for such fee because the judgment for the claim against the United States had been recovered by other attorneys acting independently of the complainants. Thus reaching the conclusion that as the result of the provisions of the statute there could be no lien, and there was, moreover, none, viewing the case independently of the statute, and hence, no valid ground of equity jurisdiction, it was substantially decided that from the point of view of the alleged contract and the right to the fund asserted to arise from it the court was without power to interfere. Considering the interlocutory decree and the agreement by which it was rendered it was in effect determined that it must be treated as having been entered subject to the right of the defendant to challenge, in virtue of the statute, the existence of the alleged lien, and therefore as the result of the construction given to the statute at the instance of the defendant the interlocutory decree could have no greater effect to establish the lien asserted

than did the contract itself. Although it was thus concluded that as by virtue of the statute invoked by the defendant there was no lien and no jurisdiction, it was nevertheless decided that in view of the recitals in the answer that the agreement leading up to the interlocutory decree was equivalent to the consent by the parties that the court decide the case, not upon a question of contract or the right to a lien arising from it, since that was disposed of by the statute, but by way of *quantum meruit.* Coming to examine that question, it was held that by inaction or neglect the plaintiffs had lost their rights if any to recover on a *quantum meruit,* as the result of the inaction or neglect, as other attorneys had been employed and had recovered the judgment upon which the money had been collected. (40 Wash. Law Rep. 726.) A decree of reversal was entered and the cause was remanded, with directions to dismiss the bill. Application was then made to the Court of Appeals for the allowance of an appeal to this court "upon the ground that the construction of a law of the United States is drawn in question by the defendant." The appeal was refused, the court in a memorandum opinion, after reciting the fact of the making of the application, saying:

"The defendant relied upon section 3477, Rev. Stat., as prohibiting the lien claimed by the plaintiffs, and on that rests the contention that the construction of a law of the United States is drawn in question.

"The right to appeal is one of substance and not of mere form. The question of the validity of the lien is one that had been settled by the Supreme Court of the United States in construing section 3477, and was no longer an open one. The construction of the act could not, therefore, be drawn in question. *State of Kansas* v. *Bradley,* 26 Fed. 289; *Harris* v. *Rosenberger,* 145 Fed. 449–452.

"We are constrained to refuse the allowance of the appeal."

This application was then made. The section of the Judicial Code relied upon by the applicants reads as follows:

"SEC. 250. Any final judgment or decree of the court of appeals of the District of Columbia may be reëxamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases: . . .

"Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant."

This section came under consideration in *American Security Co.* v. *Dist. of Columbia*, 224 U. S. 491, where it was held that the words "any law of the United States" embraced only laws of the United States of general operation and did not therefore include laws of the United States local in their application to the District of Columbia. It follows that in the nature of things there exists a large class of cases which involve the construction of a law of the United States in one sense, although not the construction of such law in the sense of the statute, the line of distinction being whether the law whose construction was involved was of general application or merely local in character. The duty in every case, therefore, arises where the right to appeal under the section is invoked to ascertain whether the case substantially involves the construction of a law in the appealable sense. The fact that the court below in the nature of things must be constantly called upon to apply and enforce laws of the United States local in character admonishes us that when called upon to determine whether the right to an appeal exists, to be more than usually circumspect to see to it that the authority to review conferred in one class of cases be not permitted to embrace the other and large class of cases to which it does not extend.

Undoubtedly Rev. Stat., § 3477, is a law of the United

States of general application and its construction was drawn in question by the defendant and was considered and passed upon, and hence we think the right to appeal existed. Indeed, the court below did not rest its refusal to allow the appeal upon the theory that the construction of a statute of the United States of general operation had not been called in question by the defendant, but upon the conception that the questions concerning the construction of the statute which were raised had been so explicitly foreclosed as to exclude the possibility of allowing an appeal upon the theory that the case substantially involved a controversy concerning the construction of the statute. But in view of the difference between the trial court and the court below as to the operation and effect of the interlocutory consent decree, of the question which necessarily arose as to the effect of the statute upon the rights of the parties to make the agreement irrespective of its operation upon the United States and the application of the statute to the idiosyncrasies of the case as presented, we cannot say that the case arising on the record is of so frivolous a character as to deprive of the right of appeal which otherwise is obviously conferred by the statute.

The penalty of the bond to be given to operate as a supersedeas will be the sum of three thousand dollars.

Appeal allowed.

TEXAS & PACIFIC RAILWAY COMPANY *v.* HARVEY.

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

No. 204. Argued March 20, 1913.—Decided April 14, 1913.

In Texas, the common-law rule as to risks assumed by the employé has been qualified by statute so that the employé is relieved from giving notice of defects where a person of ordinary intelligence would have continued in service with knowledge of such defect.

Ordinarily, and unless so evident that fair-minded men could not differ in regard thereto, negligence or contributory negligence is not a question of law but of fact to be settled by the finding of the jury. *Richmond & Danville R. R. Co.* v. *Powers*, 149 U. S. 43.

In this case the court having charged that there could be no recovery if there was contributory negligence on the part of the deceased and also having specially charged that there could be no recovery if the deceased was not acting with the care of an ordinarily prudent man, there was no error.

The appellate court is not a jury and has no power to grant a new trial. That matter rests in the sound discretion of the trial court, and in a case of this kind its decision cannot be disturbed unless it appears that contributory negligence was so evident that it became a question of law requiring the court to take the case from the jury.

184 Fed. Rep. 990, affirmed.

THE facts, which involve the validity of a verdict against a railway company for damages for causing death of an employé, are stated in the the opinion.

Mr. F. H. Prendergast, with whom *Mr. W. L. Hall* was on the brief, for plaintiff in error.

Mr. Cone Johnson, *Mr. Jas. M. Edwards* and *Mr. S. P. Jones*, for defendant in error, submitted.

MR. JUSTICE DAY delivered the opinion of the court.

This case comes to this court from the Circuit Court of Appeals for the Fifth Circuit because The Texas & Pacific Railway Company is a Federal corporation. The action was brought by Amanda Harvey to recover for the death of her son, W. S. Harvey, occasioned by the negligence of the Railway Company while he was in its employ. The judgment against the Railway Company entered by the United States Circuit Court for the Eastern District of Texas, to which court the case had been removed, was affirmed by the Circuit Court of Appeals.

The Railway Company maintained a roundhouse at Marshall, Texas, which was constructed in a crescent form, having near the entrance a turntable. Numerous tracks coming from the roundhouse converged at the turntable, the narrowest point within the roundhouse being at the entrance. A number of posts, serving to support the roof, were located at the entrance to the roundhouse, and the locomotives, in going into and coming from the roundhouse, passed between such posts, a large locomotive, the testimony tends to show, passing within four or five inches of the posts. It appears that on the day of the injury one McGilvery served as hostler in and about the roundhouse; that Harvey, the deceased, was employed as a hostler's helper, the regular helper of one Rix, and that one George was also a hostler's helper regularly of one Adams, but on that day serving with McGilvery, who was taking the place of Adams in his temporary absence. It also appeared that a hostler took the place of an engineer and that it was customary for a hostler's helper to get upon an engine, to give and receive signals and for that purpose to look out of the cab window, to throw and set switches, to accompany the engine to the coal chute and water tank, to supply it with coal and water with a view to its going upon the road, and to otherwise

assist the hostler in his work; and, further, that frequently one helper would assist another helper because the appliances at the chute were heavy and difficult for one man to operate. On the day of the accident, the testimony discloses, Harvey got upon the engine and took a seat in the cab window on the left side, his hips protruding somewhat over the sill; and George took a similar position, beside Harvey and on the latter's right, on the same side of the engine. McGilvery got upon the engine on the other side, where he could not be seen by Harvey because of the boiler. All three having got upon the engine to coal and otherwise prepare it for the road, McGilvery started the engine out of the roundhouse. It had gone but a few feet when Harvey was crushed between the post and the casing of the cab window in such manner that he was fatally injured and shortly died. George, sitting in the same posture, but less exposed, passed the post unhurt.

The negligence charged is the failure of the Railway Company to provide a safe place to work and that the posts were so placed as to make it dangerous to use the locomotive in passing them. The question of the Railway Company's negligence was submitted to the jury in a charge to which no objection in this respect was taken, and the case is brought here because of the rulings made in the trial court and affirmed in the Circuit Court of Appeals concerning the defenses, on the Railway Company's behalf, of assumed risk and contributory negligence.

At the common law a servant assumes the ordinary risks of his employment, but he is not obliged to pass upon the methods chosen by his employer in discharging the latter's duty to provide suitable appliances and a safe place to work, and he does not assume the risk of the employer's negligence in performing such duty. This rule is subject to the exception that, where a defect is known to the employé or is so patent as to be readily observed by him, he cannot continue to use the defective

appliance, in the face of knowledge and without objection, without himself assuming the hazard incident to such a situation. If a defect is so plainly observable that the servant may be presumed to know its existence and he continues in the master's employment without objection, he is said to have made his election to thus continue, notwithstanding the master's neglect, and in such a case he cannot recover. *Choctaw, Oklahoma &c. R. R. Co.* v. *McDade,* 191 U. S. 64; *Schlemmer* v. *Buffalo &c. Ry. Co.,* 220 U. S. 590, 596.

In Texas, however, where this accident happened, the rule of assumed risk has been qualified by statute. The statute of April 24, 1905, Gen. Laws 1905, c. 163, p. 386, is as follows:

"That in any suit against a person, corporation or receiver operating a railroad or street railway for damages for the death or personal injury of an employé or servant, caused by the wrong or negligence of such person, corporation or receiver, the plea of assumed risk of the deceased or injured employé where the ground of the plea is knowledge or means of knowledge of the defect and danger which caused the injury or death shall not be available in the following cases.

* * * * * * * *

"Second. Where a person of ordinary care would have continued in the service with the knowledge of the defect and danger and in such case it shall not be necessary that the servant or employé give notice of the defect as provided in subdivision 1 hereof."

The above statute was construed in *Houston & Texas Central R. R. Co.* v. *Alexander,* 102 Texas, 497. In that case the Supreme Court of Texas held that the effect of the act was "to deny to the railroad company the defense of assumed risk in case 'the defect or danger' which caused the injury was such that a person of ordinary prudence

under like circumstances 'would have continued in the service.'" In concluding its discussion of the statute the court said (p. 505):

"The purpose of the law under consideration was to secure the servant against the injustice of being denied reparation for injuries which he received while in the faithful performance of his duties and arising out of the circumstances and conditions over which he could not possibly have control, and under circumstances which would authorize him in the exercise of ordinary care to continue in the service by using the defective machinery or implements."

This view of the statute was given in the charge of the trial court in the present case, and the jury was also instructed as follows:

"Then on the question of assumed risk only, you will determine whether or not a man of ordinary prudence and caution would have continued in the employ of the defendant knowing the position of the post and the circumstances there—that is if that post was too close to the track, it was open and visible to anybody using the track, and its proximity to the track could be seen. The question then is, whether or not under subdivision two of this act a person of ordinary care would have continued in the service with the knowledge of the defect and danger. If you find from the evidence that the post was too close to the track and that the danger was obvious, then you will determine whether or not Mr. Harvey in continuing in the employ of the defendant, exercised the care that a person of ordinary prudence would have exercised under the circumstances—that is, whether a person of ordinary prudence would have continued in the service. If you find that a person of ordinary care would have continued in the service under those circumstances, then you are charged that he would not assume the risk of injury. But, if you find from the evidence that a person of or-

dinary care would not have continued in the service of the defendant, then you are charged that he would assume the risk of injury, and could not recover. That is a question for you to determine from all the evidence."

On the branch of the case dealing with assumption of risk we think the charge of the trial court was as favorable to the Railroad Company as it could properly have been under the statute. If the doctrine of assumed risk applied to this case, it was because the alleged defect was so palpable and visible that Harvey was presumed to know of it, although there was no direct proof upon that subject, and, by continuing to work, to have taken upon himself the hazard of injury from that source. The Texas statute, as we have said, qualified the rule of assumed risk by limiting it to cases where a man of ordinary prudence would not continue to work with such knowledge, real or imputed.

The question principally argued concerns the alleged contributory negligence of the deceased under the circumstances shown. It has often been held in this court that ordinarily negligence or contributory negligence is not a question of law but of fact, to be settled by the finding of the jury. Where there is uncertainty as to the existence of negligence or contributory negligence, whether such uncertainty arises from a conflict of testimony or because, the facts being undisputed, fairminded men might honestly draw different conclusions therefrom, the question is not one of law. *Richmond & Danville Railroad Co.* v. *Powers*, 149 U. S. 43, 45, and cases there cited.

The charge of the court as to contributory negligence was distinctly and clearly that the plaintiff could not recover if the negligence of the deceased contributed to the injury resulting in his death, and at the close of the charge the court gave a special request, made by the defendant, in which the jury was again told that the plaintiff could not recover if Harvey at the time was not acting with

the care of an ordinarily prudent man when he protruded his hips beyond the window in the manner stated.

There is little dispute as to the facts in this case. We have stated them as the evidence tends to show them. Can it be said that the inference of negligence is so plain that all fairminded men would be compelled to that conclusion upon a consideration of the facts? The appellate court is not a jury for the trial of a case, nor do we have the powers of a court to grant a new trial, which in the Federal practice is a matter resting in the sound discretion of the trial court. The question and the sole question is, Was the contributory negligence so evident, applying the rules we have already stated, that it became a question of law requiring the court to take the case from the jury by direction to return a verdict for the Railway Company because of the contributory negligence of the deceased? We are not prepared to answer this question in the affirmative. Under all the circumstances, as we have related them, we cannot say, as an appellate court, that the trial court was wrong in leaving the question to the jury under the fair and full instructions given.

The other errors assigned concern the requests of the defendant below for a peremptory instruction in its favor because Harvey had placed himself in the window where none of his duties required him to be; but the record discloses that it was customary for a hostler's helper to get upon an engine and to look out of the cab window for the reasons we have stated, and for one helper to lend aid to another. We do not think that the testimony shows that Harvey was not in the line of his duties when he got upon the engine or was a mere volunteer in going to help George in his work under the circumstances.

We find no error in the record requiring the reversal of the judgment of the Circuit Court of Appeals, and it is therefore

Affirmed.

CONSOLIDATED TURNPIKE COMPANY *v.* NORFOLK & OCEAN VIEW RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 152. Argued January 28, 29, 1913.—Decided April 14, 1913.

Under § 237 of the Judicial Code, as under § 709, Rev. Stat., in order to give this court jurisdiction to review the judgment of the state court it must appear that some Federal right, privilege or immunity was specially set up in the state court, passed on and denied.

While just compensation for private property taken for public use is an essential element of due process of law under the Fourteenth Amendment, the question of whether every element of compensation was allowed by the state court cannot be reviewed in this court except as based on claims specially set up in and denied by that court.

Where there is an equal right to compensation under the state constitution as under the Fourteenth Amendment, a mere demand for just compensation not specifically made under Federal right does not raise a Federal question.

An exception to the report of Commissioners on the ground that their interpretation of the state statute of eminent domain violates a specified clause of the Federal Constitution does not give this court the right to review the judgment on the ground that other rights of the plaintiff in error under the Constitution have been violated.

It is too late to raise the Federal question for the first time in a petition for rehearing after judgment of the state court of last resort unless the record clearly shows that the state court actually entertains the petition and decides the question.

Where the state court denies a petition for rehearing, setting up a Federal question for the first time, without opinion, it does not pass on the Federal question even though it states that the petition has been maturely considered. *Forbes* v. *State Council*, 216 U. S. 396.

While a certificate of the state court can make more definite and certain that which is insufficiently shown in the record, it cannot import the question into the record and in itself confer jurisdiction on this court to review the judgment.

Writ of error to review 111 Virginia, 131, dismissed.

CERTAIN facts essential to the presentation of the questions of law upon which the judgment must turn will be preliminarily stated.

The Consolidated Turnpike Company, a corporation of the State of Virginia, acquired and united two or more toll roads, extending from Norfolk to Ocean View, on the seashore. The land acquired was somewhat more than was needed for a turnpike and so the turnpike company, by warranty deed, conveyed a strip 18 to 25 feet wide to the Bay Shore Terminal Company, also a Virginia corporation, upon which the latter company constructed a line of electric railway, with the necessary power houses and stations. This conveyance was made subject to two prior mortgages. These mortgages were for the purpose of securing bonds, and the plaintiff in error Taylor is trustee in both, and the plaintiff in error Depue a holder of some of the bonds.

The Bay Shore Company in time became insolvent, and a creditor's bill was filed in the Circuit Court of the United States at Norfolk, and its road and assets of every kind placed in the hands of a receiver. In that proceeding it appeared that its property was encumbered by the two mortgages before referred to and other liens. To clear the title before sale the Circuit Court directed its receiver to file a proper proceeding in a court of the State for the purpose of condemning any adverse title and all outstanding claims or liens against the land occupied by its tracks and appliances. Such a proceeding was accordingly filed, and Taylor, as trustee under the two deeds in trust, was made a defendant, together with certain others claiming other interests or liens. Depue, as a holder of bonds secured by the deeds in trust, intervened in behalf of himself as a beneficiary. The final decree in that proceeding is the decree here under review. Pending the condemnation proceedings, the property of the Bay Shore Terminal Company was sold under a decree made in the

original winding up suit in the United States Circuit Court, and purchased by the defendant in error, the Norfolk and Ocean View Railway Company, and conveyed to that company, "with the benefit of and subject to all suits and proceedings which have been or may be instituted by said receiver."

Pending this condemnation proceeding, Taylor as trustee and Depue as a beneficiary, although parties to the pending condemnation case, began, in a state court, a proceeding against the turnpike company to foreclose the mortgages referred to. The Ocean View Company, as purchaser of the property of the Bay Shore Company under the decree of sale made by the Circuit Court of the United States, applied to that court by petition and supplemental bill to enjoin the foreclosure suit until the proceeding to condemn the mortgagee interest pending in another state court should be decided. It was accordingly enjoined and upon appeal by Taylor, trustee, to the Circuit Court of Appeals, the injunction decree was upheld. 162 Fed. Rep. 452.

Recurring now to the condemnation proceeding: Commissioners were appointed and directed to ascertain "a just compensation for the interest of all persons or corporations having any interest in or claim against or lien upon said land, either by deed in trust or mortgage." They were directed to report the present value of the land with and without improvements and the value thereof on May 1, 1902, the date of the conveyance of same by the Consolidated Company to the Bay Shore Company. The Commissioners' report was as follows:

"If valed as of the 1st day of May, 1902 Will be a just compensation.	$5,000.00
If valued as of the date of this report, without improvements..... Will be a just compensation.	6,200.00

For the land, with improvements	7,200.00
For the steel rails	15,000.00
For the railroad ties	1,250.00
For the poles	1,250.00
For the overhead construction	2,500.00
For the machinery in power house	25,000.00
For the buildings on Tract No. 2	5,000.00
Making a total of	$57,200.00

Will be a just compensation."

Later the report came on to be heard upon exceptions filed thereto by Depue, as representing the beneficiaries under the Taylor mortgages. Taylor, as trustee, had all along been a party, and when Depue waived and withdrew nine of his exceptions to the report Taylor joined him in such waiver of exceptions. The exceptions which remained included exceptions to the valuation reported as of May, 1902, and the valuation reported as of the date of the report, May 15, 1906.

As the report was in the alternative the question was whether that part of the report which fixed the value without improvements, or that part which fixed the value with improvements should be adopted. The trial court fixed the just compensation at $57,200, which included the value added by the railway and stations which had been placed thereon by the Bay Shore Company, the predecessor in title of the Ocean View Company, and directed the latter company to deposit that sum in bank subject to the court's order.

From this decree an appeal was taken to the Supreme Court of Appeals of Virginia, where it was held that the compensation for the mortgagee interest should have been limited to the present value of the property without improvements placed thereon by the Bay Shore Company.

Mr. Charles H. Burr for plaintiffs in error.

Mr. Henry W. Anderson, with whom *Mr. E. Randolph Williams* was on the brief, for defendant in error.

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

The case comes here under § 709, Revised Statutes, now § 237 of the new Judicial Code. It must therefore appear that some right, privilege or immunity was claimed under the Constitution, or some statute of the United States, and that the decision was against the right, privilege or immunity so claimed and specially set up by the plaintiff in error.

The error assigned here is that in permitting the condemnation of the interest of the mortgagees in the strip of land condemned without including the value of the permanent improvements placed thereon by the predecessor in title of the defendant in error, the Virginia court has authorized the taking of the property of the mortgagee plaintiff in error "without due process of law, in violation of the Constitution of the United States."

Just compensation for private property taken for public use is an essential element of due process of law as guaranteed under the Fourteenth Amendment. *C., B. & Q. R. R.* v. *Chicago*, 166 U. S. 226. The argument is that, if, therefore, just compensation required that the compensation awarded for the interest condemned should include the value of the land with improvements, and the value of such improvements be not so included, due process is lacking; that it would not in such case be a mere claim of inadequate compensation, but a denial of all compensation for an element of value actually existing as a part of the property taken. *C., B. & Q. R. R.* v. *Chicago, supra; Appleby* v. *Buffalo*, 221 U. S. 524.

Before considering whether this is a case for the application of the principle invoked, however, the preliminary question is whether any such claim or right under the Fourteenth Amendment was "specially set up" in the state court, and whether the record shows that the right so specially set up was denied?

It is contended that the right to just compensation was the whole substance of the litigation in the state court, and that this right arose under the Constitution of the United States. This latter assertion does not necessarily follow, since under the law and constitution of the State the plaintiffs in error were equally entitled to due process of law including just compensation for property taken for public purposes, and the case might well have been litigated wholly upon local law. Just such a contention was held ineffectual in *Osborne* v. *Clark*, 204 U. S. 565, 569, when it was said:

"If a case is carried through the state courts upon arguments drawn from the state constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States. *Crowell* v. *Randell*, 10 Pet. 367, 398; *Simmerman* v. *Nebraska*, 116 U. S. 54; *Hagar* v. *California*, 154 U. S. 639; *Erie Railroad* v. *Purdy*, 185 U. S. 148, 153."

The ground upon which the claim was asserted to compensation for the improvements placed upon the land by the Bay Shore Company was the common-law principle that permanent structures placed upon the realty of another by a trespasser, become the property of the owner and pass under any incumbrance created by the owner. Therefore, it was contended, if the Bay Shore Company saw fit to construct upon land subject to the deeds of trust represented by the plaintiffs in error, with no other authority than that of a deed from the mortgagor in possession, the structures placed thereon passed under the mort-

gage, and any decree condemning the land which denied compensation for the value of the land thus enhanced operates to deprive the mortgagees of a part of their security without due process of law.

This view of the law of the State was the view which the trial court accepted, upon the authority of the case of *Newport News &c. Ry.* v. *Lake*, 101 Virginia, 334. The Supreme Court of the State upon appeal (111 Virginia, 131) reversed this conclusion and held that, "where a corporation clothed with the power of eminent domain, lawfully enters into the possession of land for its purposes, and places improvements thereon, and afterwards institutes condemnation proceedings to cure a defective title, or to extinguish the lien of a deed of trust, it is not proper in ascertaining 'just compensation' for such land to take into consideration the value of such improvements.

"The commissioners in their report ascertained the value of the land, as of the date of their report, without considering the improvements, at $6,200. This sum we think should have been fixed as the just compensation for the land taken, and that the trial court erred in not so holding."

The case of *Newport News &c. Ry.* v. *Lake*, *supra*, relied upon by the trial court, was distinguished, the Supreme Court saying that in that case, "the premises had been sold under the deed of trust and the purchaser, who was the defendant in the condemnation proceedings, had recovered the premises in an action of ejectment after the improvements had been placed upon the premises by the railway company under the authority of the grantors in the deed of trust," and was therefore not limited to the value of the land as it was before the improvements.

Up to the filing of this opinion by the Supreme Court of the State no right or claim to due process of law under the Fourteenth Amendment was anywhere specially set up upon the record. Nor is there any mention of the

Constitution of the United States aside from that found in the fifteenth exception to the report of the commissioners to assess compensation. The exception referred to was in these words:

"15. Said report is also excepted to by said Arthur W. Depue on the ground that if it is held that the proper interpretation of the present statute of eminent domain is that this property can be taken and that in the measure of damages the value of the land alone is to be considered without improvements, then that such interpretation impairs the obligation of a contract within the Constitution of the United States, because it is a different interpretation from what the Court of Appeals of Virginia prior to this new statute has placed upon the statute law relative to such improvements."

At most that is a vague claim that if the Virginia Eminent Domain statute shall be construed as excluding damage for improvements, there would result a change of decision which would impair the obligation of a contract.

No question of the impairment of the obligation of a contract was decided in the trial court nor in the Supreme Court, nor is any such question assigned as error here, nor presented in argument. Upon a petition for a rehearing filed in the Supreme Court one of several grounds stated was, that a decree taking the land in question without compensation for the improvements thereon would be "a taking without due process of law in violation not only of the constitution of Virginia, but of the Fourteenth Amendment to the Constitution of the United States." This application was refused, without opinion, the judgment entry being in these words:

"The court having maturely considered the petition aforesaid, the same is denied."

The words "maturely considered" do not import any decision of the question made. Just such an entry has

been held to be no more than a refusal to rehear the case: *Forbes* v. *State Council*, 216 U. S. 396.

Nothing is better settled than that it is too late to raise a Federal question for the first time in a petition for a rehearing, after the final judgment of the state court of last resort. If, however, the state court actually entertains the petition and decides the Federal question, and this appears by the record, the requirement of § 709 that the right shall be specially set up and denied is complied with. *McCorquodale* v. *Texas*, 211 U. S. 432; *Mallett* v. *North Carolina*, 181 U. S. 589; *McMillen* v. *Mining Company*, 197 U. S. 343, 347.

Having neglected to raise any Federal question before the final judgment in the state Supreme Court, and having failed to obtain a rehearing that the question might thereby be raised and a decision obtained upon it, the plaintiffs in error have endeavored to show that in fact the Supreme Court of Virginia did rehear the case upon their petition and did decide the Federal question, therein for the first time raised, adversely, by obtaining the certificate of the Chief Justice of the court, months after the court had handed down its final opinion, that the court, "refused the said petition for a rehearing on the ground *inter alia* that the decree or decision of this court . . . did not constitute a taking of the property of the defendants in error without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and that the said defendants in error were not thereby deprived of any rights under said Amendment." This certificate was never made the order of the court and a part of the record, as in *Marvin* v. *Trout*, 199 U. S. 212, where it was held "perhaps sufficient" to show what Federal question was decided in a case where no opinion was filed. But that such a certificate can do no more than make more definite and certain that which otherwise may be insufficiently shown by the record proper is the settled

rule of this court. That in itself it cannot confer jurisdiction is too plain for controversy. *Seaboard Air Line* v. *Duvall,* 225 U. S. 477; *Home for Incurables* v. *New York,* 187 U. S. 155. At the utmost it may aid to the understanding of the record. *Gulf & Ship Island Railway* v. *Hewes,* 183 U. S. 66.

For the reasons stated, the writ of error must be

Dismissed.

SY JOC LIENG *v.* GREGORIO SY QUIA.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 177. Argued March 7, 10, 1913.—Decided April 14, 1913.

Every presumption is in favor of the validity of a marriage where the marital relations have continued uninterruptedly for over forty years without any question being raised or right asserted by anyone claiming under an earlier marriage of one of the parties until more than ten years after the death, and five years after the distribution of the property, of that party.

The validity of such a marriage should not be impugned except upon clear, strong and unequivocal proof; nor in the absence of such proof will this court reverse the judgment of the lower court sustaining its validity when attacked by those who had opportunity to do so before the death of both spouses.

16 Phil. Rep. 137, affirmed.

THE facts, which involve conflicting claims to the estate of a Chinese merchant domiciled in the Philippine Islands and of the validity of his marriage, are stated in the opinion.

Mr. Jackson H. Ralston, with whom *Mr. W. Morgan Shuster, Mr. Clement L. Bouvé, Mr. Frederick L. Siddons* and *Mr. Wm. E. Richardson* were on the brief, for appellants.

Mr. Antonio M. Opisso and *Mr. James H. Blount* for appellees.

Mr. Justice Van Devanter delivered the opinion of the court.

This appeal brings under review a decree of the Supreme Court of the Philippines in a suit involving conflicting claims to the estate of a Chinese merchant domiciled in those Islands and there known as Vicente Romero Sy Quia, who died intestate at Manila in 1894. The appellants, who were plaintiffs in the Court of First Instance, claim as descendants of a marriage between the intestate and Yap Puan Niu, a Chinese woman, said to have been contracted in 1847 at Am Thau, in the Province of Amoy, China. The appellees claim as the descendants of a marriage with Petronila Encarnacion, a Filipino woman, celebrated in 1853 at Vigan, in the Philippines. The principal question here, as in the Insular courts, is whether the proof sufficiently established the Chinese marriage. On this the Insular courts differed, the Court of First Instance finding the marriage adequately proved, and the Supreme Court, one justice dissenting, holding the other way. 16 Phil. Rep. 137. Before coming to the evidence directly addressed to this question it will be well to state the facts about which there is no dispute.

Sy Quia was born at Am Thau, China, in 1822, and went to the Philippines at the age of 12. At first he was located in Manila, but at some time before 1852 went to Vigan and entered the service of a merchant at an annual salary of 200 pesos. During that year he was converted to the Catholic faith and was baptized in the parish church. The next year he married Petronila, the banns being regularly published and the marriage publicly solemnized according to the rites of the church, as a preliminary to which he affirmed under oath, and the civil and ecclesiastical

authorities certified after inquiry, that he was then unmarried. Shortly after the marriage he and Petronila took up their permanent home in Manila. They were then without any particular property other than 5,000 pesos which she received from her mother and brought into the conjugal society. He became a merchant, and through their united efforts they accumulated real and personal property amounting at the time of his death to upwards of 600,000 pesos. They lived in a manner becoming the marital state and were universally recognized as husband and wife. Three sons and two daughters were born of the marriage. One of the daughters married and predeceased her father, leaving a son surviving. The other died after the father, leaving the mother as her only heir. Following Sy Quia's death the widow administered the estate, with the aid of the sons, until 1900, when through appropriate judicial proceedings the property was distributed among the widow, sons and grandson as the persons rightly entitled thereto. The present suit was brought in 1905, more than half a century after the marriage, and then for the first time was its validity or its good faith as to either spouse brought in question—a fact which is of particular significance, first, because Yap Puan Niu, the alleged Chinese wife, visited in Manila at the home of a brother of Sy Quia twice during the life of the latter, and, second, because two of the plaintiffs were adults living in Manila at the time of Sy Quia's death and during the eleven years intervening before the suit was brought.

There was testimony, taken by way of depositions in China, tending to show that Sy Quia returned from the Philippines to Am Thau in 1847, when he was 25 years old; that during that year he married Yap Puan Niu, the marriage being properly arranged and celebrated; that he remained at Am Thau three or four years, during which two sons were born of this marriage; that he then returned to the Philippines and Yap Puan Niu continued to reside

at Am Thau, dying there in 1891; that the four plaintiffs are the only living descendants of this marriage, two being grandsons, one a granddaughter, and one a great-grandson. Six of the witnesses in China testified directly to the marriage, and their testimony, if standing alone, would be quite persuasive of its occurrence, notwithstanding some discrepancies in their statements. But this testimony did not stand alone. It was met and contradicted by that of several Filipino witnesses, taken mostly by deposition, to the effect that they had known Sy Quia in Vigan for some years before his marriage to Petronila in 1853, and that he was living there during the period when, according to the opposing testimony, he married Yap Puan Niu and remained in China. One of these witnesses was an aged man, who testified with certainty that he was a student at Manila between 1839 and 1845 and knew Sy Quia there; that he, the witness, was married at Vigan in 1847, and that Sy Quia was living there then. Others of these witnesses gave kindred reasons for their ability to speak with precision concerning Sy Quia's presence at Vigan during the period in question. Still other witnesses gave testimony more or less corroborative of these opposing theories, but it was less direct and was also contradictory.

In addition to this conflicting testimony there was this situation, as before indicated: The Philippine marriage and the forty years of uninterrupted marital life following it were not only established but conceded. While Sy Quia lived the validity of that marriage passed unchallenged and no right was asserted under the one alleged to have occurred in China. More than this, the right of the widow and children of the Philippine marriage to the property acquired during its existence went unquestioned for eleven years after his death and for five years after the judicial distribution of the property.

In these circumstances every presumption was in favor

of the validity and good faith of the Philippine marriage, and sound reason required that it be not impugned and discredited through the alleged prior marriage save upon proof so clear, strong and unequivocal as to produce a moral conviction of the existence of that impediment. The conflicting testimony, isolatedly considered, did not measure up to this standard, and clearly it did not do so if proper regard was had for the probative force of the conduct of all the parties concerned during the many intervening years. Then, too, the lips of Sy Quia and Yap Puan Niu had been sealed by death, and this, with the long interval of time, gave unusual opportunity for the use of fabricated testimony, the untruth of which it would be difficult to expose.

Giving due effect to these considerations, we cannot say that the Supreme Court of the Philippines erred in holding that the Chinese marriage was not adequately proved. Indeed, we regard the evidence as not producing a moral conviction of the existence of that marriage, but as leaving the issue in serious doubt. The decree is accordingly

Affirmed.

REXFORD *v.* BRUNSWICK-BALKE-COLLENDER COMPANY.

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

No. 188. Argued March 14, 1913.—Decided April 14, 1913.

The disqualification under § 3 of the Court of Appeals Act of 1891 arises not only when the judge has tried or heard the whole cause in the court below, but also when he has tried or heard any question therein upon which it is the duty of the Circuit Court of Appeals to pass.

Under § 3 of the Court of Appeals Act of 1891, a judge is not disqualified from sitting in a cause because he had previously passed upon a motion which did not involve a non-waivable question of jurisdiction if the parties voluntarily and unequivocally eliminate all the questions involved in the motion from consideration by the Circuit Court of Appeals.

The time for filing a petition for removal is not essential to the jurisdiction of the Federal court, and may be the subject of waiver or estoppel.

Judges of Federal courts should avoid asking counsel if objections to the jurisdiction of the court are withdrawn, as the withdrawal of such objections to be effectual must be purely voluntary.

A decree of the Circuit Court adjudging right of possession to one of the parties but appointing a special master to take evidence as to identity of the articles, is not final but interlocutory only and therefore is not appealable.

The act of 1891 does not permit an appeal to the Circuit Court of Appeals from a judgment that does not finally dispose of the whole case.

181 Fed. Rep. 462, reversed.

THE facts, which involve the construction of the Circuit Court of Appeals Act as to disqualification of judges to sit on the trial of cases and as to what judgments are reviewable by the Circuit Court of Appeals, are stated in the opinion.

Mr. Julius C. Martin, with whom *Mr. J. H. Tucker* was on the brief, for petitioner.

Mr. James H. Merrimon, with whom *Mr. T. D. Bryson* and *Mr. S. W. Black* were on the brief, for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a suit by the owner of a large body of lands in two counties in North Carolina to cancel certain deeds under which the defendant was claiming several thousand

growing trees on the lands, to enjoin the defendant from entering on the premises and cutting or interfering with any of the trees thereon, and to recover damages for trees alleged to have been wrongfully cut and removed before the suit. The bill charged, in effect, that the deeds were utterly void; that if they were not originally void, all rights under them had been exhausted by the felling and removal of all the trees covered by them; and that, if those rights had not been thus exhausted, they had been lost by abandonment and lapse of time. The answer asserted the validity of the deeds, alleged that such cutting and removal as occurred prior to the suit was done in the lawful exercise of the rights acquired under the deeds, denied that those rights had been lost by abandonment, lapse of time or otherwise, and asserted that most of the trees covered by the deeds were still standing and the defendant was entitled to cut and remove them without any restriction in point of time. It appeared from the pleadings that the deeds had been executed twenty-four years before the suit and did not purport to cover all the trees, but only a designated number of pine and poplar trees two feet in diameter at the butt, all marked with the letter "L." After the issues were framed the Circuit Court, with the acquiescence of the parties, entered the following order:

"And it appearing to the court that the rights of the defendants in this action depend primarily on several questions of law based on documentary evidence of its title to the trees in question;

"And it further appearing to the court that it would facilitate the hearing of said cause, if such documentary evidence were offered and such preliminary question of title first disposed of by the court;

"Now, therefore, it is ordered that these questions of law and the documentary evidence bearing thereon be first presented to the court for argument and all questions

of fact in this cause be held in abeyance until said preliminary questions are disposed of by the court."

A partial hearing pursuant to that order resulted in the rendition of a decree to the effect that through the deeds in question the defendant acquired an absolute and indefeasible title in fee simple to the trees therein described, as also a right of ingress and egress for the purpose of cutting and removing them, and that under a proper construction of the deeds the defendant was not restricted to a reasonable time within which to fell and remove the trees, but was entitled to do so whenever it chose. The decree concluded: "And this cause is retained for further orders." Shortly thereafter an order was entered reciting that "there is much other proof touching the matters in issue necessary to be heard, looking to a final judgment," and appointing a special master "to take proofs of all and singular the issues herein (except the evidence in the cause heretofore heard by this court), especially to take evidence concerning the identity of certain marked trees described in the pleadings, and to report the number and identity of such trees, and to ascertain and report his findings to this court."

Without awaiting the incoming of the report of the special master or the action of the court thereon the plaintiff prayed and was allowed an appeal from the decree before described to the Circuit Court of Appeals, and the decree was there affirmed. 181 Fed. Rep. 462. The plaintiff then petitioned this court for a writ of certiorari, which was allowed.

The first question that claims our attention is, whether one of the judges who sat at the hearing in the Circuit Court of Appeals was disqualified under the statutory provision, act of March 3, 1891, 26 Stat. 826, c. 517, § 3, which declares "that no justice or judge before whom a cause or question may have been tried or heard in a District Court, or existing Circuit Court, shall sit on the trial or hearing of such cause or question in the Circuit

Court of Appeals." The facts bearing on this question are these: The suit was begun in a state court, and was removed to the Circuit Court by the defendant on the ground of diverse citizenship. The amount in controversy and the citizenship of the parties were concededly such as to admit of the removal, but the plaintiff, conceiving that the right of removal was not seasonably asserted, moved on that ground alone that the suit be remanded to the state court. The motion was denied, and the plaintiff excepted. When the cause came on for hearing in the Circuit Court of Appeals the district judge who had heard and denied the motion to remand (but had done nothing else in the case) was sitting as one of the judges of that court in virtue of an assignment under the Court of Appeals Act. Counsel for the plaintiff thereupon suggested the question whether the district judge was disqualified to sit on the hearing of the appeal, and the court inquired whether the objection to the removal would be insisted upon. Counsel for the plaintiff answered that "it would not" and that he "believed the case had been properly removed." The hearing then proceeded, the district judge sitting as one of the judges and participating in the decision, which made no mention of the objection to the removal, doubtless because it was regarded as expressly withdrawn. In the petition for certiorari and in the supporting brief the plaintiff, although admitting the above colloquy, insisted that the district judge was nevertheless disqualified.

Unless what was said by counsel for the plaintiff in that colloquy completely relieved the Circuit Court of Appeals from considering and deciding the question relating to the removal, there can be no doubt of the disqualification of the district judge. The terms of the statute, before quoted, are both direct and comprehensive. Its manifest purpose is to require that the Circuit Court of Appeals be composed in every hearing of judges none of whom will be

in the attitude of passing upon the propriety, scope or effect of any ruling of his own made in the progress of the cause in the court of first instance, and to this end the disqualification is made to arise, not only when the judge has tried or heard the whole cause in the court below, but also when he has tried or heard any question therein which it is the duty of the Circuit Court of Appeals to consider and pass upon. *American Construction Co.* v. *Jacksonville &c. Co.*, 148 U. S. 372, 387; *Moran* v. *Dillingham*, 174 U. S. 153. That the question may be easy of solution or that the parties may consent to the judge's participation in its decision can make no difference, for the sole criterion under the statute is, does the case in the Circuit Court of Appeals involve a question which the judge has tried or heard in the course of the proceedings in the court below?

Whether such a question was involved in this instance turns upon the effect to be given to the declaration of counsel for the plaintiff, made before the hearing was begun in the Circuit Court of Appeals, that the objection to the removal would not be insisted upon, because he believed the case was properly removed. If that operated to eliminate the question relating to the removal and to relieve the court from considering or deciding it, it seems plain that the statute did not apply. On the other hand, if counsel's declaration amounted only to a consent that the court as then composed might proceed to a hearing and decision of that question, it seems equally plain that the statute did apply and that the consent given was of no effect whatever. We think the former is the correct view. Whether the removal was taken within the time designated in the removal act was a question which the plaintiff could raise and insist upon or waive at his option. It was not jurisdictional in the sense that the Circuit Court or the Circuit Court of Appeals was required to notice it *sua sponte*. As was said by this court in *Powers* v. *Chesapeake*

& Ohio Railway Co., 169 U. S. 92, 98: "The existence of diverse citizenship, or other equivalent condition of jurisdiction, is fundamental; the want of it will be taken notice of by the court of its own motion, and cannot be waived by either party. *Manchester &c. Railway* v. *Swan*, 111 U. S. 379. But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is, in the words of Mr. Justice Bradley, 'but modal and formal,' and a failure to comply with it may be the subject of waiver or estoppel." (Citing cases.)

Of course, to be of any effect the withdrawal of the question which the judge has tried or heard in the lower court must be purely voluntary. The record shows that it was so in this instance, and counsel for the plaintiff has not suggested the contrary. But that our ruling may not be misapprehended, we deem it well to observe that the court should avoid such an inquiry as was made of counsel in this case, lest it be mistaken for an invitation to withdraw the question. Our ruling rests on the ground that there was no such mistake here.

With the question arising on the removal proceedings eliminated, as we think it was by counsel's declaration, there was left no ground for regarding the district judge as disqualified.

The plaintiff advances several arguments to show that the decision of the Circuit Court of Appeals should have been one of reversal, rather than of affirmance, but it will not be necessary to state or consider them. In the Federal courts an appeal, as a general rule, lies only from a final decree. It is otherwise in the exceptional instances specified in § 7 of the Court of Appeals Act as amended April 14, 1906, 34 Stat. 116, c. 1627, and in two or three similar enactments, but none of these includes the present case. What we have said of the decree of the Circuit Court shows that it was not final, but interlocutory only. It did not dispose of all the issues and was but a step to-

ward a final hearing and decree. Further proofs were yet to be taken, and not until that was done could the entire controversy presented by the pleadings be adjudicated. This was recognized by the retention of the case for further orders and by the subsequent reference to a special master to take the remaining proofs. Plainly such a decree is not appealable. If it were, the case could be taken to the appellate court in fragments by successive appeals. But this the law wisely prevents by postponing the right of appeal until there is a final decree disposing of the whole case. *Perkins* v. *Fourniquet*, 6 How. 206; *Grant* v. *Phœnix Ins. Co.*, 106 U. S. 429; *McGourkey* v. *Toledo & Ohio Ry. Co.*, 146 U. S. 536; *Covington* v. *Covington First National Bank*, 185 U. S. 270; *Ex parte National Enameling and Stamping Co.*, 201 U. S. 156.

As the Circuit Court of Appeals erred in entertaining the appeal, its decision is vacated and the case is remanded to the District Court, as successor to the Circuit Court, with directions to proceed to a final disposition of the case in regular course.

Reversed.

MICHIGAN TRUST COMPANY *v.* FERRY.

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

Nos. 200, 201. Argued March 20, 1913.—Decided April 21, 1913.

While ordinarily jurisdiction over a person is based on the power of the sovereign to seize and imprison him, it is one of the decencies of civilization that when the power exists and has been asserted at the beginning of a cause, the necessity of maintaining the physical power is dispensed with.

Under the full faith and credit clause of the Federal Constitution, if a judicial proceeding is begun with jurisdiction over the person of the party concerned, it is within the power of the State to bind that person by every subsequent order in the cause.

A State may make the whole administration of the estate a single proceeding and provide that one undertaking it within the jurisdiction shall be subject to the order of the court until the estate is closed, and that he must account for all that he recovers by order of the probate court.

Under the law of Michigan an executor who has been removed must account to the administrator *de bonis non* for all property that has come into his hands, and he is bound by a decree of the probate court in a proceeding in which he has been personally served with notice or appeared.

Courts of other jurisdictions owe great deference to what the court concerned with the case has done; the probabilities are that the local procedure follows the traditions of the place.

This court will assume that the decree of a probate court charging an executor with all the goods of the testator that had come into his possession and with waste in neglect to pay over was within its jurisdiction.

Want of power of the court making it to enforce a decree does not affect its validity, and if the court had jurisdiction at the inception of the case, courts of other States must give it full faith and credit.

Jurisdiction is power and is not affected by the insanity of one over whom the court has acquired jurisdiction, and an executor against whom a decree is entered after appearance, appointment of guardian *ad litem* and full consideration of the case at the expense of the estate, is not deprived of his property without due process of law by such decree.

175 Fed. Rep. 667, 681, reversed.

THE facts, which involve the degree of full faith and credit to be given by the courts of one State to a decree of the probate court of another State, are stated in the opinion.

Mr. Willard F. Keeney and *Mr. Charles S. Thomas*, with whom *Mr. Edward B. Critchlow*, *Mr. Henry C. Hall* and *Mr. Walter I. Lillie* were on the brief, for petitioner.

Mr. George Sutherland and *Mr. Franklin S. Richards*, with whom *Mr. Edward Stewart Ferry* was on the brief, for respondent:

No court under our system of jurisprudence has power to render a personal judgment against one who resides beyond the territorial limits of the court upon constructive service of process on him in the place of his residence and without personal service of process upon him within the jurisdiction of the court, or after his voluntary appearance. Such action is beyond the jurisdiction of the court, and any judgment so rendered is absolutely void, and therefore not protected by the full faith and credit clause of the Federal Constitution. The enforcement of such a judgment in another jurisdiction would be a deprivation of property without due process of law. *Pennoyer* v. *Neff*, 95 U. S. 714, 720; *Insurance Co.* v. *Bangs*, 103 U. S. 435; *Old Wayne Life Ass'n* v. *McDonough*, 204 U. S. 8; *D'Arcy* v. *Ketchum*, 11 How. 165, 174; *Galpin* v. *Page*, 18 Wall. 350, 368; *Brown* v. *Fletcher*, 210 U. S. 82; *Haddock* v. *Haddock*, 201 U. S. 562, 567; *Raher* v. *Raher*, 129 N. W. Rep. 494; *Judy* v. *Kelly*, 11 Illinois, 211, approved in *Lawrence* v. *Nelson*, 154 U. S. 222; *Grover & Baker Co.* v. *Radcliffe*, 137 U. S. 287.

A personal judgment is without validity if rendered by a state court in an action upon a money demand against a non-resident of the State, upon whom no personal service of process within the State was made, and who did not appear. *Goldey* v. *Morning News*, 156 U. S. 518, 521; *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100, 111; *Bigelow* v. *Old Dominion Mining Co.*, 225 U. S. 111.

In Utah a judgment in favor of an administrator *de bonis non* against the former executor is absolutely void. *Reed* v. *Hume*, 25 Utah, 248.

No court under our system of jurisprudence has power to render a decree in excess of the claim for relief demanded in the process and pleadings in the particular proceeding before it. The enforcement of such a decree would violate the due process clause of the Federal Constitution. *In re Rosser*, 101 Fed. Rep. 562; *Ex parte Lange*, 18 Wall. 163,

176; *Fenton* v. *Garlick*, 8 Johns. 194; *Monroe* v. *People*, 102 Illinois, 406; *Hanifan* v. *Needles*, 108 Illinois, 403; *Williamson* v. *Berry*, 8 How. 495, 540; *Reynolds* v. *Stockton*, 140 U. S. 254.

The probate court of Michigan is a court of limited jurisdiction. In the administration of estates of deceased persons its proceedings are *in rem* and it had no power to render a personal decree. Its decrees create no liens and cannot be enforced by execution. *Rogers* v. *Huntley*, 166 Michigan, 129; *Holbrook* v. *Cook*, 5 Michigan, 225; *Detroit L. & N. R. Co.* v. *Probate Judge*, 63 Michigan, 676; *Hilton* v. *Briggs*, 54 Michigan, 265; *Durfee* v. *Abbott*, 50 Michigan, 278, 285; *Fourniquet* v. *Perkins*, 7 How. 160, 171; *Kingsberry* v. *Hutton*, 140 Illinois, 603; Freeman on Executions (3d ed.), § 10, p. 34; *Ferris* v. *Higley*, 20 Wall. 375; *Grignon* v. *Astor*, 2 How. 319; *Schlee* v. *Darrow*, 65 Michigan, 362; *Grady* v. *Hughes*, 64 Michigan, 540; *Missionary Society* v. *Corning*, 164 Michigan, 395; *Nolan* v. *Garrison*, 156 Michigan, 397; *Wilson* v. *Hartford Fire Ins. Co.*, 164 Fed. Rep. 817.

In the absence of express statutory authority an administrator *de bonis non* cannot sue a former executor for damages for conversion. No such authority is given such an administrator by the statutes of Michigan. *Beall* v. *New Mexico*, 16 Wall. 535; *Carrick* v. *Carrick*, 23 N. J. Eq. 364; *Wilson* v. *Walker*, 109 U. S. 258; *Wilson* v. *Arrick*, 112 U. S. 83; *Reed* v. *Hume*, 25 Utah, 248; *Nolly* v. *Wilkins*, 11 Alabama, 872; *Hanifan* v. *Needles*, 108 Illinois, 403; *Ennis* v. *Smith* 14 How. 400: *Rowan* v. *Kirkpatrick*, 14 Illinois, 1, 8.

The decree of the probate court was not in favor of the Michigan Trust Company, for it was not a party to the proceeding upon which the decree was based and therefore it had no right of action upon the decree. *Louisiana Bank* v. *Whitney*, 121 U. S. 284; *Hookpayton* v. *Russell*, 10 Exch. 27; *Bigelow* v. *Old Dominion Copper Co.*,

225 U. S. 111. And see *Reynolds* v. *Stockton*, 140 U. S. 270.

As the decree of the probate court was rendered in favor of the estate of William M. Ferry, deceased, it is void, because not rendered in favor of a legal entity. *McInerey* v. *Beck*, 39 Pac. Rep. 130; Devlin on Deeds, 2d ed., § 187; *Stacy* v. *Thrasher*, 6 How. 60.

The decree also lacks the first essential element of a final judgment because it neither concludes the right of Edward P. Ferry to participate in the trust fund alleged to be owing by him to the estate of his father nor determines the extent of his participation. *Martinez* v. *Int. Banking Co.*, 220 U. S. 214; *Forgay* v. *Conrad*, 6 How. 201, 204; *Louisiana Bank* v. *Whitney*, 121 U. S. 284; *Grant* v. *Phœnix Ins. Co.*, 106 U. S. 429; *Holbrook* v. *Cook*, 5 Michigan, 229.

There is no privity between a guardian appointed in one State and a guardian appointed in another State to the same mentally incompetent person. Therefore, an action will not lie against the general guardians of Edward P. Ferry or against Edward P. Ferry personally in Utah on an alleged judgment obtained against him personally in a proceeding in Michigan in which a guardian *ad litem* attempted to act for him as executor. *Vaughn* v. *Northup*, 15 Pet. 1; *Stacy* v. *Thrasher*, 6 How. 44; *Johnson* v. *Powers*, 139 U. S. 156; *Brown* v. *Fletcher*, 210 U. S. 82; *Wilson* v. *Hartford Fire Ins. Co.*, 164 Fed. Rep. 817.

Neither the probate court in Michigan nor any other court has power to create a guardian *ad litem* for a non-resident incompetent executor. The appointment of a guardian *ad litem* can be made only where the proceeding is against an infant or incompetent, personally, or against his individual property, and then only after first having obtained proper service of process. 15 Enc. of Law, 2d ed. 2; *Chambers* v. *Jones*, 72 Illinois, 275; *Good* v. *Norley*, 28 Iowa, 188; *Frazier* v. *Parky*, 1 Swan (Tenn.), 75, 78;

Galpin v. *Page*, 18 Wall. 365; *Insurance Co.* v. *Bangs*, 103 U. S. 435.

When the defendant removed from Michigan and judicially was declared mentally incompetent by the Utah court and his person and property taken into the custody of that court under general guardianship proceedings there, his office as executor in Michigan became vacant, and the probate court of Michigan lost all jurisdiction whatever over him. It could not proceed to settle his accounts as executor, even for unadministered assets of his father's estate. Such an accounting could be had only in a suit in equity in which the defendant's general guardians in Utah would be given their day in court. *Bush* v. *Lindsey*, 44 California, 121; *Farnsworth* v. *Oliphant*, 19 Barb. (N. Y.) 30; *Chaquette* v. *Ortet*, 60 California, 594; *Re Allgier*, 65 California, 228; *Reither* v. *Murdock*, 67 Pac. Rep. 784; *Prince* v. *Towns*, 33 Fed. Rep. 161; *Holzer* v. *Thomas*, 61 Atl. Rep. 154; Comp. Laws of Michigan, 1897, §§ 650, 651, 8697.

In the instant case there is a plain and adequate remedy, and the law allows it. The residuary distributees of the estate of William M. Ferry never have been prevented from suing Edward P. Ferry in an action for an equitable accounting in Utah where he easily can be found, and where his representatives stand ready to respond to any just demand against him. *Salter* v. *Williamson*, 2 N. J. Eq. 480, 489; *Braithwaite* v. *Harvey*, Note to 27 L. R. A. 101; *Rich* v. *Bellamy*, 14 Florida, 537, 543; *Stilwell* v. *Carpenter*, 59 N. Y. 414, 425; *McNutty* v. *Hurd*, 72 N. Y. 518.

Mr. Justice Holmes delivered the opinion of the court.

These are suits brought in the Circuit Court for the District of Utah upon decrees of the Probate Court of Ottawa, Michigan. The defendant demurred to the complaints, the Circuit Court sustained the demurrers and

gave judgments for the defendant, and these judgments were affirmed by the Circuit Court of Appeals. 175 Fed. Rep. 667. *Id.* 681. 99 C. C. A. 221. *Id.* 235. A short statement of the facts alleged at great length in the complaints will be enough.

William M. Ferry died in 1867 domiciled in Ottawa County, Michigan. His will was proved, and the defendant, Edward P. Ferry, was appointed executor by the Ottawa Probate Court, qualified and entered upon his duties. In 1878 he removed to Utah and becoming incompetent was put under the guardianship of two sons, W. Mont Ferry and Edward S. Ferry, in 1892. In 1903 residuary legatees and devisees petitioned the Michigan Probate Court that the defendant be removed from his office of executor, that he be ordered to account for the unadministered residue of the estate and that the Michigan Trust Company be appointed administrator *de bonis non* with the will annexed. Notice of the petition and time and place of the hearing was given by publication and also was given to the defendant and his guardians personally in Utah. The guardians by order of the Utah court appeared and asked for the appointment of a guardian *ad litem*, which was made, and an answer and cross petition praying for affirmative relief were filed. Lawyers were retained and paid out of the defendant's estate by order of the Utah court. There were various proceedings, the end of which was that the plaintiff was appointed administrator *de bonis non*, the cross petition was denied, and it was decreed that the defendant was indebted to the estate for $1,220,473.41. The defendant being entitled to one-fourth of the above sum as residuary legatee, he was declared liable for $915,355.08 and ordered to pay it over within sixty days to the Michigan Trust Company. The defendant also had been appointed by the same court executor under his mother's will and after proceedings like those that we have described was de-

cleared liable for $16,458.81, which too he was ordered to pay to the plaintiff within sixty days.

Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute. It applies to Article IV, § 1, of the Constitution, so that if a judicial proceeding is begun with jurisdiction over the person of the party concerned it is within the power of a State to bind him by every subsequent order in the cause. *Nations* v. *Johnson*, 24 How. 195, 203, 204. This is true not only of ordinary actions but of proceedings like the present. It is within the power of a State to make the whole administration of the estate a single proceeding, to provide that one who has undertaken it within the jurisdiction shall be subject to the order of the court in the matter until the administration is closed by distribution, and, on the same principle, that he shall be required to account for and distribute all that he receives, by the order of the Probate Court.

The court below, admitting the power of the Michigan court to adjudge the true state of the account of the assets in the defendant's hands and to require him to transfer them to his successor, denied its power to adjudge him liable for assets converted to his own use and to decree that he should pay the amount from his own property. We believe that this is the law in some of the States; *United States* v. *Walker*, 109 U. S. 258; but it is no less well established in many that an executor must account for all the property that has come to his hands, and the

proceedings end with a decree that he pay over the sum with which he is chargeable either to his successor or the ultimate distributees, such a decree indeed being a condition precedent of the cumulative remedy on the bond. *Storer* v. *Storer*, 6 Massachusetts, 390, 392, 393. *Cobb* v. *Kempton*, 154 Massachusetts, 266, 269. *Murray* v. *Wood*, 144 Massachusetts, 195, 197. *Probate Court* v. *Chapin*, 31 Vermont, 373, 376. In *Beall* v. *New Mexico*, 16 Wall. 535, 540, it is recognized that some States have made it the duty of an administrator who has been displaced to account to the administrator *de bonis non*, and very many decisions to that effect are cited correctly in 2 Woerner, Adm., 2d ed., § 352, p. 748. *Vide id.*, § 536, pp. 1181, 1182.

As there can be no doubt of the power of the States to give the larger scope to an account, which indeed is not illogical in view of the fuller modern development of the notion that an executor holds all the assets in a fiduciary capacity, the only question in any case is what the State has seen fit to do. Upon this question courts of other jurisdictions owe great deference to what the court concerned has done. It is a strong thing for another tribunal to say that the local court did not know its own business under its own laws. Even if no statute or decision of the Supreme Court of the State is produced, the probability is that the local procedure follows the traditions of the place. Therefore we should feel bound to assume that the Michigan decree was not too broad, in the absence of statute or decision showing that it was wrong.

But unless and until the Supreme Court of Michigan shall decide otherwise we are of opinion that the Probate Court was right. The statutes provide for charging an executor in his account with the whole of the goods of the deceased that come to his possession and with waste in case of neglect to pay over the money in his hands or of loss to the persons interested. Liability on the bond is stated as alternative. Compiled Laws, 1897, §§ 9428,

9435. Compiled Laws, 1857, §§ 2977, 2984. It is said by the Supreme Court that money received by an administrator and unjustifiably paid out is still in his hands in contemplation of law, and that parties interested may surcharge or falsify his account, *Hall* v. *Grovier*, 25 Michigan, 428, 432, 436; and again, that the assets of an estate are not regarded as administered until they have been collected and applied as required by law or the will of the testator; until that time the jurisdiction of the Probate Court remains. *Lafferty* v. *People's Savings Bank*, 76 Michigan, 35, 50. See farther *Stevens* v. *Ottawa Probate Judge*, 156 Michigan, 526, 533, 534, arising out of this case. *In re Saier's Estate*, 158 Michigan, 170, 173. In short Michigan in a general way adopted the Massachusetts probate system, *Campau* v. *Gillett*, 1 Michigan, 416, 417, according to which assets are not administered by being converted to the executor's own use, but must be charged to him in his account. If the defendant properly was charged in his account with all that came to his hands and that was not distributed according to law, it was within the power of the Probate Court to order him to distribute that amount or to pay it to his successor in the trust. *Lafferty* v. *People's Savings Bank*, 76 Michigan, 35, 71.

It follows from what we have said that a petition to the Probate Court that the defendant be ordered to account covered all his receipts as executor and that notice of the petition was notice that the accounting would have that scope. The decree upon the account was made with full jurisdiction and apart from the insanity of the accountant could be sued upon, *Storer* v. *Storer*, 6 Massachusetts, 390; *Cobb* v. *Kempton*, 154 Massachusetts, 266, 269, and was entitled to full faith and credit elsewhere. *Fitzsimmons* v. *Johnson*, 90 Tennessee, 614, 428, 429, 433. It is true that it could not be enforced in Michigan while the defendant remained out of the State. But while the want of power to

enforce a judgment or decree may afford a reason against entertaining jurisdiction, *Giles* v. *Harris*, 189 U. S. 475, 488, it has nothing to do with the validity of a decree when made. A decree in equity against a defendant who had left the State after service upon him and had taken all his property with him would be entitled to full faith and credit where he was found. The judgment of a court 'may be complete and perfect and have full effect independent of the right to issue execution.' *Mills* v. *Duryee*, 7 Cranch, 481, 485. See *Kimball* v. *St. Louis & San Francisco Ry. Co.*, 157 Massachusetts, 7, 8.

Jurisdiction is power, and the power of the Michigan court was not affected by the insanity of Ferry. The authority of the State to remove him and to require his account to be settled at the same time remained, and therefore, subject to any restrictions that might be imposed by the Fourteenth Amendment, it was for the State to determine how he should be represented and what steps should be taken to protect his rights. As the jurisdiction extended only to the cause and not to any independent proceeding for guardianship, the orders made necessarily were orders in the cause. But we do not perceive what more could have been done to secure Ferry's rights. Still less do we see any ground for declaring the decree invalid because of the Fourteenth Amendment. The steps taken were concurred in by the only courts that had anything to say about it, the Utah court that controlled his person and the Michigan court that controlled the cause. On the whole case our opinion is that the judgment should be reversed.

Judgment reversed.

MR. JUSTICE MCKENNA and MR. JUSTICE LAMAR dissent. MR. JUSTICE VAN DEVANTER took no part in the decision.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* STEWART.

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

No. 205. Submitted March 20, 1913.—Decided April 21, 1913.

A charge that a railway is bound to use ordinary care to light its stations and approaches for the reasonable accommodation of passengers is not erroneous to the prejudice of the railway company.

The obligation of a carrier to use due care obtains not only during carriage of passengers but while they sustain that relation and are performing acts fairly attributable thereto.

Such obligation obtains where, as in this case, the passenger left the car of a train before it had started and after considerable delay, to ascertain whether it was the right train, no one apparently being in charge who could give the information.

Such an act on the part of a passenger is not an independent cause which relieves the carrier as being a new and proximate cause of the accident. *Atchison, Topeka & Santa Fe Ry.* v. *Calhoun*, 213 U. S. 1, distinguished.

183 Fed. Rep. 575, affirmed.

THE facts, which involve the liability of a common carrier for injuries sustained by a passenger, are stated in the opinion.

Mr. W. L. Hall and *Mr. E. H. Prendergast* for plaintiff in error:

By the evidence in the case there is no negligence of the defendant shown that was the proximate cause of the injury.

Even if the steps of the car were wet and slippery, that would be the direct result of the rain and not on account of any negligence of the defendant. If there was negligence on the part of the defendant, it was not the direct

cause of the injury, but plaintiff's own voluntary conduct intervened and became the efficient cause. *Santa Fe Railway* v. *Calhoun*, 213 U. S. 1; *Insurance Co.* v. *Tweed*, 7 Wall. 44 and 52; *Santa Fe* v. *Hodges*, 24 S. W. Rep. 563.

A railway company does not have to furnish assistance to passengers in alighting from the train. *Neil* v. *Kansas City Ry.*, 21 S. W. Rep. 3; 2 Shearman & Redfield on Negligence, 4th ed., § 510; *Cole* v. *German Savings Society*, 104 Fed. Rep. 113.

The negligence of defendant was as to an independent matter. Plaintiff had safely passed all the dangers that might have caused her injury which grew out of want of lights; she had successfully gone through the darkness to a place of safety and by disregarding the advice of her escort she received the injury.

While the railroad company owes to its passengers a very high degree of care, this high degree of care is imposed on the carrier during the time the passenger commits himself into the keeping of the carrier, and does not apply when a passenger's own conduct mingles with the cause of the injury, and this duty to observe a high degree of care does not apply to the mere condition of the platform and station grounds which are but a passive instrument in use by the carrier. 3 Thompson on Negligence, §§ 2937, 2945, 3054.

After the plaintiff had been seated in the car, then she was not expected to attempt to again get off in the dark, and when she was injured in the attempt to get off she cannot hold the company liable.

When the plaintiff, an intended passenger, had been safely seated in the coach, on the proper train, and was injured in attempting to leave the coach because she thought it was the wrong train, on a dark night in the rain, the want of sufficient lights on the station grounds would not be the proximate cause of her injury.

There was no necessity for plaintiff to attempt to get

off the train when she did in the dark, and she cannot recover damages for injuries received in that attempt.

When one gets on the train he is supposed to do so for the purpose of becoming a passenger, and the servants may assume that he will not desire to get off at once. So held where one person assists another on the car and the train starts before he has time to get off. See 57 Texas, 85, *Pennsylvania Co.* v. *Marion*, 27 A. & Eng. R. R. Cas. 133; 2 Woods on Railway Law, 1000; Thompson on Pas. Cor. 209, 214; *Gwyn* v. *Cincinnati R. R.*, 155 Fed. Rep. 91; *Railway* v. *Kellogg*, 94 U. S. 469.

Mr. S. P. Jones for defendants in error.

Mr. Justice Day delivered the opinion of the court.

This case was begun by Mrs. Dora E. Mayer, since deceased, to recover damages for injuries alleged to have been sustained by her because of the negligence of The Texas and Pacific Railway Company in failing to keep its station grounds at Marshall, Texas, properly lighted when Mrs. Mayer was about to take passage upon one of its trains. Judgment upon verdict in the United States Circuit Court for the Eastern District of Texas, to which the case had been removed, was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit. The case is brought here because of the fact that the Railway Company was organized as a Federal corporation.

The facts disclosed in the record tend to show that Mrs. Mayer, a woman about fifty-nine years of age, desired to travel from Marshall to New Orleans, Louisiana. For that purpose, accompanied by a young man, a relative, she proceeded to the station in the former city. The train left late at night. The night was dark and rainy. The station at Marshall has three railway tracks adjoining it. The first track, nearest to the depot, was unoccupied. Upon the second a train was standing, bound for the west,

the opposite direction to which Mrs. Mayer expected to travel. The train for New Orleans was standing upon the third track, headed toward the east, consisting of an express car, smoker, chair car and sleeper. After purchasing her ticket Mrs. Mayer and her companion proceeded toward the eastbound train on the third track, passing around the train standing nearer the station. On their way they met some one with a lantern and were told to take the train upon the third track. They entered the smoking car. There was no one in charge of the car, which was dimly lighted, and the testimony tends to show that Mrs. Mayer became apprehensive that she was upon the wrong car, finding after ten or fifteen minutes that no other person entered the coach. Her escort assured her that she was upon the right train and left her in the car, going out of the smoker with a view to ascertaining whether the chair car was open. Mrs. Mayer testified: "I became fearful that I was on the wrong coach, as no else entered the same, and I left it to find out as to whether it was the right car or not. . . . I went to the door and saw that it was all in darkness, and I wanted to go and I held on to the door frame to try to reach the steps of the car with my feet, and in reaching for them I went on too far and slipped and fell to the ground." She was severely injured.

There was testimony tending to show that the station was improperly lighted, and, as upon writ of error the facts tending to support the judgment must be considered in their most favorable aspect in that regard, we must give due weight to the testimony offered to establish that the illumination was so deficient at this point as to make it very difficult to recognize the countenance of a person more than ten or twelve feet away, and that, when the train was on the second track, as in this instance, in the vicinity where Mrs. Mayer fell, the door and steps of the car were insufficiently lighted. The court sub-

mitted the question to the jury upon a charge which left to them the issue of negligence in the failure of the Railway Company to use ordinary care to provide sufficient lights. In this respect the court told the jury:

"Upon that subject you are instructed that after the plaintiff purchased her ticket and went to the car for the purpose of taking passage for New Orleans, the relation of passenger existed between her and the defendant railroad company, and the duty of the defendant to her was that of exercising ordinary care in having proper lights for the guidance of those desiring to take passage on its train, or, if necessary [ity] demanded it, to get off the train. By ordinary care is meant that degree of care and caution that a man of ordinary prudence and ordinary caution would exercise under the same or similar circumstances. Therefore, in this case determine whether or not the defendant had provided lights such as a man of ordinary prudence and caution under the circumstances would have provided. If you find from the evidence that the railway had provided such lights, you need not pursue your inquiry further, but return a verdict for the defendant. But, if you find from the evidence that the lights that the defendant had furnished were not such as a man of ordinary care and ordinary prudence, under the circumstances would have furnished, then you are instructed to determine the further question in regard to Mrs. Mayer's injuries and how they occurred." And the court also charged the jury that if it believed that Mrs. Mayer thought that she was on the wrong train and attempted to get off the train to ascertain that fact definitely before leaving the station, her relation to the Railway Company continued to be that of a passenger.

The court further instructed the jury that if it found that the Railway Company was negligent in the respect mentioned, it should further determine whether Mrs. Mayer was guilty of contributory negligence in attempting

to alight from the car under the circumstances shown, and that to render a verdict for the plaintiff the jury must find from the evidence that the Railway Company had not used ordinary care in providing lights and that the plaintiff in attempting to descend from the car had used ordinary care under the circumstances and that her injury was solely due to the want of ordinary care upon the Railway Company's part in failing to provide proper lights.

The charge that a railway company is bound to use ordinary care to light its stations and approaches for the reasonable accommodation of passengers, so that they or those intending to become such may enter upon and depart from trains with reasonable safety, was as favorable as the defendant could ask. *Alabama G. S. Ry. Co.* v. *Coggins,* 32 C. C. A. 1; *S. C.*, 88 Fed. Rep. 455. The obligation to use due care obtains not only while the passengers are being carried on the train, but while they sustain the relation of passengers and are performing acts reasonably and fairly attributable to that relation, such as leaving the train for refreshment, for the sending of telegrams, for the taking of exercise and the like. *Alabama G. S. Ry. Co.* v. *Coggins, supra,* and cases therein cited.

We see no reason to disagree with the court below in its charge with reference to contributory negligence. In view of the fact that no one was in charge of the train and that nobody came into the car after Mrs. Mayer had been there some ten or fifteen minutes, it was not an unusual or improper thing that she, an elderly woman, under such circumstances, should wish to learn for herself whether or not she had taken the right train or car for transportation upon her intended journey.

Nor do we think there is force in the contention that, Mrs. Mayer being once safely on the train, her own conduct in undertaking to leave it was the intervention of a new and proximate cause of the injury, which alone resulted in her misfortune and of which she cannot complain,

for this argument, like the other, proceeds upon the assumption that, she having once safely become a passenger, the Railway Company owed her no further duty. As we have said, Mrs. Mayer's conduct, because of her anxiety and desire to be sure that she was upon the right train, did not, in our view, of itself absolve the Railway Company from its duty to her as a passenger. True it is that a new cause, sufficient to produce the injury, may, after the negligence which is the basis of recovery has occurred, intervene under such circumstances as to relieve from liability the one responsible for the original wrong. In such cases, however, there must be the intervention of a new and independent cause between the wrong and the injury. *Milwaukee & St. P. Railway Co.* v. *Kellogg*, 94 U. S. 469, 475. The doctrine finds apt illustration in the case of *Atchison, Topeka & Santa Fe Ry. Co.* v. *Calhoun*, 213 U. S. 1, where a child had been safely handed to a person standing on the depot platform at which the passenger with the child wished to alight; the train started, and the third person attempted to place the child back upon the train while in motion. The child was severely injured. It appeared, it will be observed, that the child had been safely deposited at the station and that the act of the third person in trying to put the child upon the train was the intervening cause which rendered the negligence in failing to stop the train or to assist the child therefrom at the proper station no longer a proper ground of recovery. Assuming, as we think we must, that Mrs. Mayer was acting within her rights as a passenger in undertaking to assure herself that she was upon the right train, we think the mere fact that she proceeded in the manner stated was not of itself the intervention of another and independent cause itself productive of the injury.

Upon the whole record, we find no reason to reverse the judgment and it is therefore

Affirmed.

SLOCUM *v.* NEW YORK LIFE INSURANCE CO.

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

No. 20. Argued April 26, 1912.—Decided April 21, 1913.

Where a life insurance policy plainly provides for payment of the stipulated premium within a specified period of grace after the due day and as plainly excludes any idea of partial payments distributed between the premium dates, the insured gains nothing by giving an agent a portion of the premium in the absence of authority given him by the company to accept it.

One dealing with an agent knowing that his authority is limited and that his acts transcend the limits cannot hold the principal.

Where there is a method for extending payment of premiums which is known to the insured, who also knows that the agent has no power to extend on any other terms, the insured takes nothing by an attempt to extend in a different manner in which an element of substance in the prescribed method is omitted.

The temporary retention by an insurance company of a partial payment of a premium subject to the direction of the insured, *held*, under the circumstances of this case, not to constitute a waiver of full and timely payment.

The Federal courts cannot follow state statutes or practice in opposition to a provision of the Federal Constitution.

While the Seventh Amendment is not applicable to proceedings in the courts of the several States, it is controlling in the Federal courts, and, although under the practice of the State a judgment may be entered on the evidence *non obstante veredicto*, the Federal court may not do so but must order a new trial where the evidence does not sustain the verdict.

The Constitution as originally adopted conferred upon this court appellate jurisdiction both as to law and fact subject to exceptions and regulations prescribed by Congress; but this, as well as the jurisdiction of the other Federal courts, was subsequently restricted by the Seventh Amendment so far as actions at law are concerned.

The power of a Federal court to reëxamine issues of fact tried by a jury

must under the Seventh Amendment be tested by the rules of the common law.

Under the rules of the common law an appellate court may set aside a verdict for error of law in the proceedings and order a new trial but it may not itself determine the issues of fact.

Under the rules of the common law when the court sets aside a verdict there arises the same right of trial by jury as in the first instance.

In the trial by jury, the right to which is secured by the Seventh Amendment, both the court and the jury are essential factors.

Whether the facts are difficult or easy of ascertainment is immaterial, the guaranty of the Seventh Amendment operates to require the issues to be settled by the verdict of a jury unless the right thereto be waived.

The rules of the common law in respect to demurrers to evidence and non-suits furnish no warrant for a Federal court setting aside a verdict and rendering judgment on the evidence without a new trial.

Nothing in *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, or *Coughran* v. *Bigelow*, 164 U. S. 301, tends to show that a Federal court has power to reëxamine, otherwise than according to the rules of the common law, issues of fact which have been determined by the verdict of a jury.

The terms of the Seventh Amendment and the circumstances of its adoption show that one of its purposes was to require adherence to the rule of the common law that a verdict cannot be disturbed for an error of law occurring on the trial without awarding a new trial.

The right to a new trial on the vacation of a favorable verdict in a case of this nature is a matter of substance and not of form.

In this case the Circuit Court of Appeals properly reversed a judgment on a general verdict for the plaintiff on the ground that the defendant's request for a directed verdict should have been granted by the trial court; but, under the Seventh Amendment, the only course was to order a new trial, and as the judgment of the Circuit Court of Appeals directing a judgment to be entered for defendant notwithstanding the verdict for the plaintiff violated that amendment, the action of the Circuit Court of Appeals is modified by substituting for such direction a direction for a new trial.

177 Fed. Rep. 842, reversed.

THE facts, which involve the construction of a life insurance policy and whether it had expired by reason of non-payment of premium and also the power of the Cir-

cuit Court of Appeals under the Seventh Amendment to reverse a judgment entered on a verdict of a jury and direct judgment for the other party, in conformity with a state practice, are stated in the opinion.

Mr. George E. Shaw, with whom *Mr. Daniel B. Henderson* was on the brief, for petitioner.

Mr. James H. McIntosh, with whom *Mr. George B. Gordon* was on the brief, for respondent.

Mr. Justice Van Devanter delivered the opinion of the court.

This was an action in the Circuit Court for the Western District of Pennsylvania on a policy of insurance on the life of Alexander W. Slocum. The policy was for $20,000, was an ordinary life contract on the 20-year accumulation plan, was payable to the executors, administrators or assigns of the insured, became effective November 27, 1899, and called for the payment of a premium of $579.60 on each anniversary of that date. It made provision for interest-bearing loans by the company to the insured on terms stated, and also contained the following stipulations:

"*This policy is automatically non-forfeitable from date of issue, as follows:*

"First. If any premium is not duly paid, and if there is no indebtedness to the Company, this policy will be endorsed for the amount of paid-up insurance specified in the table on the second page hereof, on written request therefor within six months from the date to which premiums were duly paid. If no such request is made, the insurance will automatically continue from said date for $20,000 for the term specified in said table and no longer.

"Second. If any premium or interest is not duly paid,

and if there is an indebtedness to the Company, this policy will be endorsed for such amount of paid-up insurance as any excess of the reserve held by the Company over such indebtedness will purchase according to the Company's present published table of single premiums, on written request therefor within six months from the date to which premiums were duly paid. If no such request for paid-up insurance is made, the net amount that would have been payable as a death claim on the date to which premiums were duly paid will automatically continue as term insurance from such date, for such time as said excess of the reserve will purchase according to the Company's present published table of single premiums for term insurance, and no longer.

"*Grace in Payment of Premiums.*—A grace of one month, during which the policy remains in full force, will be allowed in payment of all premiums except the first, subject to an interest charge at the rate of five per cent. per annum.

"*General Provisions.*—(1) Only the President, a Vice-President, the Actuary or the Secretary has power in behalf of the Company to make or modify this or any contract of insurance or to extend the time for paying any premium, and the Company shall not be bound by any promise or representation heretofore or hereafter given by any person other than the above. (2) Premiums are due and payable at the Home Office, unless otherwise agreed in writing, but may be paid to an agent producing receipts signed by one of the above-named officers and countersigned by the agent. If any premium is not paid on or before the day when due, or within the month of grace, the liability of the Company shall be only as hereinbefore provided for such case."

The insured died December 31, 1907, and the action was brought by his executrix. In the plaintiff's statement of claim recovery was sought upon two grounds: First, that

all premiums prior to the one of November 27, 1907, had been duly paid; that the premium of that date had been adequately adjusted on December 27, 1907, the last day of grace, by an agreement between the insured's wife, acting in his behalf, and a duly authorized agent of the company, whereby the wife made, and the agent accepted, a payment of $264.20, which was to carry the policy along until May 27, 1908, and whereby the agent was to accept from the insured a "blue note" for $434.00, payable May 27, 1908, as covering the balance of the premium; and that the company had adopted and confirmed the acts of its agent in that regard; second, that, independently of the adjustment of that premium, the company on November 27, 1907, held a reserve on the policy sufficiently exceeding any indebtedness of the insured to the company to continue the policy in force, under the latter part of the automatic non-forfeiture provision before quoted, beyond the date of his death, and that in consequence of this the policy was in full force when he died. The company entered a plea of non-assumpsit and also filed an affidavit of defense denying the alleged adjustment of the premium of November 27, 1907, as also the existence of any reserve on the policy in excess of the indebtedness of the insured to the company, and otherwise adequately setting up the defenses presently to be noticed. The issues so presented were tried before the court and a jury. At the conclusion of all the evidence, the defendant requested the court to direct a verdict in its favor, which the court declined to do, and the company excepted. A general verdict for the plaintiff was returned, assessing the recovery at $18,224.02, which sum was ascertained by deducting from the amount of the policy a loan of $2,360.00 from the company to the insured and $434.00, the amount of the intended blue note, and then allowing interest on the remainder from the date when proofs of death were submitted to the company to the date of the verdict.

The company moved for judgment in its favor on the evidence notwithstanding the verdict, but the motion was denied, the company excepting, and judgment was entered for the plaintiff. A bill of exceptions, embodying all the evidence with the rulings and exceptions, was seasonably presented and allowed, and the case was taken on writ of error to the Circuit Court of Appeals, where error was assigned on the refusal to direct a verdict for the defendant and on the denial of the motion for judgment notwithstanding the verdict. That court reversed the judgment with a direction to sustain the latter motion, on the ground that the evidence did not legally admit of the conclusion that the policy was a subsisting contract of insurance at the date of the insured's death. 177 Fed. Rep. 842. A writ of *certiorari* then brought the case here.

The questions now to be considered are, first, whether the Circuit Court of Appeals erred in reversing the judgment, and, second, if it did not err in that regard, whether it should have awarded a new trial instead of directing a judgment for the defendant on the evidence notwithstanding the verdict for the plaintiff.

As a preliminary to the consideration of the first question it may be well to repeat what this court often has said, that when, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party. *Randall* v. *Baltimore & Ohio Railroad Co.*, 109 U. S. 478; *Delaware &c. Railroad Co.* v. *Converse*, 139 U. S. 469; *Southern Pacific Co.* v. *Pool*, 160 U. S. 438; *Patton* v. *Texas & Pacific Railway Co.*, 179 U. S. 658. The recognized mode of invoking the application of this rule is by preferring, at the conclusion of the evidence, a request for

a directed verdict, and the ruling on such a request is subject to reëxamination and approval or disapproval on writ of error in like circumstances and in like manner as are other rulings in matter of law during the course of the trial.

The case made by the evidence, in that view of it which is most favorable to the plaintiff, was as follows:

The plaintiff's right to recover if the policy was a subsisting contract of insurance at the date of the insured's death, and the latter's compliance with the terms and conditions of the policy other than the payment of the premium of November 27, 1907, were conceded. The month of grace allowed for the payment of that premium expired four days before the insured died. He had been seasonably and regularly notified of the time when the premium would fall due and of the consequences which would follow a default in its payment. But it had not been paid or adjusted, unless a payment or adjustment was effected by the negotiations and transactions presently to be recited.

When the premium fell due the insured was indebted to the company in the sum of $2,360.00 for money theretofore borrowed under the policy, and that sum represented the full amount of the reserve on the policy. If there had been no loan the automatic non-forfeiture provision before quoted and the reserve would have entitled the insured, if he so elected, to a paid-up insurance of $4,000.00 for the full period of his life, and in the absence of such an election would have operated to continue the policy in force for the full sum of $20,000.00 for a period of seven years and seven months, without payment of further premiums. But as the insured had borrowed the full amount of the reserve, there was no excess applicable to a continuance of the insurance in either mode. Thus the policy expired according to its own terms before the death of the insured, unless a pay-

ment or adjustment of the premium of November 27, 1907, was effected in the manner already suggested.

While the policy provided that only the president, a vice-president, the actuary or the secretary of the company had power in its behalf to modify the terms of that or any other policy or to extend the time for paying any premium, the company had qualified this provision by adopting a plan of adjusting the payment of premiums whereby its agents were authorized to accept from an insured less than the full amount in cash if accompanied by a "blue note" for the balance. Notes of this type were distributed by the company and contained stipulations upon which its consent to the adjustment was conditioned and to which the insured would necessarily assent by signing the note. The agent at Pittsburgh, to whom the earlier premiums on this policy were paid, was authorized to make adjustments conformably to this plan, but, like other agents, he could not accept a partial payment or grant an extension of time for the balance unless the blue note was given, nor, so far as appeared, had anything been done which was calculated to engender the belief that he could do so. He repeatedly had accepted payment in cash of part of a premium and extended the time for paying the remainder, but this was done only where the policy holder had given a note of the prescribed type embodying the terms on which the company's assent depended. The practice in this regard was known to the insured and his wife, for they had secured three or four such adjustments in connection with this policy before 1907, the insured being required in each instance to execute such a note.

On the day before the premium of November 27, 1907, fell due, the wife of the insured, acting in his behalf, called at the agent's office and made inquiry respecting the easiest method of adjusting the premium, explaining at the time that the insured was short of ready money. The

agent suggested two possible methods and outlined them upon memoranda which she took away to show to the insured. The first method has no bearing here. "By the other method," as is said in the brief for the plaintiff, "it was represented that if she [meaning the insured] paid $264.20 in cash and gave a blue-note contract for $434.00, payable in six months, the insurance would be continued for a period of six months, and if the note was paid when due, the insurance would be continued for the remainder of the year." The aggregate of these sums represented the premium on the policy and the interest on the loan, settlement of both being essential to a continuance of the policy. On the last day of grace, December 27, 1907, the wife returned to the agent's office with a check for $264.20, payable to her order and by her endorsed to the company. Of what then occurred she testified: "I gave him [the agent] the check for $264.20, and he handed me the blue note and another paper in an envelope, and he said that the note must be signed, and I must return it. I told him Mr. Slocum was ill, and it might be several days before I could send it back, and he said that would be all right, 'Mail it as soon as you can.'" She took the blue note home with her intending to get it signed, but found the insured too ill to give it attention. He died four days later without having signed it. The agent did not give a receipt for the $264.20, nor was one requested. In 1905 that year's premium was adjusted by a partial payment in cash and the giving of a blue note for the balance, and when the adjustment was completed the agent gave a single receipt for both the cash and the note and in the receipt recited the terms upon which the adjustment was made, as was done in the note.

In 1906 the insured had notified the company that his postoffice address was Houston, Texas, and that fact carried matters pertaining to his policy to the company's St. Louis agency. It was from that agency that he

received the notice calling for the payment of the premium of November 27, 1907. On January 6, 1908, the agent at St. Louis, not knowing of the insured's death, wrote to him acknowledging receipt of the check for $264.20 handed to the agent at Pittsburgh (the letter inaccurately stated the amount) and saying: "Pending the return by you of the note contract, properly signed, your remittance is held subject to your order." The check was then deposited in a St. Louis bank to the credit of the company, and the latter carried the amount in a suspense account awaiting directions from the insured.

Subsequently the plaintiff tendered to the company the amount for which the blue note was to have been given, and the company tendered to the plaintiff the amount of the check, both tenders being refused.

The material portion of the agreement set forth in the proposed blue note, which was to have been signed by the insured and returned to the company's agent, is as follows:

"This note is accepted by said Company at the request of the maker, together with One hundred forty-five and 60–100 Dollars [1] in cash, on the following express agreement: That although no part of the premium due on the 27th day of Nov. 1907, under Policy No. 3,011,158 issued by said Company on the life of A. W. Slocum has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said Company as payment of said premium, and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the day it becomes due, it shall thereupon automatically cease to be a claim against the maker, and

[1] The remaining portion of the check represented interest on the loan made under the policy.

said Company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made."

The Circuit Court of Appeals was of opinion that the evidence conclusively established that there was no excess of reserve on the policy applicable to a continuance of the insurance after the premium of November 27, 1907, fell due, and we fully concur in that conclusion. Indeed, its correctness is practically conceded by counsel for the plaintiff. That court also was of opinion that the evidence afforded no basis for a finding that that premium was either paid or adjusted. The accuracy of that conclusion is challenged, but we are constrained to give it our approval for the following reasons:

1. The policy plainly provided for the payment of the stipulated premium annually within the month of grace following the due day, and as plainly excluded any idea that payment could be made in installments distributed through the year. Concededly, there was no payment of the whole of the premium in question, and as a partial payment was not within the contemplation of the policy, nothing was gained by handing to the agent the check for $264.20, unless what he did in that connection operated as a waiver of full and timely payment.

2. One who deals with an agent, knowing that he is clothed with a circumscribed authority and that his act transcends his powers, cannot hold his principal; and this is true whether the agent is a general or a special one, for a principal may limit the authority of one as well as of the other.

3. Under the terms of the policy, as qualified by the practice of the company, the agent was without authority to waive full and timely payment of the premium, save as he could adjust the payment conformably to the blue-note plan. His authority turned upon the giving of the note,

which was a matter of real substance, and not of mere form, as is shown by the terms of the note, before quoted. See *White* v. *New York Life Insurance Co.*, 200 Massachusetts, 510. Without it he could neither accept a partial payment nor extend the time for paying the balance. No note was given, and so no waiver resulted from his acts. The insured and his wife could not reasonably have understood it otherwise, for they knew the terms of the policy and were familiar with the qualifying practice.

4. There was no evidence that the company itself treated the check as a partial payment or otherwise ratified the agent's acts. Indeed, the only permissible inference from the evidence was to the contrary.

We are accordingly of opinion that the evidence did not admit of a finding that the policy was in force at the time of the insured's death, and therefore that the Circuit Court should have granted the company's request that a verdict in its favor be directed. As that request was denied, the Circuit Court of Appeals did not err in reversing the judgment.

It becomes necessary, therefore, to consider whether that court should have directed a new trial instead of a judgment on the evidence contrary to the verdict. The latter direction was given conformably to a statute of Pennsylvania, the State in which the Circuit Court was held, and to the practice thereunder in the courts of the State. The statute reads as follows:

"That whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record; whereupon it shall be the duty of the court, if it does not

grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the court in that regard. From the judgment thus entered either party may appeal to the Supreme or Superior Court, as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court." Penn. Laws 1905, p. 286, c. 198.

The real question is, whether in the direction given by the Circuit Court of Appeals there was an infraction of the Seventh Amendment to the Constitution of the United States, which declares:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any Court of the United States, than according to the rules of the common law."

That what was done may be clearly in mind it is well to repeat that, while on the trial in the Circuit Court the jury returned a general verdict for the plaintiff, the Circuit Court of Appeals on an examination of the evidence concluded that it was not sufficient to sustain the verdict, and on that ground directed a judgment for the defendant. In other words, the Circuit Court of Appeals directed a judgment for one party when the verdict was for the other, and did this on the theory, not that the judgment was required by the state of the pleadings, but that it was warranted by the evidence. It will be perceived, therefore, that the court, although practically setting the verdict aside, did not order a new trial, but assumed to pass finally upon the issues of fact presented by the pleadings and to direct a judgment accordingly. If this was an infraction of the Seventh Amendment it matters not that it was in conformity with the state statute, or with the

practice thereunder in the courts of the State, for neither the statute nor the practice could be followed in opposition to the Amendment, which, although not applicable to proceedings in the courts of the several States, is controlling in the Federal courts.

The Constitution of the United States, as originally adopted, conferred upon this court, by Article III, § 2, "appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make;" but this and the absence of any provision respecting the mode of trial in civil actions were so generally regarded as endangering the right of trial by jury as existing at common law and evoked so much criticism on that ground that the first Congress proposed to the legislatures of the several States the Seventh Amendment, which was promptly ratified. 1 Stat. 21, 97; Story on the Constitution, §§ 1763, 1768.

The adjudged cases dealing with the origin, scope and effect of the Amendment are numerous and so comprehensive that little room for original discussion remains. A reference to some of them will show its true and settled meaning and point the way to its right application here.

In *United States* v. *Wonson*, 1 Gall. 5, 20; 28 Fed. Cas. 745, 750, a case decided in 1812 and often cited with approval by this court, it was said by Mr. Justice Story, after quoting the words of the Amendment: "Beyond all question, the common law here alluded to is not the common law of any individual State, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. . . . Now, according to the rules of the common law the facts once tried by a jury are never reëxamined, unless a new trial is granted in the discretion of the court, before which the suit is depending, for good cause shown; or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a *venire facias de novo* is awarded.

This is the invariable usage settled by the decisions of ages."

In *Parsons* v. *Bedford*, 3 Pet. 433, decided in 1830, the same learned justice, speaking for this court, said (p. 446): "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. . . . One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress, and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people." And then coming to the clause, "and no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law," he continued (pp. 447, 448): "This is a prohibition to the courts of the United States to reëxamine any facts tried by a jury in any other manner. The only modes known to the common law to reëxamine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings."

In *Walker* v. *New Mexico &c. Railroad Co.*, 165 U. S. 593, 596, decided in 1897, where the Amendment was again under consideration, it was said by this court, speaking through Mr. Justice Brewer: "Its aim is not to preserve mere matters of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative. . . . Now

a general verdict embodies both the law and the facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict. The power of the court to grant a new trial if in its judgment the jury have misinterpreted the instructions as to the rules of law or misapplied them is unquestioned, as also when it appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine all questions of fact. . . ."

In *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13, decided in 1899, the subject was much considered, and, following a careful review of the prior decisions, it was said by Mr. Justice Gray, who spoke for the court: "It must therefore be taken as established, by virtue of the Seventh Amendment of the Constitution, that either party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that, when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be reëxamined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of reexamination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States."

These decisions make it plain, first, that the action of the Circuit Court of Appeals in setting aside the verdict and assuming to pass upon the issues of fact and to direct

a judgment accordingly must be tested by the rules of the common law; second, that, while under those rules that court could set aside the verdict for error of law in the proceedings in the Circuit Court and order a new trial, it could not itself determine the facts; and, third, that when the verdict was set aside there arose the same right of trial by jury as in the first instance. How, then, can it be said that there was not an infraction of the Seventh Amendment? When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only through a new trial, with the same right to a jury as before. Disregarding those rules, the Circuit Court of Appeals itself determined the facts, without a new trial. Thus, it assumed a power it did not possess and cut off the plaintiff's right to have the facts settled by the verdict of a jury.

While it is true, as before said, that the evidence produced at the trial was not sufficient to sustain a verdict for the plaintiff and that the Circuit Court erred in refusing so to instruct the jury, this does not militate against the conclusion just stated. According to the rules of the common law, such an error, like other errors of law affecting a verdict, could be corrected on writ of error only by ordering a new trial. In no other way could an objectionable verdict be avoided and full effect given to the right of trial by jury as then known and practiced. And this procedure was regarded as of real value, because, in addition to fully recognizing that right, it afforded an opportunity for adducing further evidence rightly conducing to a solution of the issues. In the posture of the case at bar the plaintiff is entitled to that opportunity, and for anything that appears in the record it may enable her to supply omissions in her own evidence, or to show inac-

curacies in that of the defendant, which will rightly entitle her to a verdict and judgment in her favor.

We do not overlook the fact that at common law there were two well-recognized instances in which the verdict could be disregarded and the case disposed of without a new trial. One was where the defendant's plea confessed the plaintiff's cause of action and set up matter in avoidance which, even if true, was insufficient in law to constitute a bar or defense; and the other was where the plaintiff's pleading, even if its allegations were true, disclosed no right of recovery. If in either instance a verdict was taken, the court nevertheless could make such disposition of the case as was required by the state of the pleadings, and this because the issues settled by the verdict were wholly immaterial. In the first instance the court's action was invoked by a motion for judgment *non obstante veredicto*, and in the latter by a motion to arrest judgment on the verdict. Thus we find it is said in Smith's Action at Law (12th ed., p. 147), a recognized authority on common law procedure: "A motion for judgment *non obstante veredicto* is one which is only made by a plaintiff. . . . It is given when, upon an examination of the whole pleadings, it appears to the court that the defendant has admitted himself to be in the wrong, and has taken issue on some point, which, though decided in his favour by the jury, still does not at all better his case. A motion 'in arrest of judgment' is the exact reverse of that for judgment *non obstante veredicto*. The applicant in the one case insists that the plaintiff is entitled to the judgment of the court, although a verdict has been found against him. In the other case, that he is not entitled to the judgment of the court, although a verdict has been delivered in his favour. Like the motion for judgment *non obstante veredicto*, that in arrest of judgment must always be grounded upon something apparent on the face of the pleadings." To the same effect are 1 Chitty on Pleading,

687; Stephen on Pleading, 96–98; *Rand* v. *Vaughan*, 1 Bing. N. C. 767; *Pim* v. *Grazebrook*, 2 C. B. 429, 444; *Schermerhorn* v. *Schermerhorn*, 5 Wend. 513; *Bellows* v. *Shannon*, 2 Hill, 86; *McFerran* v. *McFerran*, 69 Indiana, 29, 32; *Lewis* v. *Foard*, 112 N. Car. 402; *Manning* v. *City of Orleans*, 42 Nebraska, 712; *McCoy* v. *Jones*, 61 Oh. St. 119, 129. In *Bond* v. *Dustin*, 112 U. S. 604, 608, and *Van Stone* v. *Stillwell & Bierce Mfg. Co.*, 142 U. S. 128, 135, this court, recognizing that this was the extent of the common law practice, held that a motion in arrest of judgment could not be sustained for an insufficiency in the evidence, but only for a defect apparent on the face of the record proper. Thus, it will be perceived that the rules of the common law, permitting a judgment *non obstante veredicto* and the arrest of judgment on a verdict, did not embrace cases like the present, but only those in which the pleadings presented no material issue requiring a trial or verdict.

In the trial by jury, the right to which is secured by the Seventh Amendment, both the court and the jury are essential factors. To the former is committed a power of direction and superintendence, and to the latter the ultimate determination of the issues of fact. Only through the coöperation of the two, each acting within its appropriate sphere, can the constitutional right be satisfied. And so, to dispense with either or to permit one to disregard the province of the other is to impinge on that right.

This was plainly recognized in *Barney* v. *Schmeider*, 9 Wall. 248, decided in 1869. That was an action in assumpsit, in which the defendant pleaded the general issue. The trial in the Circuit Court was before a jury, and the evidence consisted of the testimony taken a few days before on another trial. This testimony was voluminous and was put in with the consent of the parties and the approbation of the court. But it was not read to the jury, because the court regarded it as necessarily

requiring a verdict for the plaintiff. In a charge briefly referring to it and explaining why it was not read, the court instructed the jury that their verdict should be for the plaintiff, and the defendant excepted. Such a verdict was returned and judgment was given on it. This court reversed the judgment, and Mr. Justice Miller, delivering the opinion, referred to the constitutional right to a trial by jury and said, *inter alia* (pp. 251, 252):

"As the defendant in this case did not waive his right to have the facts tried by a jury, it was the duty of the court to submit such facts to the jury that was sworn to try them. It is needless to say that this was not done. The statement is clear that the case was decided upon the testimony taken on a former trial, and not read before this jury, because the court had heard it in the first case, and did not deem it necessary to be heard by the jury in this case.

"It is possible to have a jury trial in which the plaintiff, having failed to offer any evidence at all, or any competent evidence, the jury finds for the defendant for that very reason. And in such case it is strictly correct, if the plaintiff does not take a non-suit, for the court to instruct the jury to find for the defendant.

"But we have never before heard of a case in which the jury were permitted, much less instructed, to find a verdict for the plaintiff on evidence of which they knew nothing except what is detailed to them in the charge of the court. It is obvious that if such a verdict can be supported here, when the very act of the court in doing this is excepted to and relied on as error, the trial by jury may be preserved in name, but will be destroyed in its essential value, and become nothing but the machinery through which the court exercises the functions of a jury without its responsibility.

"It is insisted with much ingenuity that in this case there was no disputed fact for the jury to pass upon, and

that the only issue in the case being one of law, it was proper for the court to dispose of it. If this were so, the instruction of the court might be sustained, provided the undisputed facts necessary to sustain the verdict had been submitted to the jury."

A case much in point is *Hodges* v. *Easton*, 106 U. S. 408, decided in 1882. It was an action in trover, wherein the allegations of the complaint were all put in issue by the answer. On a trial by jury in the Circuit Court a special verdict was returned consisting of responses to interrogatories specially propounded by the court but not embracing all the issues presented by the pleadings. Following the reception of the verdict the plaintiffs moved for judgment in their favor, and the defendants for a new trial on the ground that the verdict did not dispose of all the issues. After hearing these motions the court refused to grant a new trial, and gave judgment for the plaintiffs on "the special verdict of the jury, and facts conceded or not disputed upon the trial." When the case came here the defendants complained that their constitutional right to a trial by jury had been violated, and the plaintiffs insisted that the Circuit Court had but conformed to the local practice sanctioned by numerous decisions of the Supreme Court of the State where the Circuit Court was held, and that it therefore should be presumed, nothing appearing to the contrary, that the special verdict and the facts conceded or not disputed upon the trial disposed of all the issues presented by the pleadings and justified the action of the Circuit Court. Responding to these contentions this court said, speaking through Mr. Justice Harlan (pp. 411, 412):

"It is not necessary, in this opinion, to enter upon an examination of those decisions, or to consider how far the local law controls in determining either the essential requisites of a special verdict in the courts of the United States, or the conditions under which a judgment will be

presumed to have been supported by facts other than those set out in a special verdict. The difficulty we have arises from other considerations. The record discloses that the jury determined a part of the facts, while other facts, upon which the final judgment was rested, were found by the court to have been conceded or not disputed. . . . We then have a case at law, which the jury were sworn to try, determined, as to certain material facts, by the court alone, without a waiver of jury trial as to such facts. It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done was secured by the Constitution of the United States. They might have waived that right, but it could not be taken away by the court. Upon the trial, if all the facts essential to a recovery were undisputed, or if they so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury, by a peremptory instruction to find for plaintiffs, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court. The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and, itself, determine the remainder without a waiver by the defendants of a verdict by the jury. . . . It has been often said by this court that the trial by jury is a fundamental guarantee of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver. For these reasons the judgment below must be reversed."

Even more in point is *Baylis* v. *Travellers' Insurance Co.*, 113 U. S. 316, decided in 1885. It was an action on a policy of accident insurance, and on the trial before a jury in the Circuit Court the parties differed as to whether the plaintiff's evidence was sufficient to sustain a verdict in her favor, no evidence being presented by the defendant. The court directed a verdict for the plaintiff, subject to

its opinion on the sufficiency of the evidence, and the jury conformed to that direction. On further consideration, and construing the evidence in a manner deemed most favorable to the plaintiff, the court ruled that it was insufficient, because admitting of but one conclusion, namely, that the insured's death resulted from a cause not covered by the policy. Judgment was then given for the defendant notwithstanding the verdict, and the plaintiff brought the case here. The judgment was reversed, with directions to grant a new trial, for reasons stated by Mr. Justice Matthews as follows (pp. 320, 321):

'If, after the plaintiff's case had been closed, the court had directed a verdict for the defendant on the ground that the evidence, with all inferences that the jury could justifiably draw from it, was insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, it would have followed a practice sanctioned by repeated decisions of this court. *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478, and cases there cited. And, in that event, the plaintiff, having duly excepted to the ruling in a bill of exceptions, setting out all the evidence, upon a writ of error, would have been entitled to the judgment of this court, whether, as a matter of law, the ruling against him was erroneous.

"Or, if in the present case, a verdict having been taken for the plaintiff by direction of the court, subject to its opinion whether the evidence was sufficient to sustain it, the court had subsequently granted a motion on behalf of the defendant for a new trial, and set aside the verdict, on the ground of the insufficiency of the evidence, it would have followed a common practice, in respect to which error could not have been alleged, or it might, with propriety, have reserved the question, what judgment should be rendered, and in favor of what party, upon an agreed statement of facts, and afterwards rendered judgment upon its conclusions of law. But, without a waiver of

the right of trial by jury, by consent of parties, the court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue and renders judgment thereon.

"This was what was done in the present case. It may be that the conclusions of fact reached and stated by the court are correct, and, when properly ascertained, that they require such a judgment as was rendered. That is a question not before us. The plaintiff in error complains that he was entitled to have the evidence submitted to the jury, and to the benefit of such conclusions of fact as it might justifiably have drawn; a right he demanded and did not waive; and that he has been deprived of it, by the act of the court, in entering a judgment against him on its own view of the evidence, without the intervention of a jury. In this particular, we think error has been well assigned.

"The right of trial by jury in the courts of the United States is expressly secured by the Seventh Article of Amendment to the Constitution, and Congress has, by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing. Rev. Stat., §§ 648, 649.

"This constitutional right this court has always guarded with jealousy. *Elmore* v. *Grymes*, 1 Pet. 469; *De Wolf* v. *Rabaud*, 1 Pet. 476; *Castle* v. *Bullard*, 23 How. 172; *Hodges* v. *Easton*, 106 U. S. 408."

In principle, these cases are decisive of the question arising on the motion for judgment on the evidence notwithstanding the verdict. They show that it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence, and that while it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency

or conclusive character of the evidence warrants such a direction, the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact. In other words, the constitutional guaranty operates to require that the issues be settled by the verdict of a jury, unless the right thereto be waived. It is not a question of whether the facts are difficult or easy of ascertainment, but of the tribunal charged with their ascertainment, and this, we have seen, consists of the court and jury, unless there be a waiver of the latter.

But the suggestion is made that sufficient warrant for setting aside the verdict and rendering judgment on the evidence without a new trial is to be found in the rules of the common law in respect of demurrers to evidence and nonsuits. It therefore will be well to see what those rules were and whether they support the suggestion.

The leading English cases dealing with demurrers to evidence as employed at common law are *Middleton* v. *Baker*, Cro. Eliz. 752; *Wright* v. *Pindar*, Aleyn, 18; *S. C.*, Style, 34, and *Gibson* v. *Hunter*, 2 H. Bla. 187, 205. The last, which adhered to the principle of the other two, was much considered in the House of Lords, and the opinion delivered by Lord Chief Justice Eyre, who spoke for all the judges, was to the following effect: (a) A demurrer to the evidence is a proceeding whereby the court, whose province it is to answer all questions of law, is called upon to declare what the law is "upon the facts shewn in evidence," and, "in the nature of the thing, the question of law to arise out of the fact, cannot arise until the fact is ascertained." (b) Such a demurrer is permissible only when proposed by one party, joined in by the other and allowed by the court. It must contain an express and distinct admission by the demurrant of every fact which the evidence of his adversary conduces to prove, else he cannot insist that the latter join in the demurrer; and the admission, to be effective to that end, must be of the facts,

and not merely the evidence from which their existence is inferable. (c) When the matter of fact is so ascertained and shown in the demurrer, the case is deemed ripe for judgment in matter of law, and the jury properly may be discharged from giving a verdict.

This statement of the true office and use of a demurrer to evidence was both accepted and applied by this court in *Fowle* v. *Alexandria*, 11 Wheat. 320, decided in 1826. There the court below had sustained such a demurrer, which merely set forth and admitted the evidence as introduced at the trial, as well the testimony of witnesses as written documents. We excerpt the following from the opinion, which was by Mr. Justice Story (pp. 321, 322, 323):

"There is no joinder in demurrer on the record, which is probably a mere defect in the transcript, as the court proceeded to give judgment upon the demurrer in favor of the defendants. Without a joinder in demurrer, no such judgment could be properly entered; and such joinder ought not to have been required or permitted while there was any matter of fact in controversy between the parties. . . . The true and proper object of such a demurrer is to refer to the court the law arising from facts. It supposes, therefore, the facts to be already admitted and ascertained, and that nothing remains but for the court to apply the law to those facts. . . . Indeed, the case made for a demurrer to evidence, is, in many respects, like a special verdict. It is to state facts, and not merely testimony which may conduce to prove them. It is to admit whatever the jury may reasonably infer from the evidence, and not merely the circumstances which form a ground of presumption. . . . Upon examination of the case at bar, it will be at once perceived that the demurrer to evidence, tried by the principles already stated, is fatally defective. The defendants have demurred, not to facts, but to evidence of facts; not to

positive admissions, but to mere circumstances of presumption introduced on the other side."

And that this was not a new doctrine in this court is shown in *Young* v. *Black*, 7 Cranch, 565, 568, decided thirteen years before, where, in declining to disturb the action of the court below in refusing to compel a joinder in a demurrer to the evidence, it was said: "The party demurring is bound to admit as true, not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence legally may conduce to prove. It follows that it [the demurrer] ought never to be admitted where the party demurring refuses to admit the facts which the other side attempts to prove; and it would be as little justifiable where he offers contradictory evidence, or attempts to establish inconsistent propositions."

True, in *United States Bank* v. *Smith*, 11 Wheat. 171, and *Columbian Insurance Co.* v. *Catlett*, 12 Wheat. 383, 389, the rule that the demurrer should set forth the facts rather than the evidence from which they are inferable was not strictly enforced, but in each of those cases the opposite party voluntarily joined [1] in the demurrer, thereby consenting that the case be withdrawn from the jury and submitted to the court on the evidence embodied in the demurrer; so, they are without bearing here, save as the opinions contain some observations making strongly for the views expressed in *Fowle* v. *Alexandria*. Thus, in *United States Bank* v. *Smith*, the demurrer was criticised as substituting the court in the place of the jury, which, while true of the demurrer there, would not be true of one rightly drafted and allowed; and in *Columbian Insurance Co.* v. *Catlett*, it was said: "The plaintiff was not bound to have joined in the demurrer without the defendant's

[1] In *United States Bank* v. *Smith* the joinder is shown in the record, although not mentioned in the opinion. It also is shown in the report of the decision of the lower court. 1 Fed. Cas. 733.

having distinctly admitted, upon the record, every fact which the evidence introduced on his behalf conduced to prove; and that when the joinder was made, without insisting on this preliminary, the court is at liberty to draw the same inferences in favor of the plaintiff, which the jury might have drawn."

Pawling v. *United States*, 4 Cranch, 219, and *Chinoweth* v. *Haskell*, 3 Pet. 92, are also cases in which, as shown by the record, there was a voluntary joinder in the demurrer. In the former the record, after setting forth the demurrer, shows this order: "Wherefore let the jury aforesaid be discharged by the court here, by the assent of the parties, from giving any verdict."

The doctrine stated in *Gibson* v. *Hunter*, and recognized by this court in *Young* v. *Black* and *Fowle* v. *Alexandria*, has been applied not only in the lower Federal courts but in several of the state courts. *Pickel* v. *Isgrigg*, 6 Fed. Rep. 676; *Johnson* v. *United States*, 13 Fed. Cas. 868, 872; *Miller* v. *Baltimore & Ohio R. Co.*, 17 Fed. Cas. 304; *Patty* v. *Edelin*, 18 Fed. Cas. 1344; *Copeland* v. *New England Insurance Co.*, 22 Pick. 135; *Golden* v. *Knowles*, 120 Massachusetts, 336; *Dormady* v. *State Bank*, 2 Scam. 236; *Ware* v. *McQuillan*, 54 Mississippi, 703; *Ingram* v. *Jacksonville Street R. Co.*, 43 Florida, 324; *Bass* v. *Rublee*, 76 Vermont, 395, 401; *Chapize* v. *Bane*, 1 Bibb, 612; *Sawyer* v. *Fitts*, 2 Port. 9.

At common law, if on a demurrer to the evidence judgment was given for one party when it should have been for the other, the error was corrected in the appellate tribunal by directing the proper judgment, and this because the error was confined to the judgment, and did not reach the facts as ascertained and shown in the demurrer. But when the reversal was for error in allowing the demurrer, the latter necessarily went for naught, and, as there remained no ascertained facts on which to base a judgment, a new trial was deemed essential. Thus in

Gibson v. *Hunter*, *supra*, one of the questions was, whether, considering the state of the evidence and the admissions in the demurrer, the plaintiff was obliged to join in it. The question was resolved in the negative, and, as this eliminated the demurrer on which judgment had been given in the court of King's Bench, the judgment of reversal was accompanied by a direction for a new trial. And in *Fowle* v. *Alexandria*, *supra*, where this court ruled that the demurrer ought not to have been allowed, the judgment rendered thereon was reversed with a like direction. So, in the present case when the verdict was set aside there remained no ascertained facts on which a judgment might be rested, and that made a new trial necessary.

Enough has been said to make it plain, as we think, that there was nothing in the nature or operation of the demurrer to evidence at common law which has any tendency to show that issues of fact tried by a jury could be reëxamined otherwise than on a new trial.

We come, then, to the other branch of the suggestion. A nonsuit at common law was a dismissal of the plaintiff's action without an adjudication, other than the imposition of costs, and constituted no bar to another action for the same cause. Originally granted where the plaintiff made default when his presence was required, or otherwise failed to proceed in due course, it came to be applied on the trial when, although actually present, he chose, in view of the state of his evidence, not to risk an adverse verdict. But unless he assented to being nonsuited on the evidence it was essential that a verdict be taken, even although it was certain to be against him. In other words, such a nonsuit was always voluntary, and never compulsory. Mr. Starkie says of this proceeding: "The doctrine of nonsuits is founded on the ancient practice, according to which the plaintiff was bound by himself or his attorney to appear at the trial, prosecute his suit, and hear the ver-

dict; and in case, after being called, he made default, he was decreed to have abandoned his suit, and was nonsuited. This ancient practice has long been used as the medium by which the court intimates an opinion that the plaintiff has not made out a sufficient case for the consideration of the jury. The plaintiff is therefore formally called, although by himself or his counsel he has actually appeared in court. In conformity, however, with the old practice, being called, he may if he choose appear, and if he do, the case must go to the jury." Starkie Ev. 806, 4th London ed. In the course of a similar statement, Mr. Tidd says: "The plaintiff in no case is compellable to be nonsuited; and therefore, if he insist upon the matter being left to the jury, they must give in their verdict, which is general or special." 2 Tidd's Pr. 796, 1807 ed. Mr. Lilly describes the office and nature of the proceeding as follows: "Nonsuit is when a man brings a personal action, and doth not prosecute it with effect, or else upon the trial refuses to stand a verdict; then he becomes nonsuited, which is recorded by the court, and the defendant recovers his costs against him." "The court cannot compel the plaintiff to appear and stand a verdict; but if the plaintiff appears, or his counsel or attorney appears for him, he cannot be afterwards nonsuit, but the jury must deliver in their verdict." 2 Lil. Reg. 230, 231, 1719 ed. And Mr. Chitty says: "A nonsuit must always be *voluntary*, *i. e.* by the plaintiff's counsel submitting to the same or not appearing, and in no case can it be adverse or without implied consent." 3 Chitty's Gen. Pr. 910. To the same effect are 3 Bl. Com. 376, 377; *Dewar* v. *Purday*, 3 Ad. & E. 166, 170; *Corsar* v. *Reed*, 21 L. J. R. (N. S.) Q. B. 18; *Stancliffe* v. *Clark*, 21 L. J. R. (N. S.) Exch. 129; *Minchin* v. *Clement*, 1 B. & Ald. 252. In the last case the court, on ruling that a verdict theretofore given for the plaintiff could not be sustained, was requested to order a nonsuit instead of a new trial; but the request was denied, Lord

Ellenborough, C. J., observing: "It is in the plaintiff's option to be nonsuited or not."

The question whether a compulsory nonsuit could be ordered on the evidence was presented to this court in 1828 in *Elmore* v. *Grymes*, 1 Pet. 469, a case in which the Circuit Court, conceiving that the plaintiff's evidence was insufficient to sustain a verdict in his favor, had nonsuited him without his assent. Speaking for all the members of this court but one, Chief Justice Marshall disposed of the question by saying (p. 471): "The Circuit Court had no authority to order a peremptory nonsuit, against the will of the plaintiff. He had a right by law to a trial by a jury, and to have had the case submitted to them. He might agree to a nonsuit; but if he did not so choose, the court could not compel him to submit to it." The decision in that case was approved and reaffirmed in *D'Wolf* v. *Rabaud*, 1 Pet. 476, 497; *Crane* v. *Morris*, 6 Pet. 598, 609, where Mr. Justice Story said the point was not longer "open for controversy;" *Silsby* v. *Foote*, 14 How. 218, 222, and *Castle* v. *Bullard*, 23 How. 172, 183.

It being thus certain that the common law rules in respect of nonsuits recognized that the plaintiff had a right to have the verdict of the jury taken, which he could waive or assert at his option, it follows that those rules give no support to the suggestion before mentioned.

In what has been said we would not be understood as implying that a motion for a compulsory nonsuit and a demurrer to the evidence are equivalents of a request for a directed verdict, for while they are sometimes spoken of as analogous to it, this only means that for the purpose of each the evidence must be taken most strongly in favor of the opposite party. In other respects they are essentially unlike. A motion for a compulsory nonsuit looks to an arrest of the trial and a dismissal of the cause, leaving the merits undetermined and the plaintiff free

to sue again, while a request for a directed verdict looks to a completion of the trial and an adjudication of the merits through the accustomed coöperation of the court and jury. Full recognition of this, as also of its bearing here, is found in *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 264, where it is said: "The difference in the two modes is rather a matter of form than of substance, *except in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted either upon motion or upon appeal.*"

Equally pronounced is the difference between a demurrer to the evidence and a request for a directed verdict; for if on such a demurrer, properly joined in and allowed, judgment is not given for the demurrant, it is necessarily given for his opponent, while if a request for a directed verdict is denied the party making the request may yet receive the jury's verdict and a judgment thereon. And when a judgment on a demurrer to the evidence is reversed because given for the wrong party, the error is corrected by ordering a judgment for the other party, whereas when a judgment is reversed for error in granting or refusing a request to direct a verdict, judgment is not ordered for either party, but a new trial is awarded. This was so at common law, and it has been the uniform course of action in this court from the beginning. These distinctions are so substantial as to show that the suggested analogy is far from complete.

We come now to two decisions in this court which, although not involving the real question here, namely, the power of a Federal court to reëxamine, otherwise than according to the rules of the common law, issues of fact which have been determined by the verdict of a jury, yet have such an indirect bearing thereon that they ought not to be passed unnoticed.

In *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 38, a case coming here from the eastern

district of Pennsylvania, it appeared that on a trial to the Circuit Court and a jury the court, following a statute of the State, had entered a compulsory nonsuit which, according to the state law, terminated that suit but was not an adjudication of the merits or a bar to another suit on the same cause of action. This court, deeming it important to notice the question of its own jurisdiction, proceeded to inquire whether such a judgment was subject to review on writ of error, and in the course of the inquiry expressed the opinion that the state statute established a practice or mode of procedure which the conformity provisions of the Federal statutes required the Circuit Court to follow. But it was stated that the question was "not mentioned by counsel in argument," and, as the opinion contains no reference to the right of trial by jury or to the Seventh Amendment, it well may be that the bearing of the latter on the applicability of the state statute to the trial in the Circuit Court was not actually considered.

The other case is *Coughran* v. *Bigelow*, 164 U. S. 301, which originated in a territorial court, where the Seventh Amendment was applicable. On a trial by jury a compulsory nonsuit was entered according to a local statute, for an insufficiency in the plaintiff's evidence, without prejudice to his right to sue again, and when the case came here the judgment was affirmed, it being directly held that granting such a nonsuit does not infringe the constitutional right.

Of these two cases it is to be observed: (1) Although they hold, one by implication and the other expressly, that the constitutional right of trial by jury is not invaded by a statute authorizing the court to enter a compulsory nonsuit against a plaintiff for an insufficiency in his evidence, when he is not thereby prevented from suing again on the same cause of action, they neither hold nor suggest that, consistently with that right, the court can refuse to take the verdict of the jury, or disregard it when taken,

and enter a binding judgment on the evidence. (2) Assuming, without so deciding, that they should be accepted and followed in respect of the particular matter to which they are addressed, that is, the granting of an involuntary nonsuit which leaves the merits unadjudicated, they afford no justification whatever for overruling or departing from the repeated decisions of this court, reaching back to the beginning of the last century, wherein it uniformly has been held (a) that we must look to the common law for a definition of the nature and extent of the right of trial by jury which the Constitution declares "shall be preserved;" (b) that the right so preserved is the right to have the issues of fact presented by the pleadings tried by a jury of twelve, under the direction and superintendence of the court; (c) that the rendition of a verdict is of the substance of the right, because to dispense with a verdict is to eliminate the jury which is no less a part of the tribunal charged with the trial than is the court, and (d) that when the issues have been so tried and a verdict rendered they cannot be reëxamined otherwise than on a new trial granted by the court in which the first trial was had or ordered by the appellate court for some error of law affecting the verdict.

Coughran v. *Bigelow* recognizes that this is the true conception of trial by jury, for it is there said (p. 307), "if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly, and, if the jury disregard such instruction, to set aside the verdict." Why instruct the jury in such a case if they have no office to perform? Why contemplate that they may not conform to the instruction if it be immaterial whether they do or not? And why take their verdict or have any concern about it if none is required? The answers are given in prior decisions, which hold, as before shown, that in such a case it is essential "that the jury make its verdict, albeit in conformity with the order of the

court," and that if there be a verdict "the action is ended, unless a new trial be granted either upon motion or upon appeal."

Whether in a given case there is a right to a trial by jury is to be determined by an inspection of the pleadings and not by an examination of the evidence. If the pleadings present material issues of fact, either party is entitled to have them tried to the court and a jury, and this is as true of a second trial as of the first. Whether the evidence is sufficient to sustain a verdict for one party or the other is quite another matter and does not affect the mode of trial, but only the duty of the court in instructing the jury and of the latter in giving their verdict. The issues to which the jury must respond are those presented by the pleadings, and this whether the evidence be disputed or undisputed and whether it be ample or meagre. To speak, therefore, of the evidence as determinative of the right to a trial by jury is to confuse the test of that right with a different test applicable only in determining whether a particular verdict should be directed.

In the present case certain well-defined issues of fact were presented by the pleadings, which the plaintiff, as also the defendant, was entitled by the Constitution to have tried to the court and a jury. Such a trial was had and resulted in a general verdict resolving all the issues in the plaintiff's favor. That verdict operated, under the Constitution, to prevent a reëxamination of the issues save on a new trial granted by the trial court in the exercise of its discretion or ordered by the appellate court for error of law. At the trial the defendant requested that a verdict in its favor be directed, and had the court indicated its purpose to do that, it would have been open to the plaintiff, under the then prevailing practice, to take a voluntary nonsuit, which would have enabled her to make a fuller and better presentation of her case, if

the facts permitted, at another trial in a new suit. But the defendant's request being denied and a verdict being returned for the plaintiff, she recovered a judgment. That judgment the Circuit Court of Appeals reversed, and rightly so, because the defendant's request, in the state of the evidence, ought, as matter of law, to have been granted. The reversal operated to set aside the verdict and to put the issues at large, as they were before it was given. But, instead of ordering a new trial, as was required at common law, the Circuit Court of Appeals itself reëxamined the issues, resolved them in favor of the defendant, and directed judgment accordingly. This we hold could not be done consistently with the Seventh Amendment, which not only preserves the common law right of trial by jury, but expressly forbids that issues of fact settled by such a trial shall be reëxamined otherwise than "according to the rules of the common law."

To the suggestion that in so holding we are but adhering to a mere rule of procedure at common law there is a two-fold answer: First, the terms of the Amendment and the circumstances of its adoption unmistakably show that one of its purposes was to require adherence to that rule, which in long years of practice had come to be regarded as essential to the full realization of the right of trial by jury; and, second, the right to a new trial in a case such as this, on the vacation of a favorable verdict secured from a jury, is a matter of substance and not of mere form, for it gives opportunity, as before indicated, to present evidence which may not have been available or known before, and also to expose any error or untruth in the opposing evidence. As is said in Blackstone's Commentaries, vol. 3, p. 391: "A new trial is a rehearing of the cause before another jury. . . . The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the

subject; and nothing is now tried but the real merits of the case."

The judgment of the Circuit Court of Appeals is accordingly modified by eliminating the direction to enter judgment for the defendant notwithstanding the verdict, and by substituting a direction for a new trial.

MR. JUSTICE HUGHES, with whom concur MR. Justice HOLMES, MR. JUSTICE LURTON and MR. JUSTICE PITNEY, dissenting.

I concur in the decision of the court so far as it holds that the Circuit Court of Appeals was right in reversing the judgment; but I am unable to agree with the conclusion that the Circuit Court of Appeals was bound to order a new trial, and was without power, under the Seventh Amendment, to follow the state practice in directing the entry of the judgment to which, as matter of law, the defendant was entitled.

The serious and far-reaching consequences of this decision are manifest. Not only does it overturn the established practice of the Federal courts in Pennsylvania in applying, under the Conformity Act, the provisions of the state law, but it erects an impassable barrier—unless the Constitution be amended—to action by Congress along the same line for the purpose of remedying the mischief of repeated trials and of thus diminishing in a highly important degree the delays and expense of litigation. It cannot be gainsaid that such a conclusion is not to be reached unless the constitutional provision compels it. I cannot see that it does compel it. On the contrary, I submit, with the utmost respect, that the Pennsylvania practice adopted by the Circuit Court of Appeals, is entirely in conformity with the Seventh Amendment.

What, then, is this case? It was an action upon a policy of insurance. It was triable by jury, but the province of

the jury was to decide questions of fact, not questions of law. This court concludes, as did the Court of Appeals, that "the evidence did not admit of a finding that the policy was in force at the time of the insured's death." In other words, after the plaintiff had had full opportunity to present her case and to show facts for the consideration of the jury, and the case on both sides had been closed, it appeared that there were no facts whatever upon which the jury would be warranted in finding a verdict in her favor. Hence, says this court, the defendant was entitled to a direction of a verdict in its favor, as it requested. Had the trial court rightly applied the law, the case would properly have ended in a final judgment for the defendant. But the trial court erred in the law, and consequently the jury found a verdict for the plaintiff—not upon facts but without any facts upon which they could rest it. Now it is said that a statute which permits the trial court or the appellate court, after that wrongful verdict, to correct the error, and in so doing not only to set aside the verdict but to direct the entry of the judgment to which the defendant in law was entitled is, as applied to a case in the Federal court, contrary to the Constitution.

The Seventh Amendment provides that "no fact tried by a jury shall be otherwise reëxamined in any Court of the United States, than according to the rules of the common law." But, wherein has any matter of fact tried by a jury been reëxamined? Concededly, there was no fact to be tried by a jury; the case as made was barren of any such fact; and there being none, there has been no reexamination of it. How can it be said that the Circuit Court of Appeals has determined the facts or has passed upon issues of fact? Whether there was any evidence for the jury was a question of law. The trial court, in wrongly deciding it, did not convert it into a question of fact; it was not altered by the verdict, but remained the same in its nature—a question for the determination of the court.

That, it seems to me, is the substance of the matter, and all else is form and procedure. Whether in such a case, on the error being shown, a new trial should be ordered, or whether the litigation should be ended by a prompt entry of the judgment which should have followed a right decision in the first instance, is a matter to be governed by the applicable rules of practice; but, as I view it, it is not a matter withdrawn from legislative control by the constitutional provision for trial by jury, which is concerned with the settlement of disputes of fact and not with the determination of legal questions or with the consequences which should ensue when that determination is decisive of the right of recovery on the case made.

It is well to note what has been ruled in the Third Circuit upon this precise question. For the practice was there deliberately adopted after careful consideration. It has commended itself to the bench and bar as a salutary measure making for the improvement of the administration of justice. And, it should be observed that the constitution of the State of Pennsylvania, where the practice obtains, also provides that the right of trial by jury shall remain inviolate. (See Const. Pa. 1776; Declaration of Rights, XI; 1790, Art. IX, § 6; 1838, Art. IX, § 6; 1873, Art. I, § 6.) In *Smith* v. *Jones*, 181 Fed. Rep. 819, 823, the Circuit Court of Appeals for that circuit thus reviewed the matter:

"The practice of entering judgments *non obstante veredicto* has long existed in Pennsylvania, and it enables the case to be concluded by a verdict, while the entry of judgment thereon is made dependent on the court's opinion on a reserved question of law. This permits the judge to give to the decisive law question on which a case turns a more careful examination than he can do in the stress of trial. Moreover, if an appellate court on review of such judgment finds error, it can reverse and direct entry of judgment for the other party and avoid a retrial. Long

experience in this practice has convinced the bar and bench of the State of its value in conducing to a more careful and deliberate consideration of the law by the trial judge and to the avoidance of retrials. The practice in Pennsylvania is of statutory origin, as stated by Judge Acheson in *Casey* v. *Pennsylvania Asphalt Co.* (C. C.), 109 Fed. Rep. 746, adopted in 114 Fed. Rep. 189, 52 C. C. A. 145, and the principles involved in its application are set out in *Fisher* v. *Sharadin*, 186 Pa. St. 568, 40 Atl. Rep. 1091, and *Boyle* v. *Mahanoy City*, 187 Pa. St. 1, 40 Atl. Rep. 1093. Under the Conformity Act this practice has long been followed in the Federal courts in Pennsylvania and met with the approval of this court in *Carstairs* v. *American Bonding & Trust Co.*, 116 Fed. Rep. 449, 54 C. C. A. 85."

In the *Carstairs Case* to which the court thus refers, decided over ten years ago, the action was brought in the Circuit Court for the Eastern District of Pennsylvania, upon a policy of fidelity insurance. The defendant asked for a binding instruction. The court reserving that question, submitted the case to the jury which found a verdict for the plaintiff. After argument, the court concluded that the defendant was right, that there was no case for the jury and hence set aside the verdict and directed judgment for the defendant upon the point reserved. 112 Fed. Rep. 620. The Court of Appeals sustained this action of the Circuit Court (116 Fed. Rep. 449), Circuit Judge Gray delivering the opinion. There was, however, a dissent by Circuit Judge Acheson, who thought the mode of procedure was an unwarrantable departure from the constitutional provision. (*Id.*, p. 455.) This called forth a concurring opinion from Circuit Judge Dallas, who said (*id.*, pp. 456–457):

"The judgment here complained of was entered upon a point which the learned trial judge reserved in these words: 'I reserve the question whether there is any evi-

dence to go to the jury in support of the plaintiffs' claim.' In our opinion, this was a good reservation. The Supreme court of Pennsylvania has, after argument and reargument before a full bench, distinctly so decided (*Fisher* v. *Scharadin*, 186 Pa. 565, 40 Atl. 1091; *Boyle* v. *Borough of Mahanoy City*, 187 Pa. 1, 40 Atl. 1093); and within the knowledge of the writer, the Circuit Court for the Eastern district of Pennsylvania, from which this case comes, has in a number of instances, and without protest or disapproval in any, reserved precisely the same point. Indeed, counsel in this cause appear to have regarded the practice as settled, for 'the record shows no objection or any exception to the form of the reservation.' *Boyle* v. *Borough of Mahanoy City*, *supra*. . . . But in our opinion there is no substantial difference between a judgment entered upon a directed verdict for defendant and one entered in his favor notwithstanding a verdict rendered for plaintiff, subject to the question whether there was any evidence to warrant it. 'Whether there be any evidence which entitles the plaintiff to recover is necessarily a question of law' (*Fisher* v. *Scharadin*, *supra*); and that question it is which, by either method of procedure, and with like effect in each, the court decides. No encroachment is made upon the domain of the jury where either course is pursued. Its province of finding facts from evidence is not at all invaded. All that is adjudged is that a verdict which is unsupported by any evidence cannot properly be made the basis of a legal judgment; and the soundness of this fundamental proposition is now, we think, too well established to admit of question or to be open to debate."

See also *Spencer* v. *Duplan Silk Co.*, 112 Fed. Rep. 638; 115 Fed. Rep. 689; 191 U. S. 526, 527, 532.

The practice which had been followed before the *Carstairs Case*, and was expressly sanctioned in that case, continued to be observed. In 1905, the legislature of

Pennsylvania broadened it by permitting a reservation not simply of leave to enter judgment for the defendant but for either party when there was a request for binding instructions. As the Supreme Court of Pennsylvania pointed out, in construing the statute, in *Dalmas* v. *Kemble*, 215 Pa. St. 410, it was not intended in any way to impair and did not impair the function of the jury to deal with disputed questions of fact, but its purpose was to facilitate the disposition of questions of law. It was classed as one of the "practical reforms" instituted by the State "for facilitating business without impairing settled legal principles." It took account of the "growing complexity of issues, the constantly increasing pressure upon the trial lists, the taking of testimony in shorthand, and the consequent hurry of trials;" and it promoted the proper despatch of the work of the courts while conserving the essential rights of suitors.

Chief Justice Mitchell, in delivering the opinion of the court, said (*id.*, pp. 411–413): "The act being so recent it is important that it should be examined closely, and its proper construction settled. Its terms are: 'Whenever upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may . . . move the court to have all the evidence taken upon the trial duly certified and filed, so as to become part of the record and for judgment *non obstante veredicto* upon the whole record; whereupon it shall be the duty of the court . . . to enter such judgment as should have been entered upon that evidence.'

"This statute makes no radical innovation on the settled line of distinction between the powers of the court and the jury. It shows no intention to infringe, even if it could constitutionally do so, the province of the jury to pass upon the credibility of witnesses and the weight of oral testimony. The court has long had authority to direct

a verdict for defendant when it was of opinion that the plaintiff, even if all his evidence be believed, has failed to make out his case. . . .

"The act of 1905 is another step in the same direction. It broadens the power of the judge in this respect, that whereas heretofore the verdict was required to be for the plaintiff and the reservation to be of leave to enter judgment for the defendant *non obstante*, now what is reserved is a request for binding direction to the jury and may be for either plaintiff or defendant. But though thus enlarged so as to include both parties, the power of the judge is the same as it was before. He is 'to enter such judgment as should have been entered upon that evidence,' or in other words to treat the motion for judgment as if it was a motion for binding directions at the trial, and to enter judgment as if such direction had been given and a verdict rendered in accordance. What the judge may do is still the same in substance, but the time when he may do it is enlarged so as to allow deliberate review and consideration of the facts and the law upon the whole evidence. If upon such consideration it shall appear that a binding direction for either party would have been proper at the close of the trial the court may enter judgment later with the same effect. But, on the other hand, if it should appear that there was conflict of evidence on a material fact, or any reason why there could not have been a binding direction then there can be no judgment against the verdict now. As already said there is no intent in the act to disturb the settled line of distinction between the provinces of the court and the jury. The act is capable of usefulness in allowing time for mature consideration, but it should not be carried beyond its legitimate intent."

The provisions of this statute, as thus construed, were applied in the Federal courts in Pennsylvania. The propriety of the practice was challenged in *Fries-Breslin Co.*

v. *Bergen*, 168 Fed. Rep. 360–364; 176 Fed. Rep. 76, 81; and it was sustained by both the Circuit Court and the Circuit Court of Appeals. Circuit Judge Gray, in delivering the opinion of the latter court, said:

"This Pennsylvania practice act has been referred to, and has not infrequently been brought to the attention of this court in cases where the granting or refusal of judgments *non obstante veredicto* have been the subjects of review. The act enlarges the scope of the common law motion for judgment for plaintiff, notwithstanding the verdict for the defendant, by permitting it to be made by either plaintiff or defendant, when the verdict is against either. It is in general a more convenient method, so far as a defendant is concerned, of reaching practically the same result as was sought by a motion for a compulsory nonsuit, or for peremptory instructions at the close of the evidence, or by a motion in arrest of judgment, made by the defendant after the verdict or by the practice prevalent in the Pennsylvania courts, of directing a verdict for the plaintiff and reserving the question, whether there is any evidence in the case entitling the plaintiff to recover. We think, under the conformity provisions of section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684), the Circuit Court was required to recognize the practice authorized by the said Pennsylvania act of 1905, there being nothing incongruous therein with the organization of the Federal courts or their settled rules of procedure."

The plaintiff then petitioned this court for a writ of *certiorari*, and one of the grounds stated was that the Circuit Court had no power to enter judgment for the defendant notwithstanding the verdict. The petition was denied. *Fries-Breslin Co., Petitioner*, v. *Bergen*, 215 U. S. 609. And the same practice has been followed since. *Smith* v. *Jones*, *supra*. See also *Pittsburgh Construction Co.* v. *West Side Belt R. R. Co.*, 151 Fed. Rep. 125; 154 Fed. Rep.

929; *West Side Belt R. R. Co.* v. *Pittsburgh Construction Co.*, 219 U. S. 92, 96, 102.

The Seventh Amendment, it cannot be doubted, deals with matters of substance and not with mere matters of form. It guarantees the right of trial by jury, but it does not raise forms of motions or merely modal details to the dignity of constitutional rights. In numerous particulars, common law practice has been altered by statute in many States and the new procedure of the so-called code States has been followed, as near as may be, by virtue of the act of Congress, in the courts of the United States. When the question is raised of invasion of the constitutional right, we must always look to the substance of what is done and not to mere names or formal changes. It is of no consequence that at common law the motion for judgment *non obstante veredicto* was made only by the plaintiff, or was granted on something apparent on the face of the pleadings. We are not concerned with the mere use of this or any other descriptive term.

The substantial thing is that the common law recognized that the function of the jury was to deal with controversies of fact. If there was a question of law, it was for the court.

The dominating idea, in overturning the practice below, seems to be that at common law, if there was an issue of fact upon the pleadings, the plaintiff was entitled to have a verdict taken in any event; that is, if he did not voluntarily take a nonsuit, it was essential that a verdict be rendered, notwithstanding that upon the evidence there was no question of fact for the jury.

This would seem to be a misconception of the fundamental principles of the common law with respect to jury trials and to result from unjustified implications from the practice as to nonsuits as well as from a failure to regard the full scope and import of common law procedure.

It is not a new thing that a party should be able to challenge the legal sufficiency of the evidence adduced

against him and call upon the court to answer the question of law whether upon the facts shown there should be a recovery, nor is it a new thing that when he does so the court should give judgment without the intervention of the jury, and if the trial court errs in its ruling upon the law, the reviewing court should set the matter right and order the proper judgment to be entered.

This was accomplished by demurring to the evidence. This was a proceeding by which the judges of the court were called upon to declare what the law was upon the facts shown in evidence. It was analogous to the demurrer upon the facts alleged in pleading. The reason, it is said, for demurring to the evidence, was that the jury, if they pleased, might refuse to find a special verdict, and then the facts would not appear upon the record. The party demurring had to admit the truth of all the evidence against him; and if this were circumstantial, he was bound to admit every fact in favor of his adversary which the circumstances might tend to prove. Unless he did so, the other party was not bound to join in the demurrer. If, however, the demurrer was in proper form and embraced all the requisite concessions, the other party was bound to join. The result was that there was nothing left for the consideration of the jury, and the usual practice was to discharge it, although it was recognized as proper for the jury to assess the damages *conditionally* subject to the determination of the demurrer. 2 Tidd's Pr. *865–*867.

This matter was reviewed by the House of Lords in the leading case of *Gibson* v. *Hunter*, 2 H. Bl. 187, decided in the year 1793, where Lord Chief Justice Eyre, in delivering the answer of the judges, said: "All our books agree, that if a matter of *record*, or other matter in *writing*, be offered in evidence in maintenance of an issue joined between the parties, the adverse party may insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering the evidence

to join in demurrer. He cannot refuse to join in demurrer, he must join or waive the evidence. Our books also agree, that if *parol* evidence be offered, and the adverse party demurs, he who offers the evidence *may* join in demurrer if he will. We are therefore thus far advanced, that the demurrer to evidence is not necessarily confined to *written* evidence. The language of our books is very indistinct upon the question, whether the party offering *parol* evidence should be *obliged* to join in demurrer. Why is he obliged to join in demurrer, when the evidence which he offered is in writing? The reason is given in *Croke's* report of *Baker's Case*,[1] because, says the book, '*there cannot be any variance of matter in writing.*' Parol evidence is sometimes certain, and no more admitting of any variance than a matter in writing, but it is also often loose and indeterminate, often circumstantial. The reason for obliging the party offering evidence in writing, to join in demurrer, applies to the first sort of parol evidence, but it does not apply to parol evidence which is loose and indeterminate, which may be urged with more or less effect to a jury, and least of all will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. And yet if there can be no demurrer in such cases, there will be no consistency in the doctrine of demurrers to evidence, by which the application of the law to the fact on an issue is meant to be withdrawn from a jury, and transferred to the judges. If the party who demurs will admit the evidence of the fact, the evidence of which fact is loose and indeterminate, or in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, there will then be no more variance in this parol evidence, than

[1] Cro. Eliz. 753.

in a matter in writing; and the reasons for compelling the party who offers the evidence to join in demurrer, will then apply, and the doctrine of demurrers to evidence will be uniform and consistent. That this is the regular course of proceeding, in respect to parol evidence of the nature I have been describing, I think may be collected from the known case upon this subject, *Baker's Case*. There is also another case, *Wright* v. *Pindar*, as it stands reported in *Aleyn's* Reports,[1] which carries the doctrine further, and home to every case of evidence circumstantial in its nature, affording ground for a conclusion of fact from fact; and the two cases taken together, I think, prove satisfactorily, that the course is that which I have already supposed, and which would remove all the difficulties that are in the way of obliging the party to join in demurrer upon parol evidence. *Baker's Case*, after stating that the party must join in demurrer, or waive his evidence, where a matter in writing is shewn in evidence, goes on thus: 'If the Plaintiff produces witness to prove any matter in fact upon which a matter of law arises, if the defendant admits their testimony to be true, there also the defendant may demur in law upon it, but then he ought to admit the evidence given by the plaintiff to be true.' Those cases have very carefully marked the precise ground, upon which a party may demur to evidence; and prove that if a party *may* demur, the other party *must* join in demurrer. According to *Aleyn's* Report of the case of *Wright* v. *Pindar*, which case underwent very serious consideration, it was resolved, that he that demurs upon 'the evidence, ought to confess the whole matter of fact to be true, and not to refer that to the judgment of the court; *and if the matter of fact be uncertainly alleged, or that it be doubtful whether it be true or no, because offered to be proved only by presumptions or probabilities*, and the

[1] Al. 18.

other party demurs thereupon, he that alleges this matter, *cannot* join in demurrer with him, but ought to pray the judgment of the court, that he *may not be admitted* to his demurrer, unless he will *confess the matter of fact to be true.*' It seems to follow as a necessary conclusion, that if he will confess the matter of fact to be true, there he is to be admitted to his demurrer, and that if he is admitted, the other party must join in demurrer. My Lords, it is said in some of our books, that upon a demurrer entered upon parol evidence, the party offering the evidence may choose whether he will join in demurrer or not. But after having stated the two authorities which I have mentioned, I think those passages in the books must be understood with the qualification mentioned in both those authorities, 'unless the adverse party will confess the evidence to be true.' The matter of fact being confessed, the case is ripe for judgment in matter of law upon the evidence, and may then be properly withdrawn from the jury; and being entered on record will remain for the decision of the Judges." (*Id.*, pp. 206–209.)

If on a demurrer to the evidence judgment was given for one party when it should have been given for the other, the error was corrected in the appellate tribunal by directing the proper judgment. It is now said in referring to this practice, that this was because the error was confined to the judgment, and did not reach the facts as ascertained and shown in the demurrer. But what was the error? What was the basis of the judgment and upon what ground was it reversed and the proper judgment directed? The facts, by the proceeding on the demurrer, were made a part of the record, and the question of the legal sufficiency of the evidence was thus one of law arising upon the record. The court dealt with the question of law, that is, with the legal insufficiency of the evidence, and directed judgment which, as matter of law, followed the case made.

It is also said that when the reversal was for error in allowing the demurrer, the latter necessarily went for naught, and as there remained no ascertained facts on which to base a judgment, a new trial was deemed essential; and *Gibson* v. *Hunter*, *supra*, and *Fowle* v. *Alexandria*, 11 Wheat. 320, are cited. But in *Gibson* v. *Hunter*, *supra*, the reason for holding that the demurrer could not be allowed and that no judgment could be given, was thus stated (p. 209): "The examination of the witnesses in this case, has been conducted so loosely, or this demurrer has been so negligently framed, that there is no manner of certainty in the state of facts, upon which any judgment can be founded." In other words, the case was lacking in the record of facts with the essential admissions of the demurring party which were necessary to support a judgment, and there was no option but to award a new trial because of the way the record had been made up. And in *Fowle* v. *Alexandria*, *supra*, the ruling was that issue could not be joined upon the demurrer so long as any matter of fact remained in controversy between the parties; that no party could insist upon the other party's joining in the demurrer without distinctly admitting upon the record every fact and every conclusion of fact which the evidence given for his adversary conduced to prove. The court said (p. 323): "Upon examination of the case at bar, it will be at once perceived that the demurrer to evidence, tried by the principles already stated, is fatally defective. The defendants have demurred, not to facts, but to evidence of facts; not to positive admissions, but to mere circumstances of presumption introduced on the other side. . . . Even if the demurrer could be considered as being exclusively taken to the plaintiff's evidence, it ought not to have been allowed without a distinct admission of the facts which that evidence conduced to prove. But when the demurrer was so framed as to let in the defendant's evidence, and thus to rebut what the

other side aimed to establish, and to overthrow the presumptions arising therefrom, by counter-presumptions, it was the duty of the circuit court to overrule the demurrer, as incorrect, and untenable in principle. The question referred by it to the court, was not a question of law, but of fact."

The court, therefore, concluded that in this posture of the case, it was bound to order a new trial, and it was added: "We may say, as was said by the judges in *Gibson* v. *Hunter*, 2 H. Bl. 187, that this demurrer has been so incautiously framed, that there is no manner of certainty in the state of facts, upon which any judgment can be founded. Under such a predicament, the settled practice is to award a new trial, upon the ground that the issue between the parties, in effect, has not been tried." (*Id.*, p. 324.) The necessary implication is that, had the demurrer been properly framed and the record properly made, so that there had been certainty in the facts and the proper basis for the determination of a question of law, no new trial would have been ordered.

How can it be said that these authorities furnish any support for the conclusion which has been reached in this case? For this court has found no uncertainty in the state of facts shown by the record, and it has not been unable to determine the question arising thereon. On the contrary, the record being made up in an appropriate manner and the question being properly raised, this court holds that there was no evidence whatever to sustain a verdict for the plaintiff and because there is certainty in the record adjudges that the trial court erred in refusing a binding instruction.

The practice of demurring to the evidence was recognized in *Pawling* v. *United States*, 4 Cranch, 219; *Young* v. *Black*, 7 Cranch, 565; *United States Bank* v. *Smith*, 11 Wheat. 171, 182; *Columbian Insurance Co.* v. *Catlett*, 12 Wheat. 383, 389; *Thornton* v. *Bank of Washington*, 3 Pet.

36; *Chinoweth* v. *Lessee of Haskell*, 3 Pet. 92; *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 386; *Johnson* v. *United States*, 5 Mason, 425, 436; *Pickel* v. *Isgrigg*, 6 Fed. Rep. 676; and other cases.

After the decision of this court in *Fowle* v. *Alexandria*, *supra*, Mr. Justice Story, who delivered the opinion in that case, thus laid down the rules with regard to demurrers to evidence in *Johnson* v. *United States*, *supra* (p. 436):

"The general nature and operation of such a demurrer has been expounded with great force and correctness in the opinion delivered by Lord Chief Justice Eyre, in the case of *Gibson* v. *Hunter* (2 H. Bl. 187). The Supreme Court of the United States has also, on various occasions, been called upon to discuss the nature and effect of the proceeding. But I shall do no more at present, than to refer to some of the leading cases, not meaning to comment on them. . . . The result of the whole is, that the party demurring is bound to admit not merely all the facts which the evidence directly establishes, but all which it conduces to prove. The demurrer should state the facts, and not merely the evidence of facts; and it is utterly inadmissible to demur to the evidence, when there is contradictory testimony to the same points, or presumptions leading to opposite conclusions, so that what the facts are remains uncertain, and may be urged with more or less effect to a jury. The court, however, will, in favour of the party, against whom the demurrer is sought, as it withdraws from the jury the proper consideration of his case, make every inference for him, which the facts in proof would warrant a jury to draw. But if the facts are so imperfectly and loosely stated, that the Court cannot arrive at a satisfactory conclusion, that the judgment can be maintained upon the actual presentation of the evidence of these facts, then the course is to reverse the judgment, and to award a *venire facias de novo*."

In *Pawling* v. *United States*, 4 Cranch, 219, the United

States sued in debt upon an official bond. The defendants pleaded that the bond had been delivered as an *escrow* upon a condition which had not been performed. The United States demurred to the evidence produced on behalf of the defendants. The court held the evidence insufficient and judgment went in favor of the United States. This court reversed the judgment and directed that judgment be entered for the defendants in the court below.

That the practice in the present case did not differ in its essential features from that permitted at common law is shown by the decision of this court in *Chinoweth* v. *Lessee of Haskell*, 3 Pet. 92. That was an action in ejectment. What took place on the trial is thus stated by Chief Justice Marshall (p. 94): "At the trial, the defendants demurred to the plaintiffs' testimony, and the jury found a verdict for the plaintiffs, subject to the opinion of the court on the demurrer. The court overruled the demurrer and gave judgment for the plaintiffs." The applicable principles were thus stated (p. 96):

"The defendants in the district court having withdrawn their cause from the jury by a demurrer to evidence, or having submitted to a verdict for the plaintiffs subject to that demurrer, cannot hope for a judgment in their favour, if, by any fair construction of the evidence, the verdict can be sustained. If this cannot be done, the judgment rendered for the defendants in error must be reversed." On reviewing the evidence, this court found that the demurrer ought to have been sustained. And this was its judgment (p. 98):

"The judgment is reversed, and the cause remanded, with directions to enter judgment in favour of the defendants in the district court."

Here then is a case, in this court, which contradicts the conclusion that there is no permissible practice under the Constitution by which, when a verdict has been taken

for the plaintiff and it has been found, the point being duly made, that there is no legal basis for it in the evidence, judgment can be directed for the defendant.

It is said that there was a *voluntary* joinder in demurrer. Undoubtedly, the plaintiffs in the District Court did join in the demurrer, but in what sense did they join voluntarily? The demurrer to the evidence in the *Chinoweth Case* was manifestly well taken. And this being so, the other party was bound to join in it. As it was said in *Gibson* v. *Hunter*, *supra*, the cases "prove that if a party *may* demur, the other party *must* join in demurrer." Whether a demurrer should be allowed was the initial question for the trial court, but if the case was one where it was proper to allow the demurrer, and it was duly taken and allowed, the other party was not entitled to stand on his evidence and go to the jury. Let it be assumed that he could take a nonsuit; but this is not to say that by refusing to join in the demurrer he had the right to have his case, although insufficient in law for that purpose, submitted to the decision of the jury. Of course if there were some defect or variance, which he believed he could remedy, it would be natural for him to withdraw his case; but if he had proved all he could possibly prove, there would be no reason for a withdrawal unless he was willing to abandon the litigation. If he did not desire to do this, but wished to proceed, insisting upon the legal sufficiency of the evidence to which the demurrer was taken, he had to join in it. For, unless he did so, he waived his evidence (*Baker's Case*, *supra*; *Gibson* v. *Hunter*, *supra*) and was left without any evidence to go upon; while, if he did join in the demurrer, he had to abide the judgment of the court upon the point of law. He had no right to reach the jury, against proper objection, when his evidence raised no question of fact. In the *Chinoweth Case*, the plaintiffs, confronted with the demurrer, and desiring to stand upon their evidence and not to waive it, complied with the rules

of law which required them to join in the demurrer. The judgment was determined by the decision of the question of law. This court, finding no basis for the verdict which had been taken for the plaintiffs subject to the opinion of the court on the demurrer, did not order a new trial but directed judgment for the defendants.

The practice of demurring to the evidence was cumbrous. It fell into disuse, and the practice of moving for a direction of a verdict came to take its place. The fundamental question, however, of the legal insufficiency of the evidence, remained the same. As this court said in *Parks* v. *Ross*, 11 How. 362, 373, "But a jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it. It is, therefore, error in the court to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred. Hence the practice of granting an instruction like the present, which makes it imperative upon the jury to find a verdict for the defendant, and which has in many States superseded the ancient practice of a demurrer to evidence. It answers the same purpose, and should be tested by the same rules. A demurrer to evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom."

Can it be doubted that it would be competent for Congress, if it saw fit, to reinstate the old practice of demurring to the evidence and on a proper demurrer to its legal sufficiency, with an admission of all facts that his evidence tended to prove, to compel the other party to join in the demurrer; and to provide that thereupon the court should decide the question of law and enter judgment accordingly? Or that, if the trial court decided wrongly, the appellate court should be at liberty to direct the entry of the judgment to which, as matter of law, a party was entitled? And could not Congress, following the anal-

ogies of a still earlier day, before written pleadings were introduced, permit the question to be raised by a motion upon the trial? Could it not now provide, when the testimony is reported stenographically, that the record so made and appropriately approved by the court should constitute the record of the evidence for the purpose of determining the question of law thus raised?

Again, the court having this power to decide the question of law and to enter judgment accordingly, can it not be authorized to take provisionally the verdict of the jury to avoid the delay and expense of a new trial in case it should appear on a careful consideration of the evidence that it involved a dispute of fact which the jury should have resolved?

This is all, as it seems to me, that the Pennsylvania practice comes to. Had the old practice obtained, and had there been a demurrer to the evidence in this case, this court, in view of its holding that the "evidence did not admit of a finding that the policy was in force at the time of the insured's death," must necessarily have concluded that the demurrer was well taken; that the trial court would have been justified in directing judgment for the defendant without submitting the case to the jury; and that if it had not decided the question correctly the appellate court could so decide it and direct the entry of that judgment. The rest of the matter was simply the exercise of caution to avoid unnecessary litigation by taking the verdict of the jury so that it might be available if it appeared that the case was one for the jury.

The plaintiff did not take a nonsuit, or attempt in any way to dismiss her case. No question is presented with respect to her right to withdraw the suit; or to start again, if it had been withdrawn. It is said that, had the court indicated a purpose to direct a verdict for the defendant, the plaintiff might have taken a nonsuit; but the practice in the state and Federal courts had long been established

and must have been well understood. There is nothing to indicate to the contrary. The situation disclosed is that the plaintiff was standing upon her evidence contending, as she still contends, that it was sufficient to permit the jury to find in her favor. The defendant insisted that, conceding all that the evidence tended to prove, the plaintiff had no case for the jury. In this, the court now finds that the defendant was right. The defendant having made this point and the plaintiff, on the other hand, having asserted the sufficiency of the evidence and stood thereon, I find no ground for saying that the local practice was opposed to the principles of the common law in providing, in effect, that the question of law thus raised should be determined by the court, which should render judgment for the party entitled thereto.

This court has frequently said that it would deal with questions of this sort according to the substance of the matter. Thus, in *Oscanyan* v. *Arms Co.*, 103 U. S. 261, it was held that where it was shown by the opening statement of counsel that the contract on which the suit was brought was void as being either in violation of law or against public policy, the trial court might properly direct the jury to find a verdict for the defendant. The court, by Mr. Justice Field, said (*id.*, p. 266):

"Indeed, there can be, at this day, no serious doubt that the court may at any time direct a verdict when the facts are undisputed, and that the jury should follow such direction. The maxim that questions of fact are to be submitted to the jury, and not to be determined by the court, is not violated by this proceeding any more than by a nonsuit in a state court where the plaintiff fails to make out his case. The intervention of the jury is required only where some question of fact is controverted." In *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, it was held that a state statute which authorized the judge presiding at the trial to order a judgment

of nonsuit where the evidence introduced by the plaintiff was insufficient in law to sustain a verdict, might be followed in the Federal court under Rev. Stat., § 914, and that the judgment so rendered might be reviewed here upon writ of error. The court said: "The difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is, as observed by Mr. Justice Field, delivering a recent opinion of this court, 'rather a matter of form than of substance, except (that) in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted, either upon motion or upon appeal.' *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 264.

"Whether a defendant in an action at law may present in the one form or in the other, or by demurrer to the evidence, the defence that the plaintiff, upon his own case, shows no cause of action, is a question of 'practice, pleadings, and forms and modes of proceeding,' as to which the courts of the United States are now required by the act of Congress of June 1, 1872, c. 255, § 5, 17 Stat. 197, reenacted in § 914 of the Revised Statutes, to conform, as near as may be, to those existing in the courts of the State within which the trial is had. *Sawin* v. *Kenny*, 93 U. S. 289; *Ex parte Boyd*, 105 U. S. 647; *Chateaugay Co., Petitioner*, 128 U. S. 544; *Glenn* v. *Sumner*, 132 U. S. 152, 156." (*Id.*, pp. 39–40.)

In other words, a practice which would not have been allowed in the absence of statute was permitted under the statute because in the substance of the thing it was entirely in accord with the principles of the common law. In *Coughran* v. *Bigelow*, 164 U. S. 301, the constitutional question was directly presented, and after referring to the ruling in *Elmore* v. *Grymes*, 1 Pet. 469, that in a Federal court there was no authority to order a peremptory nonsuit against the will of the plaintiff (*Crane* v. *Morris*, 6 Pet. 598; *Castle* v. *Bullard*, 23 How. 172), the court said:

"The foundation for those rulings was not in the constitutional right of a trial by jury, for it has long been the doctrine of this court that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the *onus* of proof is imposed, and that, if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly, and, if the jury disregard such instruction, to set aside the verdict. *Parks* v. *Ross*, 11 How. 362; *Schuchardt* v. *Allens*, 1 Wall. 359; *Pleasants* v. *Fant*, 22 Wall. 116, 120. And, in the case of *Oscanyan* v. *Arms Co.*, 103 U. S. 264, it was said by Mr. Justice Field, in delivering the opinion of the court, that the difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is 'rather a matter of form than of substance.'

"That the cases above cited, which held that the Circuit Court of the United States had no authority to order peremptory nonsuits, were based, not upon a constitutional right of a plaintiff to have the verdict of a jury, even if his evidence was insufficient to sustain his case, but upon the absence of authority, whether statutory or by a rule promulgated by this court, is shown by the recent case of *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 38, where it was held that, since the act of Congress of June 1, 1872, c. 255, § 5, 17 Stat. 197, reënacted in § 914 of the Revised Statutes, courts of the United States are required to conform, as near as may be, in questions of 'practice, pleadings and forms and modes of proceeding' to those existing in the courts of the State within which the trial is had, and a judgment of the Circuit Court of the United States for the Eastern District of Pennsylvania, ordering a peremptory nonsuit, in pursuance of a state statute, was upheld. It is the clear im-

plication of this case that granting a nonsuit for want of sufficient evidence is not an infringement of the constitutional right of trial by jury.

"As there was a statute of the Territory of Utah authorizing courts to enter judgments of peremptory nonsuit, there was no error in the trial court in granting the motion for a nonsuit in the present case, nor in the judgment of the Supreme Court affirming such ruling; if, indeed, upon the entire evidence adduced by the plaintiffs enough did not appear to sustain a verdict." (*Id.*, pp. 307–308.)

In the present case, the point is not that the ordinary practice on a motion for the direction of a verdict is identical with that on a demurrer to the evidence, but that the latter as well as the former was clearly permitted by the Constitution and that the modern application of it, in a convenient form through the local statute in question, was not a substantial departure.

I do not see that the authorities relied upon in the opinion of the court sustain its ruling. They may be briefly reviewed. In *United States* v. *Wonson*, 1 Gall. 5, 20, it was held that where a cause had once been tried by a jury in the District Court, there could not be a new trial by a jury in the Circuit Court. The statement of Mr. Justice Story with regard to the constitutional provision and the importance of trial by jury have obvious reference to cases of disputed questions of fact with which it is the province of the jury to deal. Facts once tried by a jury are not reëxamined and the court is not to substitute its judgment of the facts for the judgment of the jury, but, in such case, should order a new trial.

Applying this rule to the present case, if this court found that on the trial there was any question of fact for the jury to decide, it could not sustain, as it does sustain, the Circuit Court of Appeals, in reversing the judgment for the plaintiff.

In *Parsons* v. *Bedford*, 3 Pet. 433, it was held that it was not the intention of Congress by the act of May 26, 1824, 4 Stat. 62, c. 181, to confer upon this court the power, in reviewing a judgment of the District Court of Louisiana, to decide questions of fact which had been passed upon by the jury. The court said that no points of law were brought under review, and that the whole object was "to present the evidence here in order to establish the error of the verdict in matters of fact." The remarks of the court in *Walker* v. *New Mexico & Southern Pacific R. R. Co.*, 165 U. S. 593, 596, plainly have reference to the same subject. Thus, it is said that the Seventh Amendment "does not attempt to regulate matters of pleading or practice," that "its aim is not to preserve mere matters of form and procedure but substance of right" and that "this requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."

In *Barney* v. *Schmeider*, 9 Wall. 248, the court received the testimony taken on a former trial, but did not have it read to the jury. The court informed the jury of its purport and directed them to find a verdict in favor of the plaintiff. In other words, the court followed the practice of directing a verdict by a jury without the evidence upon which it should rest being properly presented to the jury. The court overruled the contention that there was not a disputed question of fact, saying, after reviewing the case, "Where there is any discrepancy, however slight, the court must submit the matter to which it relates to the jury, because it is their province to weigh and balance the testimony and not the court's. The proposition is not, therefore, sustained, that nothing but a question of law was to be decided." (*id.*, p. 253.)

The cases mostly relied upon are those of *Hodges* v. *Easton*, 106 U. S. 408; and *Baylis* v. *Travellers' Insurance*

Co., 113 U. S. 316. But, it is submitted that these cases neither control the matter nor are inconsistent with the principles which I have urged as determinative of this question.

In *Hodges* v. *Easton, supra,* there was a so-called special verdict, in answer to questions propounded by the court. But the questions and the verdict in response thereto, covered only a part of the material issues of fact. The court gave judgment upon the special verdict and upon what it described as "facts conceded or not disputed upon the trial." What these facts were, which lay outside the verdict, did not appear from the record. "No bill of exceptions was taken showing the evidence introduced by either party, nor was there a general verdict." This court said that having regard alone to the questions and answers propounded to the jury, it was clear that the plaintiffs had not proved their case. If it were presumed that there were no material facts beyond those found by the jury then the judgment was unauthorized; on the other hand, if there were other material facts they were found by the court and not by the jury. As the court pointed out, there was no waiver of a jury, by a stipulation in writing, as provided by the statute (Rev. Stat. §§ 648–649) and there was "nothing in the record from which such stipulation or waiver may be inferred." The case then was one in which the record afforded no basis for a judgment, and there was no alternative but to direct that a trial be had "upon all the material issues of fact."

In *Baylis* v. *Travellers' Insurance Co., supra,* the action was upon a policy of insurance to be paid to the plaintiff in case his father "should accidentally sustain bodily injury which should produce death within ninety days." After the close of the testimony, the defendant moved to dismiss on the ground that the evidence was insufficient to support a verdict. The motion was denied, the plaintiff insisting that there were questions of fact which should be

submitted to the jury. The court then directed the jury to find a verdict for the plaintiff subject to its opinion upon the question whether the facts warranted a recovery. Subsequently the court denied a motion for judgment on the verdict in favor of the plaintiff and directed judgment to be entered for the defendant. This court reversed the judgment and ordered a new trial.

The pith of the decision is that, despite what the trial judge said regarding the matter, there were really questions of fact for the jury, and that the trial judge could not take the place of the jury in deciding them. The appellant challenged the judgment in this court upon that ground which was found to be well taken. What was actually decided appears from the following statement of the opinion:

"But, without a waiver of the right of trial by jury, by consent of parties, the court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue, and renders judgment thereon.

"This is what was done in the present case. It may be that the conclusions of fact reached and stated by the court are correct, and, when properly ascertained, that they require such a judgment as was rendered. That is a question not before us. The plaintiff in error complains that he was entitled to have the evidence submitted to the jury, and to the benefit of such conclusions of fact as it might justifiably have drawn; a right he demanded and did not waive; and that he has been deprived of it, by the act of the court, in entering a judgment against him on its own view of the evidence, without the intervention of a jury.

"In this particular, we think error has been well assigned." (*Id.*, pp. 320–321.)

This being the point of the case, it would seem to be rather an extreme construction of the rest of the opinion,

in its references to practice, to treat it as an exhaustive statement of all the possibilities of legislative control over procedure within constitutional limits, or as laying down rules which would preclude the court in a case where there was *no* question of fact for the jury, from following the applicable state practice, or an act of Congress, in entering judgment for the party who, upon the record, was as matter of law entitled to it. That, as I regard the decision, is very far from its purpose and effect.

It is said, however, that a new trial affords opportunity to a plaintiff to better his case, by presenting evidence which may not have been available before. But we are not dealing with an application for a new trial upon the ground of newly discovered evidence or with the principles controlling an application of that sort. We are concerned with the question whether a party has a constitutional right to another trial, simply because the trial court erred in its determination of a question of law which was decisive of the case made. Had the trial court done what this court says it should have done, it would have directed a verdict for the defendant and if the jury, simply following the instruction of the trial court, had so found, final judgment would have been entered and no new trial would now be granted. Still the jury would not have passed upon any question of fact, but would simply have obeyed the judge. The opportunity to better the case on a second trial would probably be as welcome, but it would not be accorded. I am unable to see any basis for a constitutional distinction which raises a constitutional right to another trial in the one case and not in the other.

Of course, in any case, where there are questions of fact for the jury, the court cannot undertake to decide them unless a jury trial is waived. But, it would seem to be an entire misapprehension to say that trial by jury, in its constitutional aspect, requires the submission to the jury of evidence which presents no question for their

decision; and that, although there be no facts for the jury to pass upon, still the judgment which follows as matter of law, can be arrived at only through a verdict. This is to create a constitutional right out of the practice of taking verdicts by direction. The ancient method of challenging the sufficiency of the evidence by demurrer, and thereupon either discharging the jury altogether or assessing the damages conditionally to await the decision of the demurrer (Cro. Car. 143), reveals the function of court and jury in a clearer light, and shows that the idea that the judgment upon a trial where there is no evidence to sustain a finding by the jury, can be reached only through a verdict, could not have been entertained at the time the Constitution was adopted.

To repeat and conclude: All that has been done in the present case could, in substance, have been done at common law, albeit by a more cumbrous method. There has been no invasion of the province of the jury. That conclusively appears from the fact that this court holds that there was no basis for a finding by the jury in favor of the plaintiff. We have here a simplification of procedure adopted in the public interest to the end that unnecessary litigation may be avoided. The party obtains the judgment which in law he should have according to the record. I submit, with deference, that in now condemning this practice, long followed in the courts below, this court is departing from, instead of applying, the principles of the common law, and is extending rather than enforcing the constitutional provision.

I am authorized to say that MR. JUSTICE HOLMES, MR. JUSTICE LURTON and MR. JUSTICE PITNEY concur in this dissent.

EX PARTE: IN THE MATTER OF DANTE, COLLECTOR OF THE ESTATE OF HUTCHINS.

IN MANDAMUS.

No. 15. Argued April 14, 1913.—Decided April 28, 1913.

The rules of the Court of Appeals of the District of Columbia were promulgated in pursuance of powers conferred upon the justices of that court by § 6 of the act of February 9, 1893, creating it.

Rule 10 providing that there shall be no review by the Court of Appeals of any order, judgment or decree of the Supreme Court of the District unless the appeal be taken within twenty days after the same is made, is the only rule governing such appeals, and there is no provision extending the time for taking or perfecting an appeal in the event of death of a party.

Rule 10 has been interpreted to include the perfecting of an appeal by filing the bond.

THE facts, which involve the construction of Rule 10 of the Court of Appeals of the District of Columbia prescribing the time within which appeals from the Supreme Court of the District must be taken, and the application of that rule to appeals where the judgment debtor has died within the prescribed period, are stated in the opinion.

Mr. Edwin C. Brandenburg, with whom *Mr. Clarence A. Brandenburg* and *Mr. F. Walter Brandenburg* were on the brief, for petitioner.

Mr. Wharton E. Lester and *Mr. Michael J. Colbert* for respondents.

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

To a rule commanding the judges of the Court of Appeals of the District of Columbia to show cause why a

certain action should not be reinstated on the docket of the court and heard and decided upon its merits, return was filed and hearing had on the issues raised. Before passing upon those issues we set out the facts of the controversy.

On April 16, 1912, in an action pending in the Supreme Court of the District of Columbia, a verdict was returned in favor of the plaintiff, India Bagby, against Stilson Hutchins. After the filing of a motion for a new trial, and in arrest of judgment, and on Sunday, April 21, 1912, Hutchins died. On May 3, 1912, the trial court overruled the motions and entered judgment *nunc pro tunc* as of the date of the verdict. The rules required the taking of appeals to the Court of Appeals of the District within twenty days from a judgment, and, although no representative of the estate had been appointed, the former attorneys of Mr. Hutchins noted an appeal within the time limited, styling themselves "attorneys for the defendant, and on behalf of the executors named in his last will." Owing to a contest over the admission of such will to probate, William J. Dante was appointed collector of the estate on June 14, 1912, and soon afterwards was authorized to enter his appearance in the Bagby case, with authority to "take such steps as may be necessary to prosecute an appeal from the judgment entered therein." He then moved in the trial court to vacate and set aside the judgment against Hutchins upon the ground that the court was without power or authority in the premises, "inasmuch as the cause abated upon the death of said Stilson Hutchins; and upon the further ground that no one representing said estate had been appointed at the time of the hearing upon said motion or the entry of said judgment." On June 22, 1912, the trial court ordered the action revived in the name of Dante, as collector in the place and stead of Hutchins, but denied the motion to vacate the judgment. The order concluded as follows:

"The said William J. Dante, collector of the estate of Stilson Hutchins, by his attorneys, in open court, notes an appeal to the Court of Appeals of the District of Columbia," followed by a recital as to the penalty of the bond for costs. The citation which issued, dated June 24, 1912, required the appellee "to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf." On June 25, 1912, a bill of exceptions was signed and made a part of the record containing the substance of the evidence taken at the trial in which judgment was entered against Hutchins. In the Court of Appeals counsel for Bagby moved to dismiss the appeal taken in the name of Hutchins because "futile;" and to dismiss the appeal taken in the name of collector Dante, on the ground that if it was from the judgment, it was too late, and if from the order refusing to vacate the judgment, that order was not appealable. The hearing of the motion was postponed to the merits. On January 6, 1913, however, after the cause had been argued on the merits, the court below granted the motion to dismiss the appeal of the collector, on the ground that the order allowing the appeal was from the decision on the motion to vacate the judgment and no appeal lay from such an order. On the state of facts just detailed, and the averment that the dismissal of his appeal without consideration of the merits of the judgment recovered by Bagby deprived the petitioner "of a substantial property right without due process of law," relief by mandamus was prayed, and we allowed a rule to issue.

From the answer to the rule it appears that the death of Hutchins was suggested to the trial court on April 23, 1912, and that on motion of the former attorneys of Hutchins the motions in arrest of judgment and for a new trial were continued to May 3 and on that day were overruled and the judgment entered *nunc pro tunc*. It is

also shown that from the organization of the Court of Appeals, pursuant to the powers conferred upon the justices of that court by § 6 of the act of Congress of February 9, 1893, creating the court, there was promulgated a rule known as Rule 10, in the first section of which it is provided as follows:

"No order, judgment, or decree of the Supreme Court of the District of Columbia, or of any justice thereof, shall be reviewed by the Court of Appeals, unless the appeal shall be taken within twenty days after the order, judgment, or decree complained of shall have been made or pronounced."

This rule is still in force and has been interpreted to include the perfecting of an appeal by filing bond, and is the only rule governing the time within which appeals from the Supreme Court of the District shall be taken or perfected; and there is no statute or rule which extends the time for taking or perfecting an appeal in the event of the death of a party to the cause. Under these circumstances we are of opinion that whatever may be the scope of the appeal noted by the collector, as the time for appealing from the judgment had expired long prior to the making of the order, the court did not err in dismissing the appeal. The rule, therefore, must be and it is discharged.

Rule discharged.

SEABOARD AIR LINE RAILWAY *v.* MOORE.

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

No. 609. Argued December 3, 1912.—Decided April 28, 1913.

Where this court finds nothing giving rise to a clear conviction that error has resulted from the action of the court below it should not reverse the judgment. *Chicago Junction Ry. Co.* v. *King*, 222 U. S. 215.

The contention of plaintiff in error that the court below construed a statute adversely to his interest in certain respects will not avail if it appears that as a matter of fact he was accorded the benefit he claimed under such statute in those respects, and the rights of the other party were made dependent on other questions involved.

Where the record shows that there was evidence that the cars on which the accident occurred and which were being transferred by a switching engine were loaded with merchandise destined for a port to be there transshipped to destination in another State, and the court instructs the jury that the plaintiff can only recover under the Employers' Liability Act of 1908 in case it finds that he was engaged in interstate commerce, this court will not, in the absence of clear conviction of error, disturb the judgment based on the verdict.

THE facts are stated in the opinion.

Mr. P. O. Knight and *Mr. James F. Glen* for plaintiff in error submitted.

Mr. George C. Bedell, with whom *Mr. Horatio Bisbee*, *Mr. A. H. King*, *Mr. Roswell King* and *Mr. Hilton S. Hampton* were on the brief, for defendant in error.

Memorandum opinion, by direction of the court, by MR. CHIEF JUSTICE WHITE.

The defendant in error sued to recover damages for injuries sustained on October 6, 1909, while in the employ

of the railway company as a foreman of switch engines, in being thrown from an alleged defective step or footboard of a switch engine. The case was submitted to a jury upon a single count of the declaration. The jury was specially instructed that it was the duty of the plaintiff to prove the existence of the defect complained of, that it was a defect of such a character as to cause its existence to be a negligent failure of the defendant to properly equip its engine, that the defect was the proximate cause of the injury, and that the plaintiff was at the time he was injured "engaged in interstate commerce." The jury was also instructed that the burden of proof was upon the railway company to establish the truth of defenses interposed by it of contributory negligence and assumption of risk. A judgment entered for the plaintiff upon a verdict in his favor was affirmed by the Circuit Court of Appeals, in a brief opinion, and this writ of error was then prosecuted.

The matters pressed upon our attention on behalf of the plaintiff in error embrace assertions of the commission of error by the Circuit Court of Appeals in deciding that the trial court rightly refused to give instructions asked on behalf of the railway company, covering the various issues raised by the pleadings. Based upon a statement made in the opinion of the court below to the effect that the case of *Mondou* v. *New York, N. H. & Hartford R. R. Co.*, 223 U. S. 1, was decisive of the constitutionality and applicability to the case of the Employers' Liability Law and, moreover, disposed of a number of contentions urged in the assignments of error filed below, it is pressed upon our attention that the court decided and erred in deciding that the Employers' Liability Law abolished, as to all cases coming under its provisions, the defense of assumption of risk, and, also, that a railroad employé injured in the course of his employment could avail of the benefits of the statute although at the time he sustained the injury he

was not actually engaged in interstate commerce. But we think it is plain that the contentions last stated are without merit and that the only even pretext afforded for their assertion arises from a misconception of the opinion below, which we think, despite its meagre and may be inadequate examination of the case, nevertheless on its face rebuts the inferences which the contentions attempt to draw from it. It is unnecessary to recur to the text of the opinion to demonstrate the conclusion just stated, because in any event the contentions must be overruled, since the benefit of the defense of assumption of risk was accorded to the railway company at the trial and the right of the plaintiff to recover was made dependent upon his establishing that at the time he was injured he was actually engaged in interstate commerce. Indeed, in a bill of exceptions, certified by the trial Judge, it was stated that there was evidence tending to show that the freight train in question was engaged in hauling two freight cars which were loaded with lumber "destined to be shipped to the terminal of the Tampa Northern, at Hooker's Point, near Tampa, and there unloaded, and to be afterwards shipped by schooner to a point in the State of New Jersey." Coming to consider the errors alleged to have been committed in sustaining refusals of the trial court to give requested instructions, we content ourselves with saying, after an adequate examination of the record, and in the light of the various bills of exceptions therein set forth, containing the "substance and effect" of the evidence, that we think the charge as given by the trial court fully and correctly stated the applicable law. As "we find nothing giving rise to a clear conviction on our part that error has resulted from the action of the courts below," the judgment of the Circuit Court of Appeals must be affirmed. *Chicago Junction R. Co.* v. *King*, 222 U. S. 222.

Affirmed.

JORDAN, COLLECTOR OF INTERNAL REVENUE, *v.* ROCHE.

SAME *v.* ROSS.

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

Nos. 202, 203. Argued April 15, 1913.—Decided April 28, 1913.

Bay rum imported from Porto Rico subsequent to the passage of the Foraker Act and prior to the passage of the act of February 4, 1909, was subject to the payment of a tax equal to the internal revenue tax imposed in the United States, under §§ 3248 and 3254, Rev. Stat., on distilled spirits, spirits, alcohol, and alcoholic spirits.

The provision in § 3 of the Foraker Act, that with the institution of a system of taxation in Porto Rico, tariff duties on goods coming to and from Porto Rico and the United States should cease, is explicitly confined to such duties and does not relate to internal revenue taxes established in the act.

A statute declaring that a specified article shall be taxed and how is not necessarily a declaration by Congress that such article was not taxed under prior statutes; its history may show, as in the case of the act of February 4, 1909, that it was not the declaration of a new policy but a more explicit expression of prior statutes.

The purpose of the Foraker Act was the equal taxation of Porto Rican articles and domestic articles.

The language of § 3248, Rev. Stat., is comprehensive enough to cover all distilled spirits.

Under the revenue laws of the United States articles are taxed not by their commercial names or uses, but according to their alcoholic contents, under the generic name of "distilled spirits."

THE facts, which involve the liability of bay rum, imported from Porto Rico subsequent to the Foraker Act, to a tax equal to the internal revenue tax under §§ 3248 and 3254, Rev. Stat., on distilled spirits, are stated in the opinion.

Mr. Assistant Attorney General Harr for plaintiff in error.

Mr. John David Lannon, with whom *Mr. Howard T. Walden* and *Mr. Henry J. Webster* were on the brief, for defendants in error:

The act of February 4, 1909, taxing bay rum imported from Porto Rico, was a declaration by Congress that it was not subject to a tax under prior statutes. This act is *in pari materia* with § 3 of the Foraker Act and should be construed with it. *United States* v. *Freedman*, 3 How. 556, 564; *Tiger* v. *Investment Co.*, 221 U. S. 286, 309.

Had the tax existed, Congress would not have passed that act. It did so because it believed it was necessary because the article was not then taxed. *Cope* v. *Cope*, 137 U. S. 682, 688, and see *Morris* v. *Mellen*, 6 Barn. & C. 446, 454.

The existing situation, contemporaneous events and conditions to be changed, are proper guides to the meaning of the statute and this court has sanctioned their use. *Holy Trinity Church* v. *United States*, 143 U. S. 457, 463.

The history of the act and the amendment of the title demonstrated its purpose and scope and indicated that Congress did not intend to declare the purposes of § 3 of the Foraker bill. *United States* v. *Press Publishing Co.*, 219 U. S. 1 at 13.

The debate on a bill in Congress may be resorted to as a means of ascertaining the situation at the time of its enactment. *Standard Oil Co.* v. *United States*, 221 U. S. 221.

That debate shows that there then was no tax on Porto Rican bay rum. Cong. Rec., Vol. 43, pt. I, p. 910.

The best way to find out what Congress intended is to put one's self in the place of Congress. *Ex parte Milligan*, 4 Wall. 2, 114; *Union & St. P. R. R. Co.* v. *Barney*, 113 U. S. 618, 624; *Platt* v. *Union Pacific R. R. Co.*, 99 U. S. 48, 64.

The act of February 4, 1909, has become a statement by Congress that bay rum imported from Porto Rico was not taxed by § 3 of the Foraker Act, and this is so whether it be because it amounts to an adoption by Congress of the decision of the court in *Newhall* v. *Anderson* (*supra*), to this effect, or to what Chief Justice Marshall called a complete demonstration of the legislative sense of its own language. *Alexander* v. *Alexandria*, 5 Cranch, 1, 7.

Porto Rican bay rum is the article of merchandise "like" to bay rum of domestic manufacture and not "like" to distilled spirits of domestic manufacture.

If bay rum of domestic manufacture does not pay a tax, then the like article of Porto Rican manufacture is not liable to a tax. For definition of "manufacture" see *Anheuser Busch Assn.* v. *United States*, 207 U. S. 556, 562; *United States* v. *Semmer*, 41 Fed. Rep. 324, 326.

There is a substance like to bay rum manufactured in the United States called by the same name and manufactured in the same way, on the manufacture of which there is no tax. See *Newhall* v. *Jordan*, 149 Fed. Rep. 586; *Newhall* v. *Anderson*, 161 Fed. Rep. 906.

Bay rum has never been treated as distilled spirits under the revenue laws or under the customs laws.

Under the Dingley Tariff Act it was taxed at a lower rate of duty than that imposed on spirits. 30 Stat. 151; see §§ 289 and 294. See also present tariff act of August 5, 1909; No. 17840 G. A. 3774. As to classification of bay rum, see *Hollendar* v. *Magone*, 149 U. S. 586.

Bay rum is treated, in the decisions under the Internal Revenue Laws as being an entirely different article from distilled spirits. See Stamp Act July 13, 1868, § 9; Act of July 14, 1870, § 1, Schedule "C"; 7 Int. Rev. Dec., p. 11; War Revenue Act of June 13, 1898; Treas. Dec., 1898, No. 19767; Treas. Dec., 1904, Int. Rev., No. 812; Act of February 8, 1875, § 18, as amended by act of 1872, § 4, 20 Stat., c. 327; Treas. Dec., 1901, Int. Rev. 404; Treas.

Dec., 1905, Int. Rev., No. 922, Circular No. 673; Treas. Dec., 1905, Int. Rev., No. 934; *United States* v. *Stubblefield*, 40 Fed. Rep. 454; *United States* v. *Wilson*, 69 Fed. Rep. 144. The term "distilled spirits" as used in this section has been held to include all spirits which have been distilled whether they have been subsequently rectified or not. *Boyd* v. *United States*, 14 Blatchf. 317.

Bay rum manufactured in the United States is not subject to an internal revenue tax. See Treas. Dec., 1901, Int. Rev. 404. Rev. Stat., § 3251, does not include bay rum.

In construing taxing statutes the taxpayer is entitled to the most favorable construction and any doubt is to be resolved in his favor. *Hartranft* v. *Weighmann*, 121 U. S. 609; *Twine Co.* v. *Worthington*, 141 U. S. 468.

The Foraker Act does not provide for any tax on merchandise imported from Porto Rico into the United States after July 25, 1901.

Mr. Justice McKenna delivered the opinion of the court.

Actions were brought in the Circuit Court, Eastern District of New York, to recover money paid upon certain importations of bay rum from Porto Rico. Judgment was entered for defendants in the actions, and error was prosecuted from the Circuit Court of Appeals for the Second Circuit, and that court certifies the following question to this court:

"Was bay rum imported from Porto Rico subsequent to the passage of the act of April 12, 1900, and prior to the passage of the act of February 4, 1909, subject to the payment of a tax equal to the internal revenue tax imposed in the United States under §§ 3248 and 3254 on 'distilled spirit, spirits, alcohol, and alcoholic spirit?'"

The facts are these: In the years 1907 and 1908 plain-

tiffs imported from the Island of Porto Rico certain casks of bay rum manufactured in said island. Upon arrival at the port of New York, the Collector of Internal Revenue for the first district collected taxes upon the same under the act of April 12 and §§ 3248 and 3254 of the Revised Statutes of the United States. Plaintiffs duly protested against such exaction and paid the same to obtain delivery of the goods. Bay rum is a fragrant spirit obtained by distilling rum with the leaves of the bay-berry, or by mixing various oils with alcohol.

The act of April 12, 1900, referred to in the question certified, is known as the Foraker Act (31 Stat. 77, c. 191). Section 3 provides that after the passage of the act all merchandise coming into the United States from Porto Rico, and reversely, shall be subject to a duty of 15% of the duties which were required to be levied upon like articles imported from foreign countries, and, in addition thereto, articles of merchandise of Porto Rican manufacture coming into the United States shall pay "a tax equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture." Articles of United States manufacture coming into Porto Rico were required to pay a tax equal to the internal revenue tax imposed on like articles of Porto Rican manufacture. It was provided that whenever the legislature of Porto Rico should put into operation a system of local taxation the President should make proclamation thereof and thereupon all *tariff duties* upon goods going from the United States into Porto Rico, or from Porto Rico to the United States, should cease and all such articles should be free of duty.

Section 4 of the act provided that the duties and taxes imposed under § 3 should not be paid into the Treasury of the United States, but should be placed at the disposal of the President, to be used for the government of Porto Rico, and that upon the organization of the government

of Porto Rico such moneys should be transferred to the local treasury of Porto Rico, the duties and taxes to be collected at such ports and by such officers as the Secretary of the Treasury should designate. And it was provided that as soon as civil government was established in Porto Rico the President was to make proclamation thereof, and thereafter all duties and taxes in Porto Rico under the provisions of the act, should be paid into the treasury of Porto Rico and expended as required by law.

The proclamation of the President referred to in § 3 was issued July 25, 1901, 32 Stat., part 2, p. 1983, and all *tariff* duties on merchandise coming into the United States from Porto Rico ceased. The internal revenue tax upon articles of Porto Rican manufacture remained as that imposed "upon the like articles of merchandise of domestic manufacture" (§ 3). This, however, plaintiffs dispute, contending that the Foraker Act was intended to be, and was declared to be, an act temporarily to provide revenue, and that with the institution of a system of taxation in Porto Rico the act ceased to have operation. The contention is untenable. The act explicitly declares that the *tariff duties* shall cease. The distinction was deliberate and its effect unmistakable. We repeat, therefore, that the internal revenue tax upon Porto Rican articles remains as that imposed "upon the like articles of domestic manufacture." Upon the quoted words the controversy in this case turns. What shall determine the likeness between articles of domestic and Porto Rican manufacture, their name or their substance? The latter is the Government's contention; the former is that of plaintiffs.

The contention of plaintiffs has the support of *Newhall* v. *Jordan* in the Circuit Court of the Eastern District of New York (149 Fed. Rep. 586); also of the Circuit Court of Appeals of the Second Circuit in *Anderson* v. *Newhall* (161 Fed. Rep. 906), sustaining a judgment of the Circuit

Court of the Southern District of New York. But the Circuit Court of Appeals seems to have come to doubt the correctness of its ruling, for the present certificate is from that court, and bears the signature of Judges Lacombe and Ward, who constituted a majority of the court when *Anderson* v. *Newhall* was decided. We realize, therefore, that the contentions of the parties present a close question.

Bay rum is a fragrant spirit obtained by distilling rum with the leaves of the bay-berry, or by mixing various oils with alcohol. We must seek its likeness in the revenue laws, and the Government contends that it is found in §§ 3248, 3254, 3251 and 3282, as respectively amended by the acts of August 28, 1894 (28 Stat. 509, 563, c. 349), and March 1, 1879 (20 Stat. 327, 335, c. 125).

Plaintiffs contend that "Porto Rican bay rum is the article of merchandise 'like' to bay rum of domestic manufacture, and not 'like' to distilled spirits of domestic manufacture." And then insisting, and quoting the Commissioner of Internal Revenue in support of the insistence, that as there is no internal revenue tax imposed on bay rum, as such, it follows necessarily "that if bay rum of domestic manufacture does not pay a tax, then the article of Porto Rican manufacture is not liable to pay a tax." And stress is put upon "manufacture" as defined in *Anheuser-Busch Association* v. *United States*, 207 U. S. 556, 562, where it is said, "There must be a transformation; a new and different article must emerge, 'having a distinctive name, character or use.'" And bay rum, it is asserted, satisfies the distinction and has been regarded as satisfying it in the laws, also commercially and practically. It has never been treated, it is said, as distilled spirits, but has been treated as different "by every person and every court and every department of the Government until these Porto Rican imports were made." This is the substance of plaintiffs' argument. We cannot follow it in its details.

The Government replies to it that the purpose of the Foraker Act was to apply the revenue laws of the United States to Porto Rican articles and to do this comprehensively, not by special or variable adaptations. No article containing alcoholic spirits, the Government says, is taxed in the general statutes of the United States by its commercial name, but that all such articles are provided for and taxed in Chapter 4, of the Revised Statutes, under the name of "distilled spirits." It is hence argued that domestic bay rum being "distilled spirits" for the purpose of internal revenue taxation, Porto Rican bay rum must be considered as "distilled spirits" and subject to the same tax. In other words, the likeness is established by the essential nature of the article, not by its name. "If this be not so," it is further argued, "not only will the internal revenue tax on Porto Rican bay rum fail, but the tax on Porto Rican alcohol, whiskey, brandy, gin, ordinary rum, and on all wines, liqueurs and cordials, will also fail, because no tax is laid on any such article *eo nomine* by our internal revenue laws, but all are embraced in one generic article 'distilled spirits.'" We think the argument is complete and irresistible. The purpose of the Foraker Act, the provisions of the internal revenue laws and the administration of both, by departmental officers all concur in support of the Government's contention. The purpose of the Foraker Act was the equal taxation of Porto Rican articles and domestic articles; the provisions of the internal revenue laws do not describe articles by name but by character; the revenue officers have construed them as applicable to Porto Rico, except for a few months following the decision in *Newhall* v. *Anderson, Collector*.

The language of the revenue laws is comprehensive enough to cover all distilled spirits. Section 3248, after specifically defining them to be "that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of

grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance," provides that "the tax shall attach to this substance as soon as it is in existence as such," no matter in what state it may be subsequently separated or in what other substance it may be subsequently transferred.

By § 3254 it is provided that "all products of distillation, by whatever name known, which contain distilled spirits or alcohol, on which the tax imposed by law has not been paid, shall be considered and taxed as distilled spirits." In other words, all mixtures or dilutions of the substance so defined, and more specifically in § 3248, are subject to a tax as "distilled spirits." And it is provided in § 3282, as amended, that the use of "spirits or alcohol, in manufacturing vinegar or any other article, or in any process of manufacture whatever," is prohibited "unless the spirits or alcohol so used shall have been produced in an authorized distillery and the tax thereon paid."

The purpose of the law to impose a tax upon the compounds of alcohol under the single designation of "distilled spirits" receives confirmation from the exemptions from the tax. Six exemptions are pointed out by the Government, as follows: (1) alcohol withdrawn for scientific purposes by scientific institutions or colleges of learning; (2) wine spirits used in the fortification of sweet wines under certain restrictions; (3) distilled spirits used in the manufacture of sugar from sorghum, or (4) purchased by the United States for government uses, or (5) exported in bond or with benefit of drawback of taxes paid; and (6) distilled spirits denatured in accordance with the Denatured Alcohol Act.

These considerations demonstrate, we think, that bay rum is subject to a tax as an alcoholic distillate.

We have already stated the chief contention of plaintiffs to be that the test of a tax on Porto Rican articles must be a tax upon domestic articles of like name, and that this is

especially so as to bay rum, it is contended, is established by the fact that under the tariff act, bay rum, as a commercial article, is taxed at a lower rate than brandy, and other spirits not specifically provided for. And, further, that bay rum, under the revenue act of June 13, 1898, 30 Stat. 446, c. 448, was taxed or held taxable by the Commissioner of Internal Revenue under the head of "perfumery and cosmetics." So also the ruling of the Commissioner, it is urged, refusing to hold that druggists and bay rum dealers, were liquor dealers, which, it is contended, he would necessarily have to hold them to be, if bay rum were to be considered an alcoholic distillate. It is not necessary to answer these contentions in detail. They have, when taken by themselves, an appearance of strength. They may, however, be explained by other statutory provisions. A general answer to them is that the purpose of the Foraker Act, was, as we have said, to subject Porto Rican articles to the internal revenue laws of the United States, and under those laws, articles are taxed not by their commercial names or uses, but according to their alcoholic content, under the generic name of "distilled spirits."

One other contention of plaintiffs we may notice. On February 4, 1909, 35 Stat. 594, c. 65, Congress passed the act by which it is provided "that upon bay rum, or any article containing alcohol, hereafter brought from Porto Rico into the United States for consumption or sale there shall be paid a tax on the spirits contained therein of one dollar and ten cents per proof gallon," and the Commissioner of Internal Revenue is given power to establish rules to make the act effective. It is insisted that this act is a declaration by Congress that bay rum was not subject to a tax under prior statutes. The history of the act rejects the contention and manifests that the act was passed in consequence of the decision in *Newhall* v. *Anderson*, and the other decisions to which we have

referred. The law was not the declaration of a new policy but a more explicit expression of the purpose of the prior law, made necessary by the judicial construction of that law.

The question certified is, therefore, answered in the affirmative.

BRADFORD *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 571. Submitted March 24, 1913.—Decided April 28, 1913.

One convicted of fraud in obtaining patents to public lands filed a petition for pardon which was granted on condition that he make full restitution to the satisfaction of the United States Attorney for the district in which the land was situated, in respect to all land, land titles or claims to land. He filed a relinquishment reserving under the laws of the State in which the land was situated the right to all improvements, the value thereof, with all taxes theretofore paid and to proceed against the United States for the same. He then brought suit in the Court of Claims therefor: *Held* that

Under the conditions of the pardon which he accepted no right was wrested from him; but, as he was to make voluntary restitution for his wrong-doing, he was not deprived of his lands or property nor evicted therefrom.

The power of the United States Attorney was limited by the subject-matter of the agency; and the fact that the restitution was to be made to his satisfaction did not enlarge his authority so as to bind the United States to make payments to one who was to make restitution to it.

Whatever rights the laws of the State might give under such conditions, the United States is not bound thereby, as no contract was established against it.

47 Ct. Cl. 141, affirmed.

Suit in the Court of Claims under the Tucker Act, so-called, to recover the sum of $15,791.92.

The petition was dismissed upon demurrer.

The facts, as alleged, are these: Appellant is the owner of tracts of land, each containing 160 acres, in the Parish of Ascension, State of Louisiana, which have been in his possession and ownership since, respectively, the tenth of October, 1898, fourteenth of September, 1901, and the twelfth of December, 1902. The lands at certain times prior to those dates were public lands of the United States and subject to entry under § 2289 of the Revised Statutes of the United States. One of the tracts was entered under such section by one Robert H. Cox, which entry resulted in a final certificate being issued to him on April 4, 1908, by the local land officers at New Orleans. On March 5, 1898, after he had made and submitted his final proof, he conveyed 100.45 acres of the land to one Uhlhorn, and on December 27, 1898, the latter sold and conveyed the same to appellant. On January 2, 1901, Cox conveyed the remaining lands to Leon and Julius Weil, with right of redemption. On certain subsequent dates Cox sold and relinquished to appellant his right of redemption.

On April 6, 1900, the Commissioner of the General Land Office suspended the entry of Cox upon the report of two special agents of the Land Office, but neither Cox nor appellant was notified of such suspension and no proceedings were had thereon until one Elijah Green filed in the local land office at New Orleans an application to contest Cox's entry, charging that it had been made in fraud of law, in that it had not been made for his own use and benefit, but for the benefit of appellant. The contest, under the rules of practice, was referred to the Commissioner of the General Land Office, who decided, on May 26, 1902, that Green's application could not be permitted for the reason that Cox's entry had been confirmed by § 7 of the act of Congress of March 3, 1891 (26 Stat. 1099, c. 561), more than two years having elapsed between the date of the issue of the final certificate of the entry, and

the date of Green's application. The Secretary of the Interior affirmed the decision.

On February 16, 1903, Cox filed in the local land office at New Orleans, a pretended relinquishment of the entry, accompanied by his affidavit executed January 13, 1903, alleging that he had made the entry in fraud of the law for the benefit of appellant. The papers were transmitted to the Commissioner of the General Land Office, and that officer on May 3, 1904, held the entry for cancellation and required appellant to apply for a hearing upon the truth or falsity of Cox's averments on pain of forfeiture of his rights under the entry. Appellant applied for a hearing, denied by affidavit the averments of Cox, and set up as a defense, the order of the Commissioner and the Secretary of the Interior deciding that the entry had been confirmed by the act of Congress of March 3, 1891. The hearing was never held or granted to appellant, and he has not up to this time been given an opportunity to show, as he could show if he were given opportunity, that Cox's charges were false in every particular and that he, appellant, was a *bona fide* purchaser for value of the lands embraced in the entry. On the contrary, on April 26, 1905, an indictment was filed against him in the United States District Court for the Eastern District of Louisiana, charging him with an attempt to defraud the United States and alleging as an overt act his application for a hearing of the charges made by Cox. The indictment was quashed October 31, 1907, by the United States District Attorney, with leave of the court.

On the twenty-fourth day of April, 1909, the Commissioner of the General Land Office, upon the consideration of the pretended relinquishment of Cox, canceled the entry and held that the lands were open to entry by other persons, and entries of the lands have been made.

The second tract described in the petition was entered under the Homestead Law, by one T. R. Cox, and

through certain mesne conveyances appellant became its owner.

On April 6, 1900, the Commissioner of the General Land Office, in consequence of the report of the agent of the office, suspended the entry, but no official notice of the suspension was given to appellant, and no further proceedings were ever had on the suspension of the entry.

On February 17, 1902, Cox, by a fictitious act of sale, for a nominal consideration, undertook to convey 140 acres of his entry to one S. B. Moore, for the purpose of defrauding appellant.

On March 19, 1902, one Leslie B. Wright filed a contest against the entry, making Cox, Moore and appellant parties. The local land office decided the contest in favor of appellant, holding that the conveyance to Moore was fictitious and fraudulent and was executed to defeat appellant's title. Wright appealed from the ruling to the Commissioner of the General Land Office, who affirmed the decision December 1, 1902.

On December 8, 1903, upon a request of a special agent of his office, the Commissioner recalled his decision, and on January 2, 1904, vacated the same without notice to any one or giving appellant an opportunity to meet the charges, the Commissioner stating that his action had been taken on facts disclosed by the special agent's reports made after the decision.

On April 26, 1905, an indictment under § 5440 of the Revised Statutes was filed against appellant, alleging as an overt act appellant's appearances before the local land office in the contest by Wright. No trial or other proceedings were had upon the indictment, and, on October 31, 1907, it was quashed by the District Attorney, with leave of the court.

On October 14, 1908, without further notice to appellant, the Commissioner of the General Land Office reversed the decision of the local land officers in the contest by

Wright and canceled the homestead entry of Cox, thereby undertaking to defeat appellant's right and title to the lands as a *bona fide* purchaser thereof. The Secretary of the Interior affirmed the decision.

Appellant, through his counsel, filed a motion for review, but was compelled to abandon the same by threats of criminal proceedings under § 5440 of the Revised Statutes of the United States.

The third tract was entered under the Homestead Law by one Nancy L. Cotton and final proof was made by her and a final certificate was issued to her. She sold the lands to one Fluker and the latter conveyed them to appellant.

On February 24, 1904, an indictment was filed against appellant and one Wright, in the Circuit Court of the United States for the Eastern District of Louisiana under § 5440 of the Revised Statutes. The indictment was, on motion of the District Attorney, quashed.

On May 28, 1903, a contest was instituted against the entry of Nancy L. Cotton, charging fraud in the initiation thereof. Notice of the contest was given to Wright, but not to her. Such proceedings were had thereon that a decision was rendered sustaining the contest and recommending the cancellation of the entry. Appellant appealed from the decision, but was forced to withdraw his appeal by threats of criminal prosecution. The entry was thereupon canceled and the lands subsequently entered by another, whose entry is now intact.

The petition alleges the good faith of appellant's purchase of all of the tracts, that he paid to the State of Louisiana taxes thereon, constructed roads to have access to them and cleared them of timber and otherwise improved them.

The petition further represents that appellant, being in the parish prison at the Parish of Orleans in the summer and fall of the year 1907 under proceedings in two criminal suits, neither of which had relation to or connection with

the lands covered by the entries described, and being above the age of seventy-six years, in bad health and in danger of his life, he applied for a pardon. The pardon was granted on the fifth of September of the same year, but the condition was imposed by W. W. Howe, the then District Attorney of the United States for said Eastern District of Louisiana, that appellant should relinquish to the United States the lands described in the entries.

The pardon is attached to the petition and recites appellant's conviction for violation of § 5440, Revised Statutes, in two cases, in each of which he was sentenced to imprisonment for one year, and in one, to pay a fine of $3,000 and in the other a fine of $2,500. The sentences were commuted to the payment of the fines and costs "upon condition that he [appellant] shall have previously made full restitution to the satisfaction of the United States District Attorney for the Eastern District of Louisiana, in respect to all lands, land titles or claims to lands."

Thereupon appellant executed releases of the three tracts, which were the same, the description of the lands only being different. They were as follows:

"I hereby relinquish to the United States, all my right, title and claim in and to the following-described lands, to-wit: . . . reserving, under the laws of Louisiana, the right to all improvements, or the value thereof, with all taxes heretofore paid, and to proceed against the United States for the same."

Appellant cleared portions of the lands to put them in fit condition for cultivation and also built two good dwelling houses thereon, all which were in a good state of preservation at the time he signed the relinquishment to the Government. Appellant also had made other improvements "usual and necessary for the profitable and successful cultivation and carrying on of a farm or plantation in that part of Louisiana."

Attached to the petition are exhibits specially describing the improvements and showing the amount expended on the first tract to have been $8,741.60; on the second tract, $5,765; on the third tract, $798.00, and $487.32 taxes. The Government accepted the relinquishment and permitted the lands to be entered for homestead purposes by other parties.

It is alleged that the United States, by accepting the relinquishment of the lands, became bound and contracted with appellant to pay to and reimburse him for the price and value of the improvements made by him on the lands and the taxes paid by him. Certain articles of the Code of Louisiana are set out which, it is alleged, existed and that they were specifically relied on by appellant and adopted and accepted as the measure of appellant's rights in the premises by the United States District Attorney, and by the Land Department of the United States, in accepting and filing the several relinquishments, whereby, it is further alleged, the United States contracted to pay petitioner the amount and value of his improvements made upon the lands, and the taxes.

Mr. Harvey M. Friend for appellant.

Mr. Assistant Attorney General John Q. Thompson and *Mr. George M. Anderson* for the United States.

Mr. Justice McKenna delivered the opinion of the court, after stating the facts as above.

It will be observed from the allegations of the petition that appellant not only had been convicted of defrauding the Government of certain lands, but that he was charged with fraud in regard to the lands which he relinquished and on account of which he contends a contract arose between him and the Government. This must be regarded

as an element in the consideration of the case. Appellant was a convicted wrongdoer in two cases; he was a suspected wrongdoer in the other cases, and from that standpoint the Government dealt with him; and he was a petitioner for a pardon. The pardon was granted, but upon terms. He was to make restitution for his wrongdoing. The defrauded Government was to be made whole. And not by wresting from him a right, either directly or through the coercion of circumstances, but by his voluntary reparation, securing thereby the Government clemency.

Appellant, therefore, was not deprived of his lands in the sense for which he contends, nor evicted from them. He voluntarily relinquished them for a benefit to himself. But he asserts that the relinquishment was upon conditions especially reserving rights which put the United States under indebtedness to him. The contention is anomalous. Convicted of two offenses and under sentence for them, and suspected of others, he asks that not only the punishment may be remitted, but that reimbursement of expenses and outlays be made him. And this he bases on the agency which he contends was given the District Attorney and the effect of the laws of Louisiana.

Plainly the power of the District Attorney was limited by the subject-matter of his agency. He was to secure restitution, not to engage for payments by the United States, amounting to over $15,000—payments for something which could be of no benefit to the United States, which would be mere uncompensated outlay, not reparation received from appellant but indemnity given to him. And it is to be observed that the restitution was to be "in respect to all lands, land titles or claims to lands." It is true that the restitution was to be made to the "satisfaction" of the District Attorney, but this did not enlarge his agency to do more than accept restitution.

As we have seen, appellant had been convicted in cer-

tain cases, he had been accused in others, charged with fraud in the entries here involved, found to have practiced it. This being the situation, the agency conferred upon the District Attorney comprehended such adjustments as would free the lands from the incumbrances of appellant's acts. The District Attorney had not the power, as appellant contends, as an individual in like situation. We are not therefore called upon to consider what rights the laws of Louisiana gave to appellant or whether they could give any, nor whether, if the United States is not bound by the condition in the relinquishments, the latter are void. It is only necessary to decide that appellant has not established a contract against the United States.

Judgment affirmed.

THE CHIEF JUSTICE took no part in the decision.

MADERA WATER WORKS *v.* MADERA.

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

No. 229. Argued April 17, 18, 1913.—Decided April 28, 1913.

If the constitution of the State authorizes municipalities to construct utility plants as well after, as before, such plants have been built by private parties, one constructing such a plant takes the risk of what may happen, and cannot invoke the Fourteenth Amendment to protect him against loss by the erection of a municipal plant.

There is nothing in the constitution of California that can be construed as a contract, express or implied, that municipalities will not construct water works that will compete with privately owned works built under the provisions of the constitution giving the right, sub-

ject to municipal regulation of charges, to lay mains in the streets of municipalities where there are no public works.
185 Fed. Rep. 281, affirmed.

THE facts are stated in the opinion.

Mr. Frank H. Short, with whom *Mr. F. E. Cook* and *Mr. E. J. McCutchen* were on the brief, for appellant.

Mr. Raleigh E. Rhodes, with whom *Mr. Marshall B. Woodworth* was on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity to restrain the City of Madera from proceeding with the construction of a water plant in competition with one that the plaintiff and its predecessors have built under the constitution of the State. The Circuit Court sustained a demurrer and dismissed the bill. 185 Fed. Rep. 281. The ground of the suit is that the state constitution provides that in any city where there are no public works owned by the municipality for supplying the same with water, any individual or corporation of the State shall have the privilege of using the public streets and laying down pipes, &c., for the purpose, subject to the right of the municipal government to regulate the charges. Art. 11, § 19. It is argued that this provision, coupled with the duty imposed on the governing body to fix water rates annually, and the corresponding duty of the water company to comply with the regulations, both under severe penalties (Art. 14, §§ 1, 2, act of March 7, 1881, §§ 1, 7, 8, Stats. 1881, p. 54, c. 52), imports a contract that the private person or corporation constructing works as invited shall not be subject to competition from the public source. Otherwise, it is pointed out, the same body will be called upon to regulate the

plaintiff's charges and to endeavor to make a success of the city works. Furthermore the plaintiff is forbidden by other provisions to divert its property to other uses and, again, will be called on to pay taxes to help its rival to succeed. Thus it is said, the city proposes to destroy the plaintiff's property, contrary to the Fourteenth Amendment of the Constitution of the United States.

But if, when the plaintiff built, the constitution of the State authorized cities to build water works as well after works had been built there by private persons as before, the plaintiff took the risk of what might happen. An appeal to the Fourteenth Amendment to protect property from a congenital defect must be vain. *Abilene National Bank* v. *Dolley*, 228 U. S. 1, 5. It is impossible not to feel the force of the plaintiff's argument as a reason for interpreting the Constitution so as to avoid the result, if it might be, but it comes too late. There is no pretence that there is any express promise to private adventurers that they shall not encounter subsequent municipal competition. We do not find any language that even encourages that hope, and the principles established in this class of cases forbid us to resort to the fiction that a promise is implied.

The constitutional possibility of such a ruinous competition is recognized in the cases, and is held not sufficient to justify the implication of a contract. *Hamilton Gaslight & Coke Co.* v. *Hamilton*, 146 U. S. 258. *Joplin* v. *Southwest Missouri Light Co.*, 191 U. S. 150, 156. *Helena Water Works Co.* v. *Helena*, 195 U. S. 383, 388, 392. So strictly are private persons confined to the letter of their express grant that a contract by a city not to grant to any person or corporation the same privileges that it had given to the plaintiff was held not to preclude the city itself from building water works of its own. *Knoxville Water Co.* v. *Knoxville*, 200 U. S. 22, 35. Compare *Vicksburg* v. *Vicksburg Water Works Co.*, 202 U. S. 453, 470. As there is no con-

tract the plaintiff stands legally in the same position as if the constitution had given express warning of what the city might do. It is left to depend upon the sense of justice that the city may show.

Decree affirmed.

JOHNSON *v.* UNITED STATES.

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

No. 715. Argued April 11, 1913.—Decided April 28, 1913.

Courts proceed step by step. *Matter of Harris*, 221 U. S. 274, established simply that the transfer of books of the bankrupt to the trustee could be required, and left undetermined the question of use to which the books could be put.

A party is privileged from producing his books in a prosecution against himself but is not privileged from their production.

A criminal cannot protect himself by getting the legal title to corporate books. *Wheeler* v. *United States*, 226 U. S. 478.

The production of a documentary confession by a third person, into whose hands it has come *alio intuitu*, does not compel the witness to be a witness against himself in violation of the Fifth Amendment.

On appeal from a conviction, where there is evidence tending to support the finding and no certificate that all the evidence is in the record, this court is not warranted in declaring, as matter of law, that the Government did not make out a case.

THE facts are stated in the opinion.

Mr. Edward J. Fox, with whom *Mr. Robert A. Stotz* and *Mr. James W. Fox* were on the brief, for plaintiff in error.

Mr. Assistant Attorney General Harr, with whom *Mr. Solicitor General Bullitt* was on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment for concealing money from the defendant's trustee in bankruptcy. The defendant was convicted and sentenced subject to exceptions which raised in different forms the questions whether his books properly were admitted against him and whether the evidence warranted the verdict.

On the first point the facts are simply that the books had been transferred to the trustee in accordance with § 70 of the Bankruptcy Act of July 1, 1898, 30 Stat. 544, c. 541, and were produced before the grand jury and before the petit jury at the trial. That the transfer lawfully could be required is established by *Matter of Harris*, 221 U. S. 274. But the defendant lays hold of an expression in that case, 'the properly careful provision to protect him from use of the books in aid of prosecution,' as an intimation that the books could not be put to such a use.

Courts proceed step by step. And we now have to consider whether the cautious statement in the former case marked the limit of the law in a case where no rights, if there were any, were saved when the books were transferred. The answer was implied in that decision. A party is privileged from producing the evidence but not from its production. The transfer by bankruptcy is no different from a transfer by execution of a volume with a confession written on the fly leaf. It is held that a criminal cannot protect himself by getting the legal title to corporate books. *Wheeler* v. *United States*, 226 U. S. 478. But the converse proposition is by no means true, that he may keep the protection from the introduction of documentary evidence that he would have had while he retained it, after the title and possession have gone to some one else.

It is true that the transfer of the books may have been

against the defendant's will, but it is compelled by the law as a necessary incident to the distribution of his property, not in order to obtain criminal evidence against him. Of course a man cannot protect his property from being used to pay his debts by attaching to it a disclosure of crime. If the documentary confession comes to a third hand *alio intuitu*, as this did, the use of it in court does not compel the defendant to be a witness against himself.

As to the question of evidence, it is enough to say that there was evidence tending as far as it went to show that the defendant foresaw what was coming and attempted to save something from the wreck. There is no certificate that all the evidence is before us, and we should not be warranted in declaring as matter of law that the Government did not make out a case. See *Seigel* v. *Cartel*, 164 Fed. Rep. 691.

Judgment affirmed.

BURLINGHAM ET AL., TRUSTEES OF McINTYRE & COMPANY, *v.* CROUSE.

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

No. 184. Argued March 12, 13, 1913.—Decided April 28, 1913.

In construing a general reference to property in the Bankruptcy Act, weight must be given to a proviso dealing with a special class of property.

A proviso may sometimes mean additional legislation and not be intended to have the usual and primary office of a proviso which is to limit generalities and exclude from the scope of the statute that which otherwise would be within its terms.

Life insurance is property, but it is peculiar property, and Congress

by the proviso in § 70a of the Bankruptcy Act intended that the bankrupt should have the benefit of all policies except to the extent of the actual cash value which could be realized by the trustee for the creditors.

Under the proviso in § 70a of the Bankruptcy Act, the assignee of a policy of insurance on the life of the bankrupt has the right to retain the policy on the same terms that the bankrupt might have retained it.

Under § 70a life insurance policies which have no cash surrender value, or on which the company has loaned the full surrender value so that the policy has no cash surrender value remaining, do not pass to the trustee as general property but remain the property of the bankrupt who is not limited in dealing with them.

181 Fed. Rep. 479, affirmed.

THE facts, which involve the construction of § 70a of the Bankruptcy Act and the ownership of policies of insurance on the life of a bankrupt, are stated in the opinion.

Mr. Dorr Raymond Cobb, with whom *Mr. Irving L. Ernst* was on the brief, for appellants:

The policies were assets of the bankrupt estate. They constituted property which the bankrupts could have transferred. *Matter of Slingluff*, 105 Fed. Rep. 502. And this irrespective of their value. *Re Brown*, 196 Fed. Rep. 758.

The defendant's position, that by an unlawful transfer he acquired a lien upon securities of the bankrupt which were not property and could not pass to the trustees as assets, is inconsistent and illogical.

As a matter of fact, however, the policies in question were valuable although their value at the time of the failure was contingent and uncertain. *Partridge* v. *Andrews*, 191 Fed. Rep. 325; *Kinzie* v. *Winston*, 56 Illinois, 56.

Bearing upon the definition of "property" see also:

Wynehamer v. *People*, 13 N. Y. 396; *Jackson* v. *Housel*, 17 Johns. (N. Y.) 280.

Life insurance policies belonging to the bankrupt and payable to his estate, pass to the trustee, § 70 of the Bankruptcy Act. *Morris* v. *Dodd*, 110 Georgia, 606, however, holds that no policy passes to the trustee unless it has a cash surrender value, and then subject to redemption by the bankrupt. The contrary is held in *Re Josephson*, 9 A. B. Reports, 345; 121 Fed. Rep. 142.

Prior to the present decision, it had been repeatedly held in the Second Circuit that the interest of the bankrupt in all policies of life insurance, payable to his estate, vested in the trustee subject to redemption by the bankrupt when they had either technically or as a matter of fact or custom, a cash surrender value upon his paying such value to the trustee. *In Re Coleman*, 136 Fed. Rep. 818; *Matter of White*, 174 Fed. Rep. 333; *Matter of Hettling*, 175 Fed. Rep. 65; *VanKirk* v. *Slate Co.*, 140 Fed. Rep. 38; *In Re Mertens*, 142 Fed. Rep. 445; aff'd *Hiscock* v. *Mertens*, 205 U. S. 202. See also Remington on Bankruptcy, § 1131, p. 644; *In Re Wright*, 157 Fed. Rep. 554; Bump on Bankruptcy, p. 368. Bearing on this question, see also: *Security Warehouse Co.* v. *Hand*, 206 U. S. 425, 426; *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545, 557; *Stern-Falk & Co.* v. *Louisville Trust Co.*, 112 Fed. Rep. 501; *In re Orear*, 178 Fed. Rep. 632. And see also *In re Charles N. Davidson*, 179 Fed. Rep. 750.

There is no decision of this court upon this precise question, so far as its attitude is disclosed by decisions handed down, but see *Hiscock* v. *Mertens*, 205 U. S. 202; *Holden* v. *Stratton*, 198 U. S. 214 as to its views on certain phases of life insurance as property.

The question of a redemption of the policies by the bankrupt is not in this case, however, as it was in those cases.

If defendant's position is correct the policies in the

absence of the assignment to Crouse would have remained the property of the McIntyre firm notwithstanding the bankruptcy, and that firm, not the trustee, would have been entitled to the proceeds of the policies. The defendant Crouse's position is in no respect stronger than would have been that of the bankrupt had there been no transfer.

Mr. Winfred T. Denison also for the appellants:

Commercially, these insurance policies were transferable property to the full extent of their corpus and not merely to the extent of their "cash surrender value," which was merely what one particular individual (the Insurance Co.) was bound on demand to pay for them.

The entire corpus of the policies and not merely the cash surrender value was "property which . . . the bankrupt could by any means have transferred" within the meaning of § 70. *Re Coleman*, 136 Fed. Rep. 818 (C. C. A. 2d Ct.); *Re Brodbine*, 93 Fed. Rep. 643; *Hyde* v. *Woods*, 94 U. S. 523–525; *Williams* v. *Heard*, 140 U. S. 529.

Therefore they passed to the trustees unless exempted by some provision of law.

Even if the laws of New York controlled this class of exemption, no portion whatever of these policies would be exempt. Laws, N. Y. 1896, p. 220, c. 272, § 22; *Re Coleman*, 136 Fed. Rep. 818, *supra*; *Re Heffling*, 175 Fed. Rep. 65 (C. C. A. 2d Ct.); *Re White*, 174 Fed. Rep. 333 (C. C. A. 2d Ct.); *Re Wolff*, 165 Fed. Rep. 984 (D. C. N. Y.); *Re Boardman*, 103 Fed. Rep. 783 (D. C. N. Y.); *Re Dieck*, 100 Fed. Rep. 770.

But the exemption contained in the proviso to § 70 is a general rule laid down by Congress itself and applies to policies which would not be exempt by the state law. *Holden* v. *Stratton*, 198 U. S. 202.

The language of the proviso does not carry the exemption beyond a privilege to bankrupts who have insurance

on their own lives. This is "the feeling of the language," (*United States* v. *Johnson*, 221 U. S. 488, p. 496) and there is no affirmative hint of any purpose to give the privilege to a bankrupt who is not the assured, but a mere stranger holding the policy exclusively as a commercial asset.

In using the terms "payable to himself, his estate or personal representatives," the proviso excludes policies payable to his assignees *inter vivos* and held by them entirely as commercial property.

The purpose of the proviso does not require any extension of the normal meaning of the language. *Holden* v. *Stratton*, *supra*; *Re Judson*, *supra*; *Burlingham* v. *Crouse*, 181 Fed. Rep. 479 (C. C. A.).

To construe the proviso as granting an exemption to policies held commercially and not by the beneficiaries, would be to make a useless encroachment on the general clause in § 70 and the general purposes of the Bankruptcy Act. *Re Slingluff*, 106 Fed. Rep. 154, at pp. 156–158.

It is significant that in every one of the cases under this proviso the bankrupt has been the assured: e. g., *Holden* v. *Stratton*, 198 U. S. 202; *Re Coleman*, 136 Fed. Rep. 818; *Hiscock* v. *Mertens*, 204 U. S. 202; *Re Buelow*, 98 Fed. Rep. 86; *Re Lange*, 91 Fed. Rep. 361; *Gould* v. *N. Y. Life*, 132 Fed. Rep. 927; *Re Judson*, 192 Fed. Rep. 834; and cf. under act of 1867, *Re McKinney*, 15 Fed. Rep. 535.

The Bankruptcy Law having established an exemption of its own which would not have existed at all under the New York law, it is immaterial whether, and under what conditions, a New York exemption, if it had existed, would have been available to an individual bankrupt out of partnership property. But the New York rule is not clear, the only case being *Stewart* v. *Brown*, 37 N. Y. 350, decided in 1867, and not in point with this case. Even *Re Camp*, 91 Fed. Rep. 745, covering the Georgia District, has since been doubted and strictly limited by the court which decided it. *Re W. S. Jennings & Co.*, 166 Fed. Rep.

639 (Georgia). See also *Jennings* v. *Stannus & Son*, 191 Fed. Rep. 347, p. 349; *Re Beauchamp*, 101 Fed. Rep. 106 (Md.); Collier on Bankruptcy (9th ed.), p. 196; Burdick on Partnership (2d ed.), p. 299 (5); *Pond* v. *Kimball*, 101 Massachusetts, 105.

Mr. Levi S. Chapman and *Mr. Henry E. Newell* for appellee:

The policies in suit were not, under the circumstances here shown, assets which in any event would pass to the trustees. Sec. 70a, subd. 5.

The policies in suit, at the time of petition filed having no actual cash surrender value and no value of any kind which could be realized by the bankrupt or the trustees, were merely executory contracts, and were not property or a property right which the trustees in bankruptcy were entitled to take. *Warnock* v. *Davis*, 104 U. S. 775; *In re McKinney*, 15 Fed. Rep. 535; *Bank of Washington* v. *Hume*, 128 U. S. 195; *In re Coleman*, 136 Fed. Rep. 818; *Hiscock* v. *Mertens*, 205 U. S. 202; *In re Newland*, No. 10170 Fed. Cas.; *Leonard* v. *Clinton*, 26 Hun (N. Y.), 288; *Barber's Adms.* v. *Laroue*, 106 Kentucky, 546; *Holt* v. *Everall*, 34 L. T. (N. S.) 599; *In re Beulow*, 98 Fed. Rep. 86; *Matter of Josephson*, 121 Fed. Rep. 142; aff'd 124 Fed. Rep. 734; *Morris* v. *Dodd*, 116 Georgia, 606; *In re Steele*, 98 Fed. Rep. 78; *Re Lange*, 91 Fed. Rep. 361; *Aetna Nat. Bank* v. *U. S. Life Ins. Co.*, 24 Fed. Rep. 770; *Gould* v. *N. Y. Life Ins. Co.*, 132 Fed. Rep. 927; *Re Judson*, 193 Fed. Rep. 834; *Re Slingluff*, 106 Fed. Rep. 154; Collier on Bankruptcy, 7th ed., 1909, p. 822.

The value of a life insurance policy as an asset in the case of liquidation of the company, is its cash or reserve value. *People* v. *Security Life Ins. Co.*, 78 N. Y. 114; *Matter of Hettling*, 23 A. B. R. 161; *In re Orear*, 178 Fed. Rep. 632; *Partridge* v. *Andrews*, 191 Fed. Rep. 325, can all be distinguished or are in error.

The policies in question are within the proviso of § 70a, subd. 5 of the Bankruptcy Law. *In re Bertonshaw*, 157 Fed. Rep. 363.

A transfer by an insolvent of exempt property is valid as to creditors even though the transfer be voluntary. A debtor may keep or sell his exempt property as he sees fit. *Baldwin* v. *Rogers*, 28 Minnesota, 544; *Bulkley* v. *Wheeler*, 52 Michigan, 296; *Kramer* v. *Wood*, 52 S. W. Rep. 1113; *Smyth* v. *Hall*, 126 Iowa, 627, 102 N. W. Rep. 520.

The bankrupt's right under § 70 to retain any insurance policy held by him by paying or securing to the trustee the cash surrender value thereof after the same has been stated by the company to the trustee, is an assignable right. *Van Kirk* v. *Vermont Slate Co.*, 140 Fed. Rep. 38.

Mr. Justice Day delivered the opinion of the court.

The action was brought in the United States District Court for the Southern District of New York by the trustees of the firm of T. A. McIntyre & Company, and of the individual members of that firm, bankrupts, against Charles M. Crouse and The Equitable Life Assurance Society of the United States to recover the sum of $90,698.32, the net proceeds of certain policies of insurance issued by the Equitable Life Assurance Society upon the life of Thomas A. McIntyre, one of the bankrupts, deceased. The proceeds of the policies were paid into court by the Society. The judgment of the District Court in favor of Crouse was affirmed by the Circuit Court of Appeals (181 Fed. Rep. 479), and the case has been appealed to this court.

It appears that on the tenth of April, 1902, Thomas A. McIntyre obtained two policies of life insurance in the Equitable Society. They were known as "guaranteed cash-value, limited payment, life policies," each providing that upon the death of the insured the company would pay to his executors, administrators or assigns the sum of

$100,000 in fifty annual instalments or the sum of $53,000 in cash, a total of $106,000 for the two policies. On April 14, 1906, the policies were assigned absolutely to the firm of T. A. McIntyre & Company, and on April 24, 1907, they were by that firm assigned to the Equitable Society as collateral security for a loan of $15,370. On February 25, 1908, two months prior to the filing of the petition in bankruptcy, the policies were assigned by McIntyre & Company to the defendant, Charles M. Crouse, subject, however, to the prior assignment to the Equitable Society. A petition in involuntary bankruptcy was filed against McIntyre & Company and its individual members on April 25, 1908, and on May 9, 1908, the defendant Crouse paid the premiums on the policies, in the sum of $6,078.38. McIntyre & Company and the individual members thereof were adjudged involuntary bankrupts on May 21, 1908, and the trustees were elected on the twenty-fourth of July, 1908. On the twenty-ninth of July, 1908, Thomas A. McIntyre died, and the policies became payable.

It appears that the policies had a cash surrender value, which at the time when the trustees qualified was $15,370, or the amount of the loan of the Equitable Society upon the policies. It is therefore apparent that on the day when the petition was filed, as well as the day of the adjudication in bankruptcy, the cash surrender value would not have exceeded the loan and lien of the Society upon the policies. The Circuit Court of Appeals for the Second Circuit held that under the circumstances the policies did not pass to the trustees as assets, and therefore the action which had been begun to set aside the transfer to Crouse, as a preference within the Bankruptcy Act, could not be maintained.

The correctness of this decision depends primarily upon the construction of § 70a of the Bankruptcy Act which reads:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

The part of the section particularly to be considered is subdivision 5 and its proviso. Subdivision 5 undertakes to vest in the trustee property which, prior to the filing of the petition, the bankrupt could by any means have transferred or which might have been levied upon or sold under judicial process against him. Then follows the proviso with reference to insurance policies which have a cash surrender value, permitting a bankrupt, when the cash

surrender value has been ascertained and stated, to pay or secure such sum to the trustee and to continue to hold, own and carry the policies free from the claims of creditors, otherwise the policies to pass to the trustee as assets.

Two constructions have been given this section, and the question, as presented in this case, has not been the subject of direct determination in this court. The one favors the view that only policies having a cash surrender value are intended to pass to the trustee for the benefit of creditors.[1] The other, conceding that the proviso deals with this class of policies, maintains that policies of life insurance which have no surrender value pass to the trustee under the language of § 70a immediately preceding the proviso, which reads: "Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." [2]

To determine the congressional intent in this respect requires a brief consideration of the nature of the rights dealt with. Life insurance may be given in a contract providing simply for payment of premiums on a calculated basis which accumulates no surplus for the holder. Such insurance has no surrender value. Policies, whether payable at the end of a term of years or at death, may be issued upon a basis of calculation which accumulates a net reserve in favor of the policy-holder and which forms a consequent basis for the surrender of the policy by the insured with advantage to the company upon the payment of a part of this accumulated reserve. This feature of surrender value was discussed by Judge Brown of the

[1] *In re Buelow*, 98 Fed. Rep. 86; *In re Josephson*, 121 Fed. Rep. 142; *Gould* v. *New York Life Ins. Co.*, 132 Fed. Rep. 927; *Morris* v. *Dodd*, 110 Georgia, 606.

[2] *In re Becker*, 106 Fed. Rep. 54; *In re Slingluff*, 106 Fed. Rep. 154; *In re Welling*, 113 Fed. Rep. 189; *In re Coleman*, 136 Fed. Rep. 818; *In re Hettling*, 175 Fed. Rep. 65; *In re Orear*, 178 Fed. Rep. 632.

Southern District of New York, in *In re McKinney*, 15 Fed. Rep. 535, 537:

"The first of these elements, the surrender value of the policy, arises from the fact that the fixed annual premium is much in excess of the annual risk during the earlier years of the policy, an excess made necessary in order to balance the deficiency of the same premium to meet the annual risk during the latter years of the policy. This excess in the premium paid over the annual cost of insurance, with accumulations of interest, constitutes the surrender value. Though this excess of premiums paid is legally the sole property of the company, still in practical effect, though not in law, it is moneys of the assured deposited with the company in advance to make up the deficiency in later premiums to cover the annual cost of insurance, instead of being retained by the assured and paid by him to the company in the shape of greatly-increased premiums, when the risk is greatest. It is the 'net reserve' required by law to be kept by the company for the benefit of the assured, and to be maintained to the credit of the policy. So long as the policy remains in force the company has not practically any beneficial interest in it, except as its custodian, with the obligation to maintain it unimpaired and suitably invested for the benefit of the insured. This is the practical, though not the legal, relation of the company to this fund.

"Upon the surrender of the policy before the death of the assured, the company, to be relieved from all responsibility for the increased risk, which is represented by this accumulating reserve, could well afford to surrender a considerable part of it to the assured, or his representative. A return of a part in some form or other is now usually made. . . ."

This case has been cited with approval in this court. *Holden* v. *Stratton*, 198 U. S. 202; *Hiscock* v. *Mertens*, 205 U. S. 202.

Under the Bankruptcy Act of 1867 no special provision was made for insurance policies. The section providing for the passing of the assets of the bankrupt to the trustee contained the broad language of "all the estate, real and personal." Under this statute it was held in *In re McKinney, supra,* that the insurance upon the life of the bankrupt vested in the bankrupt estate only to the extent of its cash surrender value at the time of the filing of the petition.

In *Holden* v. *Stratton, supra,* this court held that the law of the State of Washington, exempting the proceeds of life insurance policies, was applicable, and under the Bankruptcy Act of 1898, § 6, the bankrupt might retain such policies. The Circuit Court of Appeals for the Ninth Circuit, from which *Holden* v. *Stratton* came by certiorari to this court, had held that § 70a was not controlled by the exemptions provided in § 6 of the Bankruptcy Act, and had adhered to its former decision in *In re Scheld,* 104 Fed. Rep. 870, in which § 70a had been construed to pass insurance policies having a cash surrender value to the trustee, unless the bankrupt paid or secured the surrender value, as pointed out in the section. While this court held that the exemption under the state law applied under the Bankruptcy Act to the policy in question, coming to deal with the construction of § 70a, this court said (p. 213):

"As section 70a deals only with property which, not being exempt, passes to the trustee, the mission of the proviso was, in the interest of the perpetuation of policies of life insurance, to provide a rule by which, where such policies passed to the trustee because they were not exempt, if they had a surrender value their future operation could be preserved by vesting the bankrupt with the privilege of paying such surrender value, whereby the policy would be withdrawn out of the category of an asset of the estate. That is to say, the purpose of the proviso was to confer a benefit upon the insured bankrupt by limiting

the character of the interest in a non-exempt life insurance policy which should pass to the trustee, and not to cause such a policy when exempt to become an asset of the estate. When the purpose of the proviso is thus ascertained it becomes apparent that to maintain the construction which the argument seeks to affix to the proviso, would cause it to produce a result diametrically opposed to its spirit and to the purpose it was intended to subserve."

The section came again before this court in *Hiscock* v. *Mertens, supra,* and it was held that the insured was entitled to retain the policies upon the payment to the trustee of a sum equivalent to the amount the company was willing to pay according to its custom, although there was no stipulation in the policies as to a cash surrender value, and upon this subject the court said (p. 212):

"What possible difference could it make whether the surrender value was stipulated in a policy or universally recognized by the companies. In either case the purpose of the statute would be subserved, which was to secure to the trustee the sum of such value and to enable the bankrupt to 'continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of the estate under the bankruptcy proceedings.'"

And in that case it appeared that this sum was less than $6,000, whereas in a short time, some six months later, the maturity of one of the policies would give it a value of over $11,000. But this court held that this circumstance made no difference in the right of the insured to pay the surrender value and hold the policy.

True it is that life insurance policies are a species of property and might be held to pass under the general terms of subd. 5, § 70a, but a proviso dealing with a class of this property was inserted and must be given its due weight in construing the statute. It is also true that a proviso may sometimes mean simply additional legisla-

tion, and not be intended to have the usual and primary office of a proviso which is to limit generalities and exclude from the scope of the statute that which would otherwise be within its terms.

This proviso deals with explicitness with the subject of life insurance held by the bankrupt which has a surrender value. Originally life insurance policies were contracts in consideration of annual sums paid as premiums for the payment of a fixed sum on the death of the insured. It is true that such contracts have been much varied in form since, and policies payable in a period of years so as to become investments and means of money saving are in common use. But most of these policies will be found to have either a stipulated surrender value or an established value, the amount of which the companies are willing to pay and which brings the policy within the terms of the proviso (*Hiscock* v. *Mertens*, *supra*) and makes its present value available to the bankrupt estate. While life insurance is property, it is peculiar property. Legislatures of some of the States have provided that policies of insurance shall be exempt from liability for debt, and in many States provision is made for the protection from such liability of policies in favor of those dependent upon the insured. See *Holden* v. *Stratton*, *supra*.

Congress undoubtedly had the nature of insurance contracts in mind in passing § 70a with its proviso. Ordinarily the keeping up of insurance of either class would require the payment of premiums perhaps for a number of years. For this purpose the estate might or might not have funds, or the payments might be so deferred as to unduly embarrass the settlement of the estate. Congress recognized also that many policies at the time of bankruptcy might have a very considerable present value which a bankrupt could realize by surrendering his policy to the company. We think it was this latter sum that the act intended to secure to creditors by requiring its pay-

ment to the trustee as a condition of keeping the policy alive. In passing this statute Congress intended, while exacting this much, that when that sum was realized to the estate the bankrupt should be permitted to retain the insurance which, because of advancing years or declining health, it might be impossible for him to replace. It is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched. In the light of this policy the act must be construed. We think it was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset, otherwise to leave to the insured the benefit of his life insurance.

It should be observed, in this connection, that in the present case the company had advanced upon the policies their full surrender value, as stipulated in the policies, and that the only interest that could have passed to the trustees would have been the speculative right to the net proceeds of the policies, contingent upon the death of the bankrupt and possibly dependent upon the payment of large annual premiums for thirteen years.

It is urged, however, that under § 70a, the cash surrender value was to be paid by the *bankrupt* when ascertained and the policies kept alive for *his* benefit, and as these policies had been assigned by the beneficiary to McIntyre & Company, not as collateral, but absolutely, they would not come within the terms of the proviso, and therefore the proceeds of the policies vested in the bankrupt estate; but we find nothing in the act by which the right of the assignee of a policy to the benefits which would have accrued to the bankrupt is limited. As we have construed the statute, its purpose was to vest the surrender value in the trustee for the benefit of the creditors and not otherwise to limit the bankrupt in dealing with his policy.

As to the reimbursement of Crouse for the premiums advanced by him and the application by him of the proceeds of the policies to particular items of indebtedness of the bankrupt estate in his favor—upon the facts found we have no occasion to disturb the decree of the Circuit Court of Appeals.

It results that the judgment of the Circuit Court of Appeals must be

Affirmed.

EVERETT, TRUSTEE IN BANKRUPTCY OF JUDSON, *v.* JUDSON.

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

No. 595. Argued March 13, 1913.—Decided April 28, 1913.

Burlingham v. *Crouse, ante*, p. 459, followed to effect that under § 70a of the Bankruptcy Act the trustee only takes surrender value of insurance policies on the bankrupt's life, or, in case loans have been made by the company issuing the policies, only the excess of surrender value over the amount of the loan.

Under § 70a of the Bankruptcy Act the bankrupt is entitled to the policy by paying the amount of the cash surrender value or excess thereof over loans as of the date of the filing of the petition, and in case of the maturity of the policy before the adjudication he or his legal representative is entitled to the proceeds of the policy over and above such amount.

Congress, by the proviso in § 70a, fixed the date of filing the petition as the line of cleavage as between the trustee and the bankrupt in regard to life insurance policies, and this is not affected by subsequent events such as the maturity of the policy by the suicide of the bankrupt, even though prior to adjudication.

192 Fed. Rep. 834, affirmed.

THE facts, which involve the construction of § 70a of the Bankruptcy Act and the ownership of policies of

insurance on the life of a bankrupt, are stated in the opinion.

Mr. Charles K. Beekman for petitioner:

Life insurance policies having no surrender value at petition filed are property, and pass to a bankrupt's trustee. Sec. 70a, subd. 5, Bankruptcy Act; *In re Coleman*, 136 Fed. Rep. 818; *Grigsby* v. *Russell*, 222 U. S. 149, 156; *Sessions* v. *Romadka*, 145 U. S. 29, 30; Collier on Bankruptcy, 9th ed., 1912, pp. 1027, 1028; *In re Orear*, 178 Fed. Rep. 632, 634; *In re Welling*, 113 Fed. Rep. 189.

Life insurance policies, whether they have a surrender value or not at petition filed, are property which the bankrupt could have transferred prior thereto, if payable to himself, his executors, administrators or assigns. 1 Remington on Bankruptcy, p. 556, § 1002; § 1, subd. 25, Bankruptcy Act; *In re Barrow*, 89 Fed. Rep. 583; *Partridge* v. *Andrews*, 191 Fed. Rep. 325, 329.

Life insurance policies having a surrender value at petition filed vest absolutely in a trustee if the bankrupt dies before adjudication. *Partridge* v. *Andrews*, 191 Fed. Rep. 325; *Burlingham* v. *Crouse*, 181 Fed. Rep. 479; *In re Welling*, 113 Fed. Rep. 189, 193; *In re Orear*, 178 Fed. Rep. 632; *In re Judson*, 188 Fed. Rep. 702.

For interpretation of proviso contained in § 70a, subd. 5, Bankruptcy Act, see *Holden* v. *Stratton*, 198 U. S. 202; *Hiscock* v. *Mertens*, 205 U. S. 202.

A trustee takes title to the proceeds of property owned by a bankrupt at petition filed. *Partridge* v. *Andrews*, 191 Fed. Rep. 325, 331.

Where a bankrupt dies or becomes insane subsequent to the filing of a petition in bankruptcy against him, a discharge in bankruptcy may nevertheless be granted, though the requirement calling for the personal presence of the bankrupt cannot be complied with. Collier on Bankruptcy, 9th ed., 1912, page 250; Bankruptcy Act, § 8.

As to property acquired after petition filed, see 1 Remington on Bankruptcy, p. 647, § 1135; *In re Ghazal*, 174 Fed. Rep. 809; *In re McDonnell*, 101 Fed. Rep. 239.

Under the present Bankruptcy Act, not only the property which the bankrupt owned at the time of filing of the petition against him passes to his trustee, but also the proceeds of property owned by him at petition filed which he has disposed of afterwards. *In re Milk Company*, 145 Fed. Rep. 1013; *In re Pease*, 4 Am. B. R. 578, 582.

The surrender value referred to in § 70a, subd. 5, is the surrender value of a policy at the time the same is stated to the trustee by the company issuing the same. *In re McKinney*, 15 Fed. Rep. 537; *Holden* v. *Stratton*, 198 U. S. 214; *Hiscock* v. *Mertens*, 205 U. S. 202, 209.

A trustee takes title to rights of action arising upon a bankrupt's life insurance policies which have matured before adjudication, if they were owned by him at petition filed under Bankruptcy Act, § 70a, subd. 6. *Matthews* v. *Amer. Cent. Ins. Co.*, 154 N. Y. 449, 460; *Partridge* v. *Andrews*, 191 Fed. Rep. 325.

Mr. George S. Ludlow for respondent.

Mr. Justice Day delivered the opinion of the court.

This case involves the title to the proceeds of certain insurance policies upon the life of Alfred M. Judson, bankrupt, deceased, collected by the trustee in bankruptcy. The executor of Judson's estate brought suit against the trustee in the United States District Court for the Southern District of New York, asserting title to such funds. The District Court ordered that the proceeds of the policies, less their cash surrender value, be paid to the executor (188 Fed. Rep. 702); the Circuit Court of Appeals for the Second Circuit, upon petition to revise, affirmed that order (192 Fed. Rep. 834), and the case comes here on certiorari.

A petition in involuntary bankruptcy was filed against the firm of Judson & Judson and its members, Alfred M. Judson being one, on December 17, 1910, and on December 23, 1910, Judson entered a notice of his appearance in the proceedings. On January 9, 1911, the firm and its members were adjudged bankrupts, and on February 9, 1911, Everett qualified as trustee. Judson owned certain life insurance policies, at the time of the institution of the bankrupt proceedings, and thereafter and until his death payable to his executors, administrators or assigns. So far as this case is concerned, at the time of the filing of the petition in bankruptcy, these policies, with cash surrender values and subject to loans, were as follows: One policy for $5,000, having a cash surrender value of $2,291.49 and subject to a loan of $2,238; another for $1,000, having a cash surrender value of $332.31 and subject to a loan of $322; and another for $10,000, having a cash surrender value of $5,030 and subject to a loan of $5,240. It therefore appears that the cash surrender value of the policies on December 17, 1910, was $63.80.

On January 4, 1911, Judson committed suicide. Notice was served on the trustee that the executor claimed the right, under § 70a of the Bankruptcy Act to pay to the trustee the cash surrender value of the policies when ascertained, but the trustee denied such right and also the right of the executor to the balance of the proceeds of the policies. Under agreement, the insurance companies paid to the trustee $8,675.14 upon the policies. The executor asserted title to the difference between the sum realized on the policies and the cash surrender value, namely, $8,611.34. The District Court, upon the authority of *Burlingham* v. *Crouse*, 181 Fed. Rep. 479, held that the proceeds of the policies, over and above the cash surrender value as of the date of the filing of the petition, passed to the executor. The Circuit Court of Appeals affirmed the order of the District Court, holding that the

time when the interest of the bankrupt estate in the policies passed to the trustee was the date of the filing of the petition, and further, also upon the authority of *Burlingham* v. *Crouse*, 181 Fed. Rep. 479, that the interest of the trustee in the policies extended only to their cash surrender value.

The present case was argued at the same time as the case of *Burlingham* v. *Crouse, ante*, p. 459, and in so far as it is like that case the principles therein laid down are controlling. The present case has, however, a feature not directly involved in the case of *Burlingham* v. *Crouse*, because Judson, the insured, committed suicide before the adjudication in bankruptcy, although after the filing of the petition, and it is the contention of the petitioner that the Bankruptcy Act vested the title to the property in the trustee as of the time of the adjudication and that the death of the bankrupt between the filing of the petition and the date of the adjudication made the proceeds of the policies assets in the hands of the trustee.

While it is true that § 70a provides that the trustee, upon his appointment and qualification, becomes vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, there are other provisions of the statute which, we think, evidence the intention to vest in the trustee the title to such property as it was at the time of the filing of the petition. This subject was considered in *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, wherein it was held that, pending the bankrupt proceedings and after the filing of the petition, no creditor could obtain by attachment a lien upon the property which would defeat the general purpose of the law to dedicate the property to all creditors alike. Section 70a vests all the property in the trustee, which, prior to the filing of the petition, the bankrupt could by any means have transferred or which might have been levied upon and sold under judicial process against him. The

bankrupt's discharge is from all provable debts and claims which existed on the day on which the petition for adjudication was filed. *Zavelo* v. *Reeves*, 227 U. S. 625, 630–1. The schedule that the bankrupt is required to file, showing the location and value of his property, must be filed with his petition.

We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition. And it is as of that date that the surrender value of the insurance policies mentioned in § 70a should be ascertained. The subsequent suicide of the bankrupt before the adjudication was an unlooked-for circumstance which does not change the result in the light of the construction which we give the statute.

It follows that the judgment should be

Affirmed.

ANDREWS, EXECUTRIX, *v.* PARTRIDGE, TRUSTEE.

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

No. 496. Argued March 13, 1913.—Decided April 28, 1913.

Burlingham v. *Crouse*, *ante*, p. 459, and *Everett* v. *Judson*, *ante*, p. 474, followed to effect that under § 70a of the Bankruptcy Act the trustee is only entitled to the cash surrender value of insurance policies on the life of the bankrupt at the time of the filing of the petition and that the bankrupt or his representative is entitled to the balance of

the value thereof, and that the subsequent death of the bankrupt had no effect on this division even though it occurred before adjudication.

191 Fed. Rep. 325, reversed.

THE facts, which involve the construction of § 70a of the Bankruptcy Act and the ownership of policies of insurance on the life of a bankrupt, are stated in the opinion.

Mr. Samuel H. Richards, with whom *Mr. Thomas E. French* was on the brief, for petitioner.

Mr. John D. McMullin, with whom *Mr. Henry F. Stockwell* was on the brief, for respondent.

MR. JUSTICE DAY delivered the opinion of the court.

Harvey K. Partridge, Trustee in Bankruptcy of Benajah D. Andrews, by petition filed in the United States District Court for the District of New Jersey, sought to acquire the title to the proceeds of certain insurance policies upon the life of Benajah D. Andrews, bankrupt, deceased, a claim to such proceeds having been made by the executrix of Andrews' estate. An order having been entered in the District Court in favor of the executrix, except as to the cash surrender value of the policies, the Circuit Court of Appeals for the Third Circuit, upon a petition to revise, reversed the decree of the District Court and ordered that the proceeds pass entirely to the trustee. 191 Fed. Rep. 325. To review that decree this writ of certiorari was issued.

It appears from the finding of facts by the Circuit Court of Appeals that a petition in involuntary bankruptcy was filed against Andrews on February 3, 1910; that on April 4, 1910, he was adjudicated a bankrupt, and on April 28 of the same year a trustee was elected and qualified. It further appears that Andrews died on February 15, 1910,

having at that time, and at the time of the filing of the petition in bankruptcy, two policies of insurance upon his life, one for $10,000 payable upon his death to his executors, administrators or assigns, and the other for $5,000 payable upon his death to his estate. At the date of filing the petition in bankruptcy the $10,000 policy had a cash surrender value of $14.93 and was subject to a loan of $4,481.39; and the $5,000 policy had a cash surrender value of $100. Under a stipulation between the trustee and the executrix the net proceeds of the two policies were paid to the trustee to be held until the title thereto had been determined.

The District Court decreed that the trustee was entitled to the cash surrender value of the policies as of the date of the filing of the petition, and that the bankrupt estate had no interest in the balance of the proceeds of the policies. The Circuit Court of Appeals also held that the cash surrender value of the policies must be ascertained as of the date of the filing of the petition in bankruptcy. Construing § 70a of the Bankruptcy Act, it decided, however, that the policies passed to the trustee, subject to the right of the bankrupt to pay or secure to the trustee the cash surrender value of the policies and to continue to hold and own them, but that this right was extinguished by his death before adjudication.

This case was argued and submitted at the same time as the cases of *Burlingham* v. *Crouse*, *ante*, p. 459, and *Everett* v. *Judson*, *ante*, p. 474. An application of the principles therein laid down requires the reversal of the judgment of the Circuit Court of Appeals, and it is accordingly

Reversed.

NORTHERN PACIFIC RAILWAY COMPANY *v.* BOYD.

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

No. 47. Argued November 11, 12, 1912.—Decided April 28, 1913.

A corporation acquiring stock control of a railroad company and leasing it becomes liable to account to the leased company for the amount of bonds in the treasury of the leased company diverted by it; that liability can be enforced by a creditor of the leased company who is unable to collect his judgment on account of the insolvency of the leased company which has resulted from the lease itself. *Chicago Railway* v. *Chicago Bank*, 134 U. S. 277.

A lessor railroad company which has once become liable for diversion of bonds from the treasury of a lessee company remains so until the bonds are restored; nor is the obligation lessened by disbursements made on account of the roadbed of the leased company.

Improvements of a roadbed leased for 999 years from another company are expenditures for the benefit of the lessee and not the lessor; they cannot be regarded as an offset to a debt owed by the lessee to the lessor. *Chicago Railway* v. *Chicago Bank*, 134 U. S. 277.

Contracts for reorganization made between bondholders and stockholders of corporations, insolvent or financially embarrassed, involving the transfer of the corporate property to a new corporation, while proper and binding as between the parties, cannot, even where made in good faith, defeat the claim of non-assenting creditors; nor is there any difference whether the reorganization be made by contract or at private sale or consummated by a master's deed under a consent decree.

Even in the absence of fraud, any device, whether by private contract or under judicial sale, whereby stockholders are preferred to creditors, is invalid. *Louisville Trust Co.* v. *Louisville Railway*, 174 U. S. 683.

The decree in a proceeding brought by one of a class to permit that class to participate in a reorganization is not *res judicata* as against another of the same class who was not a party thereto and had no notice of the proceeding.

Rights of creditors of corporations undergoing reorganization do not

depend upon whether the property was sufficient on the day of sale to pay them and prior encumbrances, but on fixed principles established by law.

The property of a corporation, in the hands of the former owners under a new charter, is as much subject to existing liabilities as that of a defendant who buys his own property at a tax sale.

The fact that property of great value belonging to an insolvent corporation is bid in by the reorganization committee at the upset price fixed by the court at a judicial sale, cannot be used as evidence to disprove the recital as to its actual and far greater value when subsequently transferred by the reorganization committee to the new corporation.

A creditor of a corporation undergoing reorganization cannot prevent stockholders from retaining an interest in the reorganized corporation; if he is given a fair opportunity to protect his interests and refuses to avail of it he may be cut off by the decree.

Laches is not to be measured as statutory limitations are. There is no necessary estoppel from mere lapse of time where complainant's nonaction is excusable and has not damaged defendant or caused him to change his position. *Townsend* v. *Vanderwerker*, 160 U. S. 186.

In this case the delay in bringing the suit was excusable if not unavoidable; and, as complainant's silence did not mislead the stockholders and his inaction did not induce any of them to become parties to the reorganization, laches cannot be imputed to him.

177 Fed. Rep. 804, affirmed.

THE Circuit Court of Appeals for the Ninth Circuit affirmed a decree subjecting the property of the Northern Pacific Railway Company to the payment of a judgment for $71,278 which Joseph H. Boyd had revived against the Cœur D'Alene Railway and Navigation Company. The record on this appeal is very lengthy and the transactions so overlap that any chronological statement would necessarily be confusing. It will conduce to clearness to refer first to those between the Cœur D'Alene and the Northern Pacific Railroad and then set out as succinctly as possible the facts connected with the foreclosure of the Northern Pacific *Railroad* and its purchase by the Northern Pacific *Railway*.

In 1886 the Cœur D'Alene Railroad and Navigation

Company constructed a narrow gauge railroad from Burke, Idaho, on the Northern Pacific Railroad, to Old Mission. Spaulding, in 1887, brought suit in an Idaho court to recover $23,675 for work done and material furnished in building it. Owing to the inaccessibility of the county seat in which the territorial court was held, and the fact that the terms were generally devoted to criminal business, there was much delay in getting a hearing. At last there was a trial, lasting forty days; but the presiding judge died before making his findings and entering judgment. His successor having been of counsel for one of the parties, was disqualified, so that it was not until 1896 that Spaulding recovered judgment against the Cœur D'Alene. Boyd claimed that this judgment belonged to him; and, learning that Spaulding had threatened to transfer the judgment, Boyd in 1898 instituted a suit to establish his title. It terminated in his favor in May, 1901. When the appeal was dismissed, the judgment against the Cœur D'Alene was about to become dormant. Boyd thereupon (1903) began proceedings in Idaho to have it revived, and on October 23, 1905, obtained a judgment against the Cœur D'Alene Company for $71,278, being the original debt with accumulated interest and costs. An appeal was taken, which was dismissed, and thereupon Boyd, in September, 1906, brought in a state court this suit against the Northern Pacific Railroad and the Northern Pacific Railway Company, claiming that the Rail*road* was liable for this debt of the Cœur D'Alene and that the Rail*way* in turn was liable for this debt of the Rail*road*. The case was removed to the United States Circuit Court for the Eastern District of Washington.

The Cœur D'Alene Railway and Navigation Company in 1886 built a narrow gauge railroad 33 miles in length. D. C. Corbin was president and controlled 5,100 shares, which constituted a majority of the stock, which had been increased to $1,000,000, and all of which was unpaid.

In 1888, while the Spaulding suit was pending, Corbin entered into a contract with the Northern Pacific Railroad in which he agreed to sell it his stock, stated to be full paid and non-assessable; to secure for it a lease of the Cœur D'Alene's property for 999 years and authority to issue $825,000 of mortgage bonds. The Northern Pacific was to pay the interest of six per cent. on those bonds issued at the rate of $25,000 per mile on the 33 miles of road constructed, or to be constructed; and after a certain date to create and maintain a sinking fund for the redemption of the bonds at maturity; to pay for the value of material on hand, and $20,000 to cover amounts expended for surveys.

Corbin secured the adoption of resolutions authorizing the lease and the issuance of the bonds. On September 18, 1888, 5,100 shares of stock were transferred to the Railroad, which entered into possession as lessee October 1, 1888, taking charge of all the matters relating to the Cœur D'Alene, including its litigation, although Corbin and the other officers did not immediately resign.

The resolution provided for the immediate issuance of $825,000 of bonds, $360,000 of which were to be retained to redeem the outstanding bonds for that amount. The agreement was silent as to what should be done with the remaining $465,000 of bonds, and the parties are at issue as to what use was, in fact, made of them. The Railway insists that the records show that they were delivered by the mortgage trustee on October 29 and 30, 1888, upon the order of Corbin, president, part to him and part to another person. Boyd, however, contends that these bonds, $465,000, or their proceeds were used to pay Corbin for the 5,100 shares of stock sold by him to the Northern Pacific Railroad, while the latter insists that the consideration for the transfer was, as stated in the contract, the railroad's guaranteeing the principal and interest of

the bonds and taking a lease of the property for 999 years, which provided for rental to be paid out of net earnings.

The evidence on this branch of the case is meager. On behalf of the defendant the records showed that on October 29 and 30, 1888, the bonds were turned over on the order of Corbin, president of the Cœur D'Alene Company. Corbin, who was an old man at the time of taking the testimony in 1907, stated that he received none of the bonds but so much cash; that neither he nor his associates received any benefit from the mortgage, "though I presume it was probably used to pay us. I know we got our money. . . . I do not think we received any bonds, unless possibly we might have received bonds with an agreement with somebody to take them off our hands and pay us the money, because I never had any bonds. . . . If they ever came into my hands at all, they just passed through my hands."

A witness for the Northern Pacific, who had been its Auditor in 1888, had no personal knowledge of the transaction, but testified that there was nothing on the books of the Northern Pacific which showed that it had ever received the $465,000 of bonds or that it had ever paid anything for this stock. He did not think that the 33 miles of railroad cost $825,000, and supposed that the $465,000 of bonds went to Corbin and his associates. "His rights and so on were worth something."

In December, 1889, the Railroad obtained, through Corbin, the remaining 4,900 shares of stock in the Cœur D'Alene, paying therefor $250,000. It changed the road from a narrow to a broad gauge at a cost of $150,000 and extended the line 16½ miles at a cost of $750,000, and, as provided in the mortgage, issued $413,000 of additional bonds, being at the rate of $25,000 per mile. The cost of this extension, change in grade, and other betterments amounted to $910,000, or about $500,000 more than the

Northern Pacific Railroad received from the sale of this last issue of $413,000.

The first 21 months after the lease the Cœur D'Alene's net earnings amounted to $176,000, and, as the lease provided that net earnings should be paid as rental, a dividend of 6 per cent. was declared. Thereafter the earnings rapidly decreased and ultimately the books showed a loss. But the Northern Pacific Railroad, in accordance with the terms of the lease, paid the interest on the bonds until it was itself put in the hands of a Receiver in 1893. He failed to pay the interest in 1895, and proceedings were instituted to foreclose the mortgages on the Cœur D'Alene Company. The property was sold under foreclosure in January, 1899, for $220,000 to the newly organized Northern Pacific Railway Company.

This left nothing for payment of Boyd's debt, and he insists that the lease and the diversion of the funds in purchase of Corbin's stock made the Railroad responsible for the debts of the Cœur D'Alene, including his judgment. He further claims that the Rail*way* became liable for the payment of the same debt by virtue of new and independent proceedings now to be stated, under which the Northern Pacific Rail*way* in 1896 acquired the property of the Northern Pacific Rail*road*.

On August 15, 1893, Winston and others filed in the United States Court for the Eastern District of Wisconsin a creditors' bill against the Northern Pacific Railroad alleging that it was insolvent, its mortgage bonds amounting to about $140,000,000 and its floating debts to $11,000,000, and praying for the appointment of a receiver to preserve the property as an entirety and to prevent it from being dismembered by separate sales under attachments and other liens. The company owned or controlled 54 subsidiary companies, and main and branch lines 4,700 miles in length. It also owned or was entitled to receive about 40,000,000 acres under land grants. There

were six mortgages—some on one part of the property, some on another and a general mortgage on the entire railroad lines. It also owned a large body of land which was not encumbered by liens. Interest had been paid on some of the bonds, but there had been a default in the interest on those secured by the junior mortgages.

Shortly after the filing of the creditors' bill a suit was brought in the same court by the trustees to foreclose these latter mortgages. The cases were consolidated and the receivership continued under the consolidated causes. The Railroad demurred. As the road ran through several States, there were many questions of conflicting jurisdiction which were not settled until January 31, 1896, so that except for administrative orders, no steps were taken in the litigation proper.

The representatives of the stockholders intended to resist the foreclosure, and while recognizing the superior claim of the bonds, advised that "if properly protected, stockholders can secure equitable terms in any reorganization." There were also representatives of the bondholders, and ultimately the two interests agreed upon a plan, the terms of which were stated by the Reorganization Committee which, March 16, 1896, issued a circular to "the holders of bonds and stocks issued or guaranteed by the Northern Pacific Railroad." This circular outlined a plan under which all of the stocks and bonds of the Railroad were to be transferred to a new company (the present Northern Pacific Railway Company) which was to purchase the property of the Railroad, issue new bonds, part of which were to be sold to raise money with which to discharge Receivers' Certificates, purchase needed equipment and make necessary betterments. The balance was to be issued in exchange for the bonds of the old company.

The plan also contemplated the issuance of preferred and common stock, part to be used in paying debts of the subsidiary companies, for which the Northern Pacific

Railroad was liable, part for the expenses of the reorganization, and the balance to be issued in exchange for the outstanding stock of the Northern Pacific Railroad. Under the proposed plan the holder of $100 of preferred stock in the old company, upon paying $10 per share was to receive $50 of preferred and $50 of common stock in the new company. For each $100 of common stock the holder was to receive one share of common in the new corporation upon paying $15 per share. The aggregate of these cash payments on stock was about $11,000,000.

The records showing the cost of the original construction were not accessible, and in some particulars, the costs of the main and subsidiary lines appear to have been combined. But there is testimony tending to show that the cost of the railroad property, subject to the mortgage, was about $241,000,000. What was the value of the 40,000,000 acres of land is not stated. For several years prior to the receivership the road's net earnings had varied between $10,000,000 and $4,449,000. Its fixed charges amounted to $11,000,000—showing an annual deficit of about $5,000,000. The bonds, unpaid interest and Receivers' Certificates aggregated at date of sale $157,000,000. The unsecured debts proved before the master amounted to about $15,200,000. The reorganization contemplated an issue of new bonds for $190,000,000 at lower rates of interest, $75,000,000 of preferred stock, $80,000,000 of common stock—a total in bonds and stock of $345,000,000.

The reorganization agreement contained a statement that the property intended to be purchased was mutually agreed to be of the value of $345,000,000, payable in the stocks and bonds as above described.

The plan of reorganization was accepted, and on April 27, 1896, the decree of foreclosure was entered and the property ordered to be sold, on a date later fixed for July 25, 1896.

On June 23, 1896, an order was entered directing the Special Master to give notice by publication requiring each and every creditor of the Railroad to present their claims against the company or specific property before November 1, 1896; in default of which they should be excluded from the benefit of the reference. Publication was made as directed.

On July 22, 1896, Paton and others, holding contingent and unsecured claims for $5,500,000 against the Northern Pacific R. R., filed a Bill, in the same court that had jurisdiction of the Creditors' Bill and Foreclosure suit, charging that the sale was the result of a conspiracy between bondholders and stockholders to exclude general creditors, and to award to stockholders in the old company rights in the new which were valuable and could not be legally reserved for the stockholders until first offered to and declined by the general creditors. It prayed that the decree of foreclosure should be opened; that the court would formulate a just and fair plan for distribution, and that the sale be enjoined. This was later modified so as to permit the sale to proceed, but asking an injunction to prevent the distribution of the proceeds and securities. The court held that the company was insolvent; that the assets were insufficient to pay the mortgage debts; that practical operation had demonstrated that the net earnings would not pay the fixed charges; that there was no equity in the property out of which unsecured creditors could be paid and no reason existed why the stockholders could not go into a reorganization plan whereby they would become stockholders in the new company, if it should become the purchaser. The prayer for injunction was denied. No appeal was taken.

On July 25 the railroad property was sold at public outcry to the newly organized Railway Company at a price representing $61,500,000, or $86,000,000 less than the secured debts. On July 27 the sale was reported to the

court, and, all parties consenting, was three days later confirmed. The Railway Company entered into possession, and the first year its earnings were $489,000 above fixed charges, which had been lessened under the reorganization. The second year it declared a dividend of $3,000,000 and carried $3,000,000 to surplus. Since that time the earnings have been continually large, the business profitable and the value of the securities correspondingly great; but for a year after the sale, stock on which $10 and $15 had been paid in cash sold at prices varying from $18 to $51 for preferred and $13 and $18 for common.

In addition to the property covered by the mortgage, the Northern Pacific Railroad owned large quantities of land which were not encumbered, and in May, 1896, the Farmers' Loan and Trust Company filed its Supplemental Bill describing this unmortgaged property and alleging that various intervening creditors had obtained judgments against the Railroad Company, some of which had been assigned to the trust company. It prayed that these lands of the Railroad should be sold and the proceeds applied to the satisfaction of the unsecured claims. On the same day that this Supplemental Bill was filed, the Railroad Company and other parties to the consolidated causes answered, the court adjudged that the complainant was entitled to the decree asked for, and appointed a Receiver of the property.

It was not, however, until April 27, 1899, that the sale was ordered. The property was thereupon sold to the Northern Pacific Railway for $1,623,000. The parties stipulated that the sale should be confirmed and on the same day in September, 1899, this was done.

Out of the proceeds of this unmortgaged land a dividend of $108,000 was paid on the Cœur D'Alene bonds held by the Northern Pacific Railway. The Northern Pacific Railway had a claim against the old Railroad of $86,000,000 for deficiency between the bid at foreclosure sale and

the lien debts held by it. It had also purchased about $14,000,000 of other unsecured claims. On this $100,000,000 it was paid a dividend of $1,200,000, or a little over one per cent.

But during these years the litigation between Spaulding and the Cœur D'Alene to recover judgment for work done; between Boyd and Spaulding over the title to the judgment, and between Boyd and the Cœur D'Alene to revive the judgment had been in progress and did not terminate until 1905, when the judgment was revived. When the appeal was dismissed Boyd brought this bill in equity against the Northern Pacific Railroad Company and the Northern Pacific Railway Company, insisting that the Railroad was liable for this debt of the Cœur D'Alene and that the Rail*way* was in turn liable for this debt of the Rail*road*. There was no demurrer, but both answered and much evidence was taken. A decree in favor of Boyd and against the Railway was made a lien on the property purchased, subject, however, to the mortgages placed thereon. The decree was affirmed by the Circuit Court of Appeals (170 Fed. Rep. 779; 177 Fed. Rep. 804), and both defendants appealed. In this court a brief was filed by an *amicus curiæ*, insisting that the complainants' remedy was against stockholders of the Northern Pacific Railroad and not against the Railway Company or its property.

Mr. Francis Lynde Stetson and *Mr. Charles Donnelly*, with whom *Mr. Charles W. Bunn* was on the brief, for appellant:

The complainant never has been a creditor of the Northern Pacific Railroad Company, nor as against that company, has he ever possessed any rights either in law or in equity.

There never was any misappropriation of assets of the Cœur D'Alene Company by the Northern Pacific Railroad Company, but even if so, the misappropriation by one man

of the property of another does not, at the time of the misappropriation, entitle the creditor of that other to pursue the misappropriated proceeds, unless at such time such creditor has reduced his claim to judgment, has issued execution against his debtor upon it, and the execution has been returned unsatisfied. *Scott* v. *Neely*, 140 U. S. 106, 113; *Cates* v. *Allen*, 149 U. S. 451, 457.

The Railroad Company never contracted to pay the debt on which the judgment is based.

The contention that the Cœur D'Alene stock was not paid up, and that the Railroad Company by the purchase of that stock in 1888 became liable to the extent of the unpaid stock subscription cannot be sustained.

The common-law rule is, that creditors of a corporation, who deal with it in reliance upon its representation that its authorized capital is fully paid, may if the stock has been issued in fraud of creditors without being fully paid, collect their debts to the extent of unpaid subscriptions from the original subscribers to the stock or from transferees with notice. Cook on Corporations, §§ 42, 49; Morawetz on Corporations, §§ 821, 823; Clark & Marshall on Corporations, §§ 791 *et seq.*

The Railroad Company cannot be held answerable as stockholder for the debts of the Cœur D'Alene Company because no reliance was ever placed on the stock subscriptions. Complainant has not proved that the stock was not paid up. He has only alleged it.

As to the contention that the Railroad Company fraudulently diverted the earnings of the Cœur D'Alene property, complainant has made no attempt anywhere to support that charge and it may be treated as abandoned.

Even if complainant were entitled to judgment against the Railroad Company, his rights would end there. He is not entitled to collect his judgment out of the property which in 1896 passed to the Railway Company, because the judicial proceedings, by which that property passed,

in all particulars were proper, and such as the complainants therein were entitled to pursue. Complainant's claim is based solely and simply upon the fact that as a result of the reorganization, stockholders of the old company obtained stock in the new company in consideration of cash payments. The new corporation, however, is under no obligation for debts of the old company. *Hoard* v. *Chesapeake &c. Ry.*, 123 U. S. 222; Cook on Corporations, § 80.

The transaction was as free from "fraud in law" as confessedly it was free from fraud in fact. Only by the plan adopted, or by one substantially similar, could this hopelessly insolvent property have been placed upon a sound financial basis. The reorganization of insolvent railroad properties would be an impossibility if honest, reasonable plans such as this were to be condemned, and in fact this court never has condemned them.

This branch of the defense rests on two principles, applicable in the absence of actual fraud: where nothing is taken from the general creditors, they have no valid ground of complaint; in advance of foreclosure a mortgagee may lawfully agree to sell to the mortgagor, or to anyone connected in interest with the mortgagor, a share in the property purchased, provided such sale be for a fair price and in good faith.

The mortgagee in good faith may lawfully agree to sell to the mortgagor. *Wicker* v. *Hoppock*, 6 Wall. 94, 98; *Bame* v. *Drew*, 4 Denio, 287; *Shoemaker* v. *Katz*, 74 Wisconsin, 374; *Central Trust Co.* v. *U. S. Rolling Stock Co.*, 56 Fed Rep. 5, 7. And see opinion in the *Paton Case*, 85 Fed. Rep. 838; *The Monon Case*, 174 U. S. 674; *Wenger* v. *Railway Co.*, 114 Fed. Rep. 34; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 189; *Pennsylvania Transp. Co.'s Appeal*, 101 Pa. St. 576; *Kurtz* v. *Phil. & R. R. R. Co.*, 187 Pa. St. 59. See also *McArdell* v. *Olcott*, 104 App. Div. 283; aff'd 189 N. Y. 368, 393.

The only decisions in this court relied upon by complainant's counsel are *Railroad Co.* v. *Howard*, 7 Wall. 392, and *Louisville Trust Co.* v. *Louisville Ry. Co.*, 174 U. S. 674, but neither of them is decisive of the present controversy.

The points of distinction are independent of the decision against the complainant's contention pronounced in the *Paton Case.*

Treating the question broadly, it is to be remembered that between 1892 and 1900, a large number of the railroad companies of the United States, by their necessities, were forced to submit to foreclosure. They have been succeeded by a system of vigorous, solvent, prosperous and useful corporations. The change, obviously to the public advantage, was the result of reorganizations so-called, of which almost all were based upon plans similar to that involved in the present case. The principle of such plans was that financial necessities of the physical properties could be met only by sufficient and prompt provision of additional cash capital for the new corporation; and that for prompt and sufficient cash provision the most available source was and would be those who already were acquainted with the physical property and would have faith in its future possibilities. Manifestly these were, and must continue to be, those who had been interested in the old company, either as bondholders or stockholders, and not necessarily or probably those who were its general creditors.

Prior to the decree in the present suit, no court has held to be fraudulent the reorganization of an insolvent corporation under a plan which permitted interests in the new company to be acquired by stockholders of the old company only upon making substantial money payments.

There is, now, presented for review by this court, a conclusion of law never before reached by any court upon like facts. The importance of the issue to the holders of

securities of reorganized corporations cannot be overestimated.

Even though the court should be of opinion that in this reorganization there was such participation by stockholders as should have invalidated the proceedings in the consolidated suit, still the court having charge of those proceedings adjudged otherwise; and that judgment, sustained after consideration of the specific objections here relied on, and decreeing the Railway Company to be entitled to the property, is binding on all the world, including the complainant.

The identical objections raised by complainants, based upon this identical plan of reorganization, and urged against these identical foreclosures of the mortgages on the property of the Northern Pacific Rail*road* Company, were made and were urged by eminent counsel to the court which for nearly three years had been administering the property; that court decided them to be unsound; and having so decided them to be unsound, it proceeded with the foreclosure and sale of the property and it rendered decrees and orders upon which we now rely. *Paton* v. *Nor. Pac. R. R. Co.*, 85 Fed. Rep. 838.

One who objects seasonably to the validity of a foreclosure sale upon the ground that the price paid was inadequate, must accompany his objection with an offer of some responsible person to pay more. Jones on Mortgages, § 1641; Jones on Corporate Bonds and Mortgages, § 662. It applies as well in railroad foreclosure sales as in other foreclosure sales. *Turner* v. *Indianapolis &c. Ry. Co.*, 8 Biss. 380; *S. C.*, Fed. Cas. No. 14259. Had complainant appeared in the court at Milwaukee and protested against the confirmation of this sale on the ground that the price paid was inadequate, the court would not have listened to his objections unless accompanied by an offer to pay more. *A fortiori* the court will not listen to them now unless there is some showing that a higher price

might have been obtained then. Not only is there a total failure of evidence in this regard, but it is not even alleged that a higher price could have been obtained.

This very question as to the fraudulent character of the reorganization had been passed on by the court before it rendered the decrees of foreclosure and sale; its decision in the *Paton Case*, whether or not a bar, must be regarded by every other court. *Fauntleroy* v. *Lum*, 210 U. S. 230, 237; 2 Freeman on Judgments, § 486.

Boyd was a party to the Paton proceeding in the only possible way in which he could have been one except by his own direct intervention, for not until after judgment was rendered in the foreclosure suits was he a judgment creditor even of the Cœur D'Alene Company; and not until later did he even assert himself to be a creditor of the Northern Pacific Railroad Company. 1 Daniel's Chanc. Pl. & Pr. 280, 5th Amer. ed.; Story Eq. Pl., §§ 156, 351.

The doctrine of *lis pendens* is an ancient one. It was laid down by Lord Bacon in one of his ordinances. *Murray* v. *Ballau*, 1 Johns. Ch. 577. See also *Tilton* v. *Cofield*, 93 U. S. 163; *Ex parte Railroad Co.*, 95 U. S. 221; *Stout* v. *Lye*, 103 U. S. 66; *Hollins* v. *Brierfield Coal Co.*, 150 U. S. 371; *Herring* v. *Railway Co.*, 105 N. Y. 340; *Bronson* v. *Railroad Co.*, 2 Black, 524.

Complainant has been guilty of such laches as deprives him of any right now to call upon a court of equity to enforce a claim matured in 1886 and now more than quadrupled by interest charges.

This case fairly illustrates the gross injustice of permitting a suitor to assert a liability against a defendant many years after the event, when the imputation rests upon conjecture and when the lapse of time has impaired recollection of the transactions and obscured the details. Under such circumstances it has been consistently held by courts of equity, and by none more forcibly than by this

court, that the welfare of society demands the rigid enforcement of the equitable rule of diligence. *Hammond* v. *Hopkins*, 143 U. S. 224, 274; *Foster* v. *Mansfield &c. R. R.*, 146 U. S. 88, 99.

Such rule of diligence will rigidly be enforced in equity against a bondholder who fails promptly to prosecute a claim to share in the proceeds of a corporate reorganization from which he has been excluded, even though otherwise he would be entitled to relief. *Alsop* v. *Riker*, 155 U. S. 448, 459; *Felix* v. *Patrick*, 145 U. S. 317, 329.

As to the applicability of laches when the property is of a speculative character, see *Starkweather* v. *Jenner*, 216 U. S. 524; *Rothschild* v. *Memphis & Co. R. Co.*, 113 Fed. Rep. 476; *Leavenworth* v. *Chicago Ry. Co.*, 134 U. S. 688, 709; *Graham* v. *Boston, H. & E. R. R. Co.*, 118 U. S. 161.

Mr. George Turner and *Mr. R. L. Edmiston*, for appellee.

Mr. Samuel W. Moore, by leave of the court, filed a brief as *amicus curiæ*.

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

Boyd's judgment against the Cœur D'Alene Railway & Navigation Company was rendered in 1896 in an action begun in 1887 in a court of the Territory of Idaho. After he had established his title to the judgment and revived it in 1906 for $71,278 there was nothing on which an execution could be levied because, in the meantime, all of the property of the Cœur D'Alene had been sold under foreclosure. He thereupon brought this suit, claiming that the Northern Pacific R. R. Co. was liable in equity as for a diversion of $465,000 of bonds, belonging to the Cœur D'Alene but used by the Northern Pacific in payment of 5,100 shares of stock bought from Corbin in 1888.

At that time the Cœur D'Alene was solvent, owning

and operating at a profit a narrow gauge railroad, 33 miles in length, constructed at a cost of about $12,000 a mile and paid for mainly out of the proceeds of $360,000 of first mortgage bonds. The original capital stock of $500,000, increased to $1,000,000, had been issued, but the subscriptions were unpaid. A majority of this stock was controlled by Corbin, the president.

On August 1, 1888, he, in his individual capacity, entered into a written contract with the Northern Pacific, in which he undertook to have the Cœur D'Alene issue $825,000 of bonds, $360,000 of which were to be retained to retire those then outstanding. He also agreed to cause the Cœur D'Alene to lease its property for 999 years to the Northern Pacific, which, in turn, was to guarantee the payment of the principal and interest of the bonds. The contract further recited that in consideration of the execution of the lease and guaranty Corbin would transfer to the Northern Pacific 5,100 fully paid and non-assessable shares of the capital stock of the Cœur D'Alene. The agreement was promptly carried into effect. A resolution was passed by the directors of the Cœur D'Alene authorizing the issue of $825,000 of bonds for properly constructing, completing and equipping the road; the 999-year lease was made and Corbin transferred his stock. Shortly afterwards the Trust Company, named in the mortgage, issued to Corbin, president, or order, $465,000 of the new bonds. They were not used for completing or equipping the road, paying the debts or other corporate purpose, and although the Northern Pacific was the then holder of a majority of the stock and in charge of the business and litigation of the Cœur D'Alene, no steps were taken to trace or recover them. Corbin testified that he was paid for the stock, in cash, about the par value of the bonds; that he had never received them, or if so, that they only passed through his hands "with an agreement that somebody was to take them off of our hands and pay us the money."

1. The buyer would naturally have been the person to make arrangement for the payment. But the Railway insists that the payment was not made in cash but that, as recited in the written contract, the stock was transferred by Corbin in consideration of the Northern Pacific guaranteeing the bonds and entering into the lease. But even if Corbin sold his 5,100 shares for a consideration nominally moving to the Cœur D'Alene, that would not change the character of the transaction if, in fact, Corbin made the transfer with the further understanding that he was to have the proceeds of the guaranteed bonds. In that event the purchaser would be as much liable for the diversion of the $465,000 as the seller. *Chicago, M. & St. P. Ry.* v. *Third Nat. Bank,* 134 U. S. 276. The terms of the contract; Corbin's control of the Cœur D'Alene; the failure to produce or account for the absence of the agent who represented the Northern Pacific Railroad in the purchase, together with Corbin's testimony that the stock was paid for out of the cash proceeds of the bonds, support the concurrent findings of the two courts that the Northern Pacific combined with him to divert $465,000 of the assets of the Cœur D'Alene. And even if, as claimed, liability for a diversion of trust funds was dependent upon the insolvency of the Cœur D'Alene, that insolvency was brought about in the very act of carrying the illegal contract into effect; for thereby the Cœur D'Alene was encumbered with a mortgage for twice its value, and the lease for 999 years, with rental payable only from net profits, left nothing out of which debts could be made by levy and sale. 134 U. S. 277.

2. Being liable for this diversion of $465,000, the Northern Pacific Railroad remained so liable until the funds were restored to the true owner. *Chicago, M. & St. P. Ry.* v. *Third Nat. Bank,* 134 U. S. 277. The obligation was not lessened by set-offs, nor discharged in whole, because the Northern Pacific spent $500,000 of its own

money in broadening the gauge, extending the line, equipping the road, or for other purposes which may have been thought by it advantageous to the Cœur D'Alene. Such disbursement was not a restoration of what had been taken, but an expenditure by the Northern Pacific, for its own benefit, in improving a road which it practically owned by virtue of the 999-year lease.

3. Although this diversion of $465,000 of bonds in 1888 made the Northern Pacific liable, in equity, for the payment of Boyd's judgment for $71,278, recovered in 1896 and revived in 1906, yet his right was apparently not enforcible because, in 1896, all of the property of the Northern Pacific Rail*road* had been sold under foreclosure to the newly created Northern Pacific Rail*way* Company. He thereupon brought this suit against the mortgagor and purchaser, seeking to subject the property bought to the payment of this liability. He claimed that the foreclosure sale was void because made in pursuance of an illegal plan of reorganization, between bondholders and stockholders of the Railroad, in which, though no provision was made for the payment of unsecured creditors, the stockholders retained their interest by receiving an equal number of shares in the new Railway. There was no question as to parties and no demurrer to the bill. The Railway answered and on the trial of the merits offered evidence tending to support its contention that the decree was regular in form, free from fraud and that the property brought a fair price at public outcry. Both courts found against this contention and entered a decree making Boyd's claim a lien upon the property of the Rail*road* in the hands of the Rail*way*, but subject to the mortgages placed thereon at the time of the reorganization.

The appellants attack the ruling from various standpoints based upon many facts in the voluminous record. But, having been summarized in the statement, they will not be discussed in detail, inasmuch as the case, though

presenting various aspects, is controlled by a single proposition. For although Boyd was not a party to the foreclosure, and was not made such by the publication notifying creditors to prove their claims, yet the original and supplemental decrees were free from any moral or actual fraud and were, in form and nature, sufficient to have passed a title good against him, unless the contract of reorganization, reserving a stock interest in the new company for the old shareholders, left the property still subject to the claims of non-assenting creditors of the Northern Pacific Rail*road.*

4. Corporations, insolvent or financially embarrassed, often find it necessary to scale their debts and readjust stock issues with an agreement to conduct the same business with the same property under a reorganization. This may be done in pursuance of a private contract between bondholders and stockholders. And though the corporate property is thereby transferred to a new company, having the same shareholders, the transaction would be binding between the parties. But, of course, such a transfer by stockholders from themselves to themselves cannot defeat the claim of a non-assenting creditor. As against him the sale is void in equity, regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company. Cf. *San Francisco & N. P. R. R.* v. *Bee*, 48 California, 398; *Grenell* v. *Detroit Gas Co.*, 112 Michigan, 70. There is no difference in principle if the contract of reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree.

5. It is argued that this is true only when there is fraud in the decree,—the appellants insisting that in all other

cases a judicial sale operates to pass a title which cuts off all claims of unsecured creditors against the property. They rely on *Wenger* v. *Chicago &c. R. R.*, 114 Fed. Rep. 34; *Farmers' Loan & Trust Co.* v. *Louisville &c. Ry. Co.*, 103 Fed. Rep. 110; *Pennsylvania Transportation Co.'s Appeal*, 101 Pa. St. 576; *Kurtz* v. *R. R.*, 187 Pa. St. 59; *Paton* v. *N. P. R. R.*, 85 Fed. Rep. 838; *Shoemaker* v. *Katz*, 74 Wisconsin, 374; *Bame* v. *Drew*, 4 Denio, 287; *Ferguson* v. *Ann Arbor R. R.*, 17 App. Div. 336; *McArdell* v. *Olcott*, 104 App. Div. 263; *S. C.*, 189 N. Y. 368, 384; *Candee* v. *Lord*, 2 N. Y. 269. Some of these cases hold directly, and others inferentially, that, in the absence of fraud, as here, a judicial sale is binding upon non-assenting creditors even though the decree was entered and the sale was made in pursuance of a contract, to which the stockholders were parties, and by which they were to retain a stock interest in the purchasing company. This makes the creditor's legal right against the shareholders' interest depend upon the motive with which they act and the method by which they carry out the scheme. If they do so by means of a private contract, though in ignorance of the existence of the creditor, the property remains liable for his debts. If they do so by means of a judicial sale under a consent decree and in like ignorance or disregard of his existence, the result is said to be different, although the shareholders should reserve exactly the same interest and deprive the creditor of exactly the same right.

Such and similar possibilities at one time caused doubts to be expressed as to whether a court could permit a foreclosure sale which left any interest to the stockholders. But it is now settled that such reorganizations are not necessarily illegal, and, as proceedings to subject the property must usually be in a court where those who ask equity must do equity, such reorganizations may even have an effect more extensive than those made without judicial sale, and bind creditors who do not accept fair

terms offered. The enormous value of corporate property often makes it impossible for one, or a score, or a hundred bondholders to purchase, and equally so for stockholders to protect their interests. A combination is necessary to secure a bidder and to prevent a sacrifice. Coöperation being essential, there is no reason why the stockholders should not unite with the bondholders to buy in the property.

That was done in the present case. And while the agreement contained no provision as to the payment of unsecured creditors, yet the Railway Company purchased unsecured claims aggregating $14,000,000. Whether they were acquired because of their value, to avoid litigation, or in recognition of the fact that such claims were superior to the rights of stockholders, does not appear, nor is it material. For, if purposely or unintentionally a single creditor was not paid, or provided for in the reorganization, he could assert his superior rights against the subordinate interests of the old stockholders in the property transferred to the new company. They were in the position of insolvent debtors who could not reserve an interest as against creditors. Their original contribution to the capital stock was subject to the payment of debts. The property was a trust fund charged primarily with the payment of corporate liabilities. Any device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditor was invalid. Being bound for the debts, the purchase of their property, by their new company, for their benefit, put the stockholders in the position of a mortgagor buying at his own sale. If they did so in good faith and in ignorance of Boyd's claim, they were none the less bound to recognize his superior right in the property, when years later his contingent claim was liquidated and established. That such a sale would be void, even in the absence of fraud in the decree, appears from the reasoning in *Louisville Trust Co.* v. *Louis-*

ville Ry., 174 U. S. 674, 683, 684, where "assuming that foreclosure proceedings may be carried on to some extent at least in the interests and for the benefit of both mortgagee and mortgagor (that is, bondholder and stockholder)" the court said that "no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. . . . Any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation."

6. The Railway seeks to distinguish that case from this, insisting that even if the stockholders' participation in the reorganization would have invalidated the proceeding, such result does not follow here because the court having charge of the foreclosure passed on this very question before the sale in 1896 and dismissed the Bill of Paton, an unsecured creditor, when he made exactly the same attack upon the reorganization as that by Boyd in this bill. That court then held that as the property was insufficient to pay the mortgage debts of $157,000,000, there was nothing which could come to the unsecured creditors, and they, therefore, had no ground to complain if the bondholders were willing to give new shares to the old stockholders. No appeal was taken from that decision—possibly because the Paton claim was purchased by the Railway. But inasmuch as Boyd was not a party to the record that decree was not binding upon him as *res adjudicata*, and the opinion not being controlling authority, cannot be followed in view of the principles declared in *Chicago, R. I. & P. R. R.* v. *Howard*, 7 Wall. 392; *Louisville Trust Co.* v. *Louisville R. R.*, 174 U. S. 674.

In saying that there was nothing for unsecured creditors the argument assumes the very fact which the law con-

templated was to be tested by adversary proceeding in which it would have been to the interest of the stockholders to interpose every valid defense. If, after a trial, a sale was ordered, they were still interested in making the property bring its value, so as to leave a surplus for themselves as ultimate owners. Even after sale they could have opposed its confirmation if the bids had been chilled, or other reason existed to prevent its approval. In the present case all these tests and safeguards were withdrawn. The stockholders, who, in lawfully protecting themselves, would necessarily have protected unsecured creditors, abandoned the defense that the foreclosure suit had been prematurely brought. The law, of course, did not require them to make or insist upon that defense if it was not meritorious, nor does it condemn the decree solely because it was entered by consent. But the shareholders were not merely quiescent. They, though in effect defendants, became parties to a contract with the creditors, who were in effect complainants, by which, in consideration of stock in the new company, they transferred their shares in the Railroad to the Railway. The latter then owning the bonds of the complainant and controlling the stock in the defendant, became the representative of both parties in interest. In such a situation there was nothing to litigate, and so the demurrer to the bill was withdrawn. An answer was immediately filed admitting all the allegations of the bill. On the same day, "no one opposing," a decree of foreclosure and sale was entered. Two months later the property was sold to the agreed purchaser at the upset price named in the decree. In a few days and by consent that sale was confirmed. As between the parties and the public generally, the sale was valid. As against creditors, it was a mere form. Though the Northern Pacific Railroad was divested of the legal title, the old stockholders were still owners of the same railroad, encumbered by the same debts. The circum-

location did not better their title against Boyd as a non-assenting creditor. They had changed the name but not the relation. The property in the hands of the former owners, under a new charter, was as much subject to any existing liability as that of a defendant who buys his own property at a tax sale.

The invalidity of the sale flowed from the character of the reorganization agreement regardless of the value of the property, for in cases like this, the question must be decided according to a fixed principle, not leaving the rights of the creditors to depend upon the balancing of evidence as to whether, on the day of sale the property was insufficient to pay prior encumbrances. The facts in the present case illustrate the necessity of adhering to the rule. The railroad cost $241,000,000. The lien debts were $157,000,000. The road sold for $61,000,000 and the purchaser at once issued $190,000,000 of bonds and $155,000,000 of stock on property which, a month before, had been bought for $61,000,000.

It is insisted, however, that not only the bid at public outcry, but the specific finding in the Paton case, established that the property was worth less than the encumbrances of $157,000,000, and hence that Boyd is no worse off than if the sale had been made without the reorganization agreement. In the last analysis, this means that he cannot complain if worthless stock in the new company was given for worthless stock in the old. Such contention, if true in fact, would come perilously near proving that the new shares had been issued without the payment of any part of the implied stock subscriptions except the $10 and $15 assessments. But there was an entirely different estimate of the value of the road when the reorganization contract was made. For that agreement contained the distinct recital that the property to be purchased was agreed to be "of the full value of $345,000,000, payable in fully paid non-assessable stock and the prior

lien and general lien bonds to be executed and delivered as hereinafter provided."

The fact that at the sale, where there was no competition, the property was bid in at $61,000,000 does not disprove the truth of that recital, and the shareholders cannot now be heard to claim that this material statement was untrue and that as a fact there was no equity out of which unsecured creditors could have been paid, although there was a value which authorized the issuance of $144,000,000 fully paid stock. If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever.

7. This conclusion does not, as claimed, require the impossible and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance, on equitable terms, of income bonds or preferred stock. If he declines a fair offer he is left to protect himself as any other creditor of a judgment debtor, and, having refused to come into a just reorganization, could not thereafter be heard in a court of equity to attack it. If, however, no such tender was made and kept good he retains the right to subject the interest of the old stockholders in the property to the payment of his debt. If their interest is valueless, he gets nothing. If it be valuable, he merely subjects that which the law had originally and continuously made liable for the payment of corporate liabilities.

8. Lastly, it is said that Boyd was estopped from attacking, in 1906, a reorganization completed in 1896, and, ordinarily, such a lapse of time would prevent any creditor

from asserting a claim like that here made. For along with the policy to encourage reorganizations, goes that of requiring prompt action by those who claim that their rights have been injuriously affected. The fact that improvements are put upon the property—that the stock and bonds of the new company almost immediately became the subject of transactions with third persons—call for special application of the rule of diligence. But the doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations. For what might be inexcusable delay in one case would not be inconsistent with diligence in another, and unless the non-action of the complainant operated to damage the defendant or to induce it to change its position, there is no necessary estoppel arising from the mere lapse of time. *Townsend* v. *Vanderworker*, 160 U. S. 171, 186.

In this case the defendants and their stockholders have not been injured by Boyd's failure to sue. His delay was not the result of inexcusable neglect, but in spite of diligent effort to put himself in the position of a judgment creditor of the Cœur D'Alene so as to be able to proceed in equity to collect his debt. He accomplished this result only after protracted litigation, beginning in 1887 and continuing through the present appeal (1913). The more important chapters of the different cases, with lawsuits within lawsuits, are reported in 5 Idaho, 528; 6 Idaho, 97; 6 Idaho, 638; 85 Fed. Rep. 838; 93 Fed. Rep. 280; 174 U. S. 801; 170 Fed. Rep. 779; 177 Fed. Rep. 804. They involve a series of independent transactions, in different courts, between Spaulding and the Cœur D'Alene Company; Boyd and Spaulding; Boyd and the Cœur D'Alene Company; the Northern Pacific Railroad and the Cœur D'Alene, and finally the foreclosure of the Northern Pacific Railroad and its purchase by the Northern Pacific Railway.

When Spaulding recovered against the Cœur D'Alene it required years for Boyd to establish his title to the judgment. To prevent it from becoming dormant it was necessary promptly to institute proceedings against the Cœur D'Alene in the nature of *scire facias* to revive the judgment. There is no reason suggested by this record why it should have done so, unless it was to avoid the enforcement of this very claim, but the Northern Pacific Rail*way*, by its counsel, defended that revivor suit against the Cœur D'Alene, and when, in 1906, it terminated in favor of Boyd, he at once filed this bill alleging that the Rail*road* was liable for the debts of the Cœur D'Alene and the Rail*way* liable for the debts of the Rail*road*.

The delay in beginning the present suit—the last of a remarkable series of legal proceedings—was excusable if not absolutely unavoidable. Boyd claims that he had no notice of the fact that the stockholders were to retain an interest in the new company and that, in part, the delay to begin proceedings was occasioned by the Rail*way* Company itself, since it, as the purchaser of the Cœur D'Alene property, resisted his attempt to revive the judgment. Boyd's silence, in 1896, did not mislead the stockholders, nor did his non-action induce them to become parties to the reorganization plan. They have not in any way changed their position by reason of anything he did or failed to do, and the mere lapse of time under the peculiar and extraordinary circumstances of this case did not estop him, when he revived the judgment, from promptly proceeding to subject the shareholders' interest in property which in equity was liable for the payment of his debt. The decree of the Circuit Court of Appeals is

Affirmed.

Dissenting opinion by MR. JUSTICE LURTON, in which concur THE CHIEF JUSTICE, MR. JUSTICE HOLMES and MR. JUSTICE VAN DEVANTER.

I find myself unable to agree with the opinion of the court. The consequences which may result from the decision to the numerous reorganizations of railroad companies which occurred about the time of this reorganization or since, are, to my mind, alarming. Arrangements and agreements in advance of judicial sales between creditors interested for the common benefit are the usual incidents of foreclosures, and if fairly and openly entered into and approved by the court are not subject to criticism.

Nor do I agree that every plan of reorganization which in any way includes stockholders of the reorganized company is for that reason alone to be regarded as an illegal withholding from creditors of corporate property which should go to the payment of corporate debts. That corporate property must be applied to corporate debts before shareholders can participate, is plain. But I think every case should stand upon its own facts, and the remedy be shaped to do justice and equity in the particular case, and not tried out by any hard and fast rule such as indicated when this court says that the invalidity of a judicial sale must turn upon the character of the reorganization agreement and is not affected by actual consequences to creditors.

Here is a single creditor who comes forward many years after a judicial sale under a general creditors bill and a mortgage foreclosure bill which had been pending several years, and asserts the right to ignore the judicial sale and the title resulting and asks to have the property of the old company subjected to his non-lien claim, not because of any actual fraud in the sale, nor because he can show that he has in any way suffered a loss by reason of the plan of reorganization under which the sale was conducted, but

solely and simply because the shareholders of the debtor company are said to have participated in some way in the benefits of the sale. I think this goes too far and that there is no just foundation for upsetting a judicial sale upon the complaint of an unsecured creditor of the debtor company in the absence of proof of fraud in the decree. The cases supporting this view which I venture to say should control this case are cited in the opinion of the court. It is not a case of the transfer by stockholders of one company to themselves as stockholders of another. The railroad company was hopelessly insolvent. Its annual deficit was about five million dollars. Its general creditors, represented by the general creditors' bill, and its mortgage creditors, represented in the mortgage foreclosure proceeding, were endeavoring to prevent a disintegration and to bring the property to sale. The stockholders, represented by the company, were resisting. The receivership had already lasted for several years and the situation was growing steadily worse. The lien creditors, to save themselves, devised a plan for the sale and purchase of the property by a new company which should assume their claims, so far as possible, and put the new company in shape to meet its obligations. A large sum of actual money was necessary, and also the consent of the stockholders, to bring about a speedy sale. This money might be in part procured by the sale of the bonds of the new company; but if fixed charges were to be reduced, and the deficit of the old company turned into a surplus, the bonded debt and interest must be reduced. Therefore it was that most of this necessary money must come from the sale of stock. That was not a hopeful outlook. The value of this new stock was obviously speculative. The very basis of the plan to receive any large sum upon stock sales was believed to depend upon making a market among the stockholders of the old company. This was the motive that led to the proposal that they should exchange their

shares for those in the new company, paying the price stated. This actually produced about eleven of the twenty-five million dollars deemed essential to any arrangement which would save to the bondholders any large part of their debt. The price fixed turned out to be little below what the stock actually sold for on the open market for the year following the operation of the property by the purchasers. The subscription price to the shareholders, as the situation then appeared, was deemed fair, full and just by the very court which had approved the plan and decreed the sale, as is shown by the opinion of Judge Jenkins in the *Paton Case*, 85 Fed. Rep. 838.

It is true that Boyd was not a party to that suit. But it was a bill filed after the decree and before the sale, attacking the reorganization plan upon the precise grounds here advanced, and is highly persuasive as to the good faith of the plan and the fairness of the subscription price.

The upset price of sixty-one million dollars was fixed by the court,—probably as large as could be expected at the sale. As observed by this court in *Louisville Trust Co.* v. *Louisville &c. Ry.*, 174 U. S. 674, 683, "railroad mortgages, or trust deeds, are ordinarily so large in amount that on foreclosure thereof only the mortgagees, or their representatives, can be considered as probable purchasers." Hence it was that the upset price must be fixed at such a sum as was reasonably within the range of any bidding which the property might be started at by the only probable bidders. The case last cited goes to the very verge of the law, but in that case the denunciation of such a plan of reorganization goes no farther than to condemn any arrangement by which the subordinate rights of stockholders are saved at the expense of creditors. That was not done here. The sale price was about eighty million dollars less than the lien claims entitled to be paid before creditors of the class to which Boyd belongs. Many of his class were actual parties to the consolidated cause in which the reorganiza-

tion plan was approved and the sale decreed. They might have sought a larger upset price, but did not. They might have objected to the plan upon the grounds now brought forward, but they did not. They consented to the decree. They were doubtless hopeless of any sale price which could by any possibility save them, and therefore they stood aside. Technically Boyd was not a party, though under the order of the court every creditor was by publication, all along the line of the railroad, and in many States, notified to come in or be barred from participation in the proceeds. He had actual knowledge of the pending of the foreclosure proceedings, and yet took no steps to assert his rights. I do not find from the facts of this case any such diligence in his litigation against the real debtor company,—the Cœur D'Alene, and the determination of his claim to ownership of the judgment against that company in the name of Spalding as to excuse the long delay in the assertion of his rights against the railroad company or its successor, and it is not explained why he did not intervene and set up his contingent claim before the sale, or, at least, after the sale, many years before he did. I think he waited too long, and that no court of equity should upset a judicial sale after such unreasonable delay. What was said by this court in *Alsop* v. *Riker*, 155 U. S. 448, 459, 461, applies with great force to this case:

"The record discloses no element of fraud or concealment upon the part of the trustees or of any of them. What they did was done openly and was known or might have been known by the exercise of the slightest diligence upon the part of every one interested in the property of the old corporation. The plaintiff unquestionably knew, or could easily have ascertained, before the trustees bought the property at the foreclosure sale,—at any rate, before they transferred it to the new corporation,—that their purchase would be, and was, exclusively for the benefit of certificate holders interested in the trust.

LURTON, J., WHITE, Ch. J., HOLMES, J., VAN DEVANTER, J., dis'nt'g.

Although his bonds had not then matured, he could have taken steps to prevent any transfer of the property that would impair his equitable rights in it or instituted proper judicial proceedings, of which all would be required to take notice, to have his interest in the property adjudicated. He allowed the trust to be wound up, and postponed any appeal to a court of equity based upon an illegal breach of trust by the trustees, until six out of the seven original trustees had died."

In *Foster* v. *Mansfield &c. Rd.*, 146 U. S. 88, 99, 100, it was said:

"If a person be ignorant of his interest in a certain transaction, no negligence is imputable to him for failing to inform himself of his rights; but if he is aware of his interest, and knows that proceedings are pending the result of which may be prejudicial to such interests, he is bound to look into such proceedings so far as to see that no action is taken to his detriment."

Boyd had actual knowledge. If he had sought to intervene, I have no doubt he would have been permitted to do so. He chose to do nothing, and now asks a court of equity, after the purchaser has been for more than a decade in undisturbed possession and ownership, to declare the judicial sale invalid as against him. The case is without merit, and the bill should have been dismissed.

THE CHIEF JUSTICE, MR. JUSTICE HOLMES and MR. JUSTICE VAN DEVANTER concur in this dissent.

EX PARTE: IN THE MATTER OF THE FIRST NATIONAL BANK OF DEXTER, NEW YORK.

EX PARTE: IN THE MATTER OF EDWARDS.

IN MANDAMUS.

Nos. 11 and 12, Original. No. 11, Argued March 10, 11, 1913. No. 12, Submitted March 11, 1913.—Decided May 5, 1913.

Striking from the record, for non-compliance with the rules of court, the bill of exceptions, after the case has been heard on its merits, is not a refusal to take jurisdiction or a refusal after taking jurisdiction to exercise it; if the action is erroneous it is but an error committed in the exercise of judicial discretion, reviewable by writ of error and not by mandamus.

Mandamus in this case to compel the Court of Appeals of the District of Columbia to reinstate a bill of exceptions which on motion it had stricken out for failure to comply with its rules, refused.

THE facts are stated in the opinion.

Mr. A. S. Worthington and *Mr. Charles L. Frailey* for the First National Bank, petitioner.

Mr. W. W. Millan for Edwards, petitioner.

Mr. J. J. Darlington for the respondents.

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

By § 226 of the Code of Law of the District of Columbia, the right of appeal to the Court of Appeals of the District is given to "any party aggrieved by any final order, judgment, or decree of the Supreme Court of the District of Columbia, or of any justice thereof, including any final

order or judgment in any case heard on appeal from a justice of the peace." By an act approved February 9, 1893, 27 Stat. 434, c. 74, creating the Court of Appeals, the justices of the court were invested with the power to make "such rules and regulations as may be necessary and proper for the transaction of its business and the taking of appeals to said court." In the assumed exercise of such power certain rules were promulgated to govern the practice on appeals, among which is paragraph 4 of Rule V, regulating the mode of preparing bills of exceptions and requiring such exceptions to be so prepared as to present only the rulings of the court below upon matters of law, accompanied by only such statement of fact as may be necessary to explain the bearing of the rulings upon the issues involved, and providing further, that where a defect of proof is the ground of the ruling or exception, only the substance of the evidence connected with and having relation to the proposition or propositions in respect to which the proof is supposed to be defective shall be set out in the bill of exceptions.

The petitioners herein—the First National Bank of Dexter, New York, and Benjamin F. Edwards—respectively, commenced actions in the Supreme Court of the District, against Edmund K. Fox and others to recover upon notes given as part of the consideration on the purchase of a yacht. The defense was interposed in each case that the sale was induced by fraudulent representations and that the plaintiff was not an innocent holder in due course, so as to exclude the assertion of such defense. By order of the trial court, the cases were tried together, before the same jury, the issues and the testimony being identical except as to the circumstances under which each plaintiff acquired the promissory note sued upon in the respective cases. A verdict was returned in each case for the defendants, whereupon the plaintiff prosecuted an appeal to the Court of Appeals. That court, after a hear-

ing upon the merits, sustained a motion to strike out the bill of exceptions, because not prepared in conformity to the rule on the subject, and while a motion for judgment because of the want of a bill of exceptions was pending below, we allowed rules to issue upon petitions filed on behalf of the plaintiffs below, directing the Court of Appeals to show cause why it should not be commanded to reinstate the bill of exceptions in the cause in the record thereof. The respondents answered, and, after detailing the facts, averred that the action of the court below complained of "was simply the rightful and necessary enforcement by the court of one of its rules, established in pursuance of the authority to that end conferred upon it by the act of Congress creating it and necessary to the due and proper discharge of the business before it."

We deem it unnecessary to detail the contentions as to the compliance or non-compliance by counsel in the bills of exceptions referred to with the rule of court on the subject, nor do we think it necessary to consider whether the rule warranted the particular exertion of power and if it did authorize such exertion of power, whether it was amenable to condemnation. In view of the fact that the case was heard below on the merits and it was not until after such hearing that the court sustained the motion to strike out the bill of exceptions, we are of opinion that the case presented is not one "where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise." *In re Parker*, 131 U. S. 221. The court below, in effect, took jurisdiction, and its action in striking out the bill of exceptions was at best but an error committed in the exercise of its judicial discretion, to correct which is the province of a writ of error where the right to such writ obtains. *Ex parte Brown*, 116 U. S. 401; *Ex parte Harding*, 219 U. S. 363.

Rule discharged.

UNION TRUST COMPANY OF ST. LOUIS *v.* WESTHUS.

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

No. 46. Argued November 8, 11, 1912.—Decided May 5, 1913.

By the distribution of power made by the Circuit Court of Appeals Act of 1891, and now embodied in the Judicial Code of 1911, this court has no jurisdiction to review a judgment or decree of the Circuit Court of Appeals otherwise than by proceedings addressed directly to that court in a cause which is susceptible of being reviewed.

That which can only be done by direct action cannot be done by indirection.

In a case in which on the original pleadings the judgment of the Circuit Court of Appeals would not have been reviewable by this court, plaintiff recovered in the Circuit Court and on appeal the Circuit Court of Appeals reversed and remanded for new trial, with an opinion adverse to all of plaintiff's contentions: plaintiff in the Circuit Court amended by adding an allegation denying due process of law, and elected not to plead further after demurrer sustained and took a direct writ of error to this court basing it on the constitutional question, and claiming that in this court all other questions could also be passed on: *Held* that this court will not in this indirect manner attempt to review a judgment of the Circuit Court of Appeals which it otherwise has not jurisdiction to review.

This court is scrupulous to keep within its jurisdiction, and if the record does not show that the Circuit Court of Appeals has already passed on questions in the case it will order the deficiency supplied by directing the court below to certify all the papers in the case.

THE facts, which involve the jurisdiction of this court directly to review the judgment of the Circuit Court, are stated in the opinion.

Mr. H. T. Newcomb, with whom *Mr. Montague Lyon* and *Mr. S. L. Swarts* were on the brief, for plaintiff in error.

Mr. Assistant Attorney General Harr for defendant in error.

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

Plaintiff in error was plaintiff below, and brought this action to recover a sum levied as a legacy tax under §§ 29 and 30 of the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, 464, 465, as amended by the act of March 2, 1901, c. 806, §§ 10, 11, 31 Stat. 938, 946–948. The grounds for recovery stated in the petition in effect presented only questions of statutory construction. The trial court, being of opinion that a recovery was justified upon one of the stated grounds, sustained a demurrer to the answer, and, the defendants not desiring to plead further, judgment was entered for the plaintiff. The case was then taken to the Circuit Court of Appeals. That court in a full and careful opinion reviewed the grounds for recovery relied upon in the petition, decided that all the grounds of the claim were without merit and held there was no right to the relief prayed. In consequence the judgment of the court below was reversed and the case was remanded with directions to overrule the demurrer, and for further proceedings consistent with the views expressed in the opinion of the court. 164 Fed. Rep. 795. A petition for rehearing was overruled. 168 Fed. Rep. 617.

On the receipt of the mandate the trial court allowed the plaintiff to file an amended petition, wherein, in addition to repeating the contentions urged in the original petition it was alleged that the "clear value" of the life estate in question had been fixed and determined by a method so arbitrary as to amount to a deprivation of property without due process of law. A demurrer to this amended petition was sustained, and, the plaintiff elect-

ing not to plead further, judgment was entered in favor of the defendants.

The case was then brought directly to this court upon the theory that a constitutional question was involved. The assignments of error invoked a reëxamination of all the issues including those which had been adversely passed on by the Circuit Court of Appeals. On these assignments the case was argued at bar and taken under advisement on a record which contained only the proceedings had in the trial court subsequent to the filing of the mandate of the Circuit Court of Appeals. While in that situation the published report of the opinion of the Circuit Court of Appeals came under our observation. Mindful of the proper consideration due to the Circuit Court of Appeals and of our duty at all times to be scrupulous to keep within our jurisdiction, for the purpose of enabling us to apply the doctrine announced in the case of *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31, in which case, as in this, the record did not disclose that the cause had been passed upon by the Circuit Court of Appeals, although there was on the files of this court certiorari proceedings so showing, to which resort was had, we directed that the court below supply the deficiency, if any there was, in the record, by certifying all the proceedings had in the case. At once, by stipulation of counsel, an additional transcript was filed stating the proceedings on the first trial, the taking of the appeal to the Circuit Court of Appeals and the action of that court, and in the light thus afforded we come first to consider our jurisdiction over the controversy.

There can be no doubt that on the record upon which the Circuit Court of Appeals acted the judgment of that court, if it had been final in form, would have been beyond our competency to review. *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397. There can equally be no doubt that if we have power to pass upon the case on this record,

our jurisdiction embraces not only the right to decide the alleged constitutional question raised after the mandate of the Circuit Court of Appeals had been filed in the trial court, but also all other questions arising on the record including those passed upon by the Circuit Court of Appeals. Indeed, it is unnecessary to cite the many authorities sustaining this view, since the insistence of the plaintiff in error is that every question is open, and in effect the argument seeks a review and reversal of the rulings previously made by the Circuit Court of Appeals. But by the distribution of power made by the act of 1891 and embodied in the Judicial Code, no jurisdiction is conferred upon this court to review a judgment or decree of the Circuit Court of Appeals otherwise than by proceedings addressed directly to that court in a cause which is susceptible of being reviewed. Under these conditions the absence of jurisdiction to exercise the authority which we are now asked to exert would seem to be clear unless the principle be recognized that we have a right to do by indirection that which the statute gives us power only to do by direct action. It is, however, said the statute gives the right to come directly to this court where a constitutional question is involved and as such question was raised below, albeit after the cause was pending in the trial court for the purpose of giving effect to the mandate of the Circuit Court of Appeals, the right to direct review exists and cannot be denied without refusing to accord the relief plainly afforded by the statute. At best this proposition but involves the assertion that by virtue of the power conferred to take a direct appeal from one court, authority is given to indirectly review the decision of another and higher court, although the statute restricts the right to review such decision to a direct proceeding. But resort to original reasoning to establish the unsoundness of the proposition relied on is scarcely necessary, as that result will be made plainly manifest by applying

principles established in the following cases: *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31, 37; *Brown* v. *Alton Water Co.*, 222 U. S. 325, and *Metropolitan Co.* v. *Kaw Valley District*, 223 U. S. 519. Nor, as in effect held in the *Metropolitan Case*, can the case of *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356, be considered as announcing a doctrine in conflict with the rulings in the *Aspen* and *Alton* cases. And aside from a distinction suggested in the *Metropolitan Case* between the *Aspen* and *Alton* cases and the *Globe Case*, it must follow that if the ruling in the *Globe Case* was in anywise in conflict with the doctrine announced and approved in the *Metropolitan Case*, to the extent of such conflict it was necessarily qualified by that decision.

It is insisted, however, that in both the *Aspen* and the *Alton* cases, the questions which it was sought to review by direct appeal after the decision of the Circuit Court of Appeals had been, either expressly or by necessary implication, passed upon by that court and therefore were expressly foreclosed, while here such is not the case, since the constitutional question was not in the case when it went to the Circuit Court of Appeals, but only made its appearance by an amendment to the pleadings after the decision of that court. Granting the premise upon which the argument rests, the deduction is unfounded. The ruling in both the *Aspen* and *Alton* cases rested upon the plain ground of the duty of this court not to exert a power not conferred, of the impossibility of proceeding upon the theory that error could be said to have been committed by the trial court because it had applied the decision of the Circuit Court of Appeals or of maintaining the right to the direct appeal which was relied upon in those cases consistently with the power of the Circuit Court of Appeals, not only to decide questions within its jurisdiction, but moreover to determine whether, when in a particular case it had decided such questions and remanded the case

in which they had been decided to a trial court for further proceedings that court had in such further proceedings given due effect to its decision. Indeed these considerations were expounded in the *Metropolitan Case*, and it was there pointed out that the attempt to make a distinction upon the mere form of the mandate was without merit (p. 523). Looked at *arguendo*, however, as a matter of first impression, the source of the error which the proposition here relied upon involves is not difficult to perceive. It consists in pursuing a mistaken avenue of approach to this court; that is, of coming directly from a trial court in a case where, by reason of the cause having been previously decided by the Circuit Court of Appeals, the way to that court should have been pursued even if it was proposed to ultimately bring the case here. The error comes from attempting, after the case has been taken to the Circuit Court of Appeals and been there decided, to resort to proceedings for review which under the statute are applicable only in case no such action by the Circuit Court of Appeals had been taken. A consideration of the confusion which inevitably would result if the doctrine of the *Metropolitan*, *Alton* and *Aspen* cases were not applied, of the necessity which would arise for denying powers conferred upon the Circuit Court of Appeals by the statute and of calling into play a power of review by this court not given, clearly demonstrates the error of the right to direct appeal here insisted upon. And the correctness of the rule announced in the *Aspen Case* and which was reiterated in the *Alton* and *Metropolitan* cases, which we again now apply, is shown by the complete concordance between all of the provisions of the statute which will be brought about by its application.

Dismissed for want of jurisdiction.

MR. JUSTICE PITNEY took no part in the decision of this case.

UNITED STATES *v.* CHAVEZ.

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

No. 863. Argued April 11, 1913.—Decided May 5, 1913.

In construing a statute a word used therein may be given the meaning it has in common speech, although it may have a narrower technical meaning.

While the word "export" technically includes the landing in, as well as the shipment to a foreign country, it is often used as meaning only the shipment from this country and it will be so construed when used in a statute the manifest purpose of which would be defeated by limiting the word to its strict technical meaning.

As used in the joint resolution of March 14, 1912, 37 Stat. 630, prohibiting exportation of munitions of war to American countries where conditions of domestic violence exist, the word "export" refers to any shipment of the prohibited articles from the United States whether there was a landing thereof in the foreign country or not.

Personal carriage of prohibited articles from this to a foreign country does not render inapplicable the prohibition to export such articles under the resolution of March 14, 1912.

THE facts, which involve the construction of the joint resolution of March 14, 1912, 37 Stat. 630, relative to shipment of arms and munitions of war to other American countries during times of domestic violence therein and what constitutes an exportation under such resolution, are stated in the opinion.

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States:

Any willful act of transporting or shipping contraband

articles from any point in the United States with Mexico as the destination of such transportation or shipment is criminal. Such is the natural meaning of the words used. As to meaning of "export" see *Swan* v. *United States*, 190 U. S. 443; 17 Op. Attys. Genl. 583. As to tax on exported articles, see *Almy* v. *California*, 24 How. 169; *Clarke* v. *Clarke*, 3 Woods, 408; *Fairbank* v. *United States*, 181 U. S. 283. As to tax on goods in interstate commerce, see *Coe* v. *Errol*, 116 U. S. 517, 525; *Turpin* v. *Burgess*, 117 U. S. 504; *Dooley* v. *United States*, 183 U. S. 151; *Kidd* v. *Flagler*, 54 Fed. Rep. 367; *United States* v. *Forrester*, 25 Fed. Cas. No. 15132. As to shipment, see *Fisher* v. *Minot*, 10 Gray, 260, 262; *Harrison* v. *Fortlage*, 161 U. S. 57, 63; *Ledon* v. *Havemeyer*, 121 N. Y. 179, 186. See also Century Dictionary; Standard Dictionary.

The construction given resolution by court below is inconsistent with purpose of its enactment and renders enforcement practically impossible. This is clear from evil sought to be remedied; means designed therefor.

The joint resolution of April 22, 1898, which formed the basis of the present resolution, was adopted shortly after the outbreak of the war with Spain in order to prevent the exportation of coal or other war materials destined for the ultimate use of the enemy. For circumstances leading to its adoption see debate in Congress upon its introduction. Cong. Rec., vol. 48, pt. 4, pp. 3257–3258; Cong. Rec., vol. 31, pt. 5, p. 4170.

The necessary consequences of the District Court's ruling is demonstrated by the inefficacy of the resolution as interpreted below. In the present case the accused is bound for Mexico with the contraband articles on his person. According to the District Court he has committed no offense until he enters Mexico. But he is then beyond the reach of process of a Federal court. At the instant of the completion of his offense, therefore, he escapes from the jurisdiction of the United States. Nor is his

offense extradictable. (See extradition treaty with Mexico of Feb. 22, 1899, 31 Stat. 1818.) The resolution was obviously designed to prevent individuals while in this country, and beyond the reach of Mexican authorities, from aiding the revolution in Mexico; and these are the very individuals whom the existing law, as construed below, is powerless to touch. Under this construction, a Mexican might safely cross the border into the United States, stack up with all the munitions of war he could carry, recross the boundary into Mexico, and then come back here for more—provided only that on subsequent trips the offender took care to avoid recognition and arrest for his prior offense.

Whatever mode of transportation was adopted the United States authorities certainly could not intercept the shipment, but must allow it to cross the boundary and proceed to its destination. Except for the deterrent effect of an occasional conviction the resolution would wholly fail as a measure of prevention. There is a strong presumption against that construction of a statute which virtually nullifies it and defeats its object, or which leads to the manifest absurdities heretofore suggested. *United States* v. *Hartwell*, 6 Wall. 396.

No appearance for defendants in error.

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

By virtue of the act of March 2, 1907, 34 Stat. 1246, c. 2564, this direct writ of error is prosecuted for the purpose of reversing the judgment below because of an alleged erroneous construction given by the court to the joint resolution of March 14, 1912, 37 Stat. 630, in consequence of which the indictment in this case was quashed because stating no offense against the provisions of the joint resolution.

The charging part of the indictment is as follows:

"That heretofore, to-wit: on the third day of May, A. D. 1912, in the City and County of El Paso, in the State of Texas, in the Western District of Texas, and within the jurisdiction of this Court, one Arnulfo Chavez, alias Arnuto Chavez, late of said district, did unlawfully, knowingly, wilfully and with intent to export the munitions of war hereinafter described from the said City of El Paso to Ciudad Juarez in Mexico, make a certain shipment of certain munitions of war, to-wit: two thousand (2,000) Winchester cartridges of the caliber 30-30, that is to say, did make a shipment of said munitions of war from said City of El Paso and with said Ciudad Juarez in Mexico as the destination of said shipment, by transporting the same on his person from a point the exact location of which is to your Grand Jury unknown and hence not here given, near the intersection of North El Paso and San Francisco Streets in the City of El Paso to a point, the exact location of which is to your Grand Jury unknown and hence not here given, but which is near the intersection of South Stanton and Fifth Streets in the said City of El Paso."

The joint resolution is as follows:

"SECTION 1. That whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress.

"SEC. 2. That any shipment of material hereby declared unlawful after such a proclamation shall be punishable by fine not exceeding ten thousand dollars, or by imprisonment not exceeding two years, or both."

The proclamation of the President applying without exception or limitation the provisions of the resolution to Mexico was issued April 12, 1912. Proclamations 1912, p. 57.

Considering it to be indisputable that two acts are essential to constitute export in the legal sense, a shipment from this country to a foreign country and the landing of the goods in such foreign country, the court below held that no transgression of the prohibition of the first section, making it unlawful to export, could arise from the facts charged, because they alleged—giving them the most favorable view to the Government—but a shipment from this country to Mexico unconsummated by delivery in the foreign country. Coming to consider the second section, it was held that the act punished by that section was the exportation prohibited by the first section, and hence the charge of shipment without an averment of landing in the foreign country stated no offense punishable by the second section. The court said:

"The allegations of the indictment, as understood by the court, charge in effect that the defendant attempted to export munitions of war—nothing more; and as the joint resolution is directed against actual exportation and not merely the attempt to export, the acts charged against the defendant are not embraced within the prohibition. The word 'shipment,' employed in connection with the words 'material hereby declared unlawful' can only refer, in the judgment of the court, to material shipped, exported, to the country where the disturbance exists, since it is only such material that is declared to be unlawful by the first section of the resolution, defining the offense."

In common speech the shipment of goods from this to a foreign country without regard to their landing in such country is often spoken of as an export. It is true also that for the purposes of the provisions of § 9, Article I, of the Constitution, prohibiting the laying by Congress of

a tax or duty "on articles exported from any State" and of § 10, Article I, forbidding any State, without the consent of Congress, to "lay any imposts or duties on imports or exports," a shipment is considered as the initiation of export so as to bring the goods shipped within the protection of the constitutional safeguards. *Almy* v. *California*, 24 How. 169; *Fairbank* v. *United States*, 181 U. S. 983. Despite, however, the significance given to the words to export in these cases, it is nevertheless certain, as stated by the court below, that by a practically unanimous concensus of opinion, accurately speaking, exportation in the complete sense consists of two essential ingredients—the sending of merchandise from this to a foreign country and its landing in such country. But the question which we are called upon to solve, that is, the meaning of the words "to export" as used in the joint resolution, may not be disposed of by any mere abstract consideration of the meaning of the words, but their signification must be determined with reference to the text of the resolution itself.

Putting out of view the parenthetical clause in the text of the resolution concerning the proclamation of the President, it reads as follows: "it shall be unlawful to export any arms or munitions of war from any place in the United States to such country," that is, the country brought within the terms of the resolution by a proclamation of the President. Conceding for argument's sake that if the words to export stood alone in the text, that is, were not accompanied by explanatory or defining words, they would have to be interpreted with reference to the meaning of export in the complete sense, that is, as including landing in the foreign country, such concession is not here controlling or persuasive. We say this because, as we have seen, the words to export are expressly qualified by a clause which serves, in a sense, to define their meaning and, at all events, to make clear the nature and char-

acter of the acts intended to be embraced by the prohibition against exporting. In other words, the resolution does not say it shall be unlawful to export, but it adds, "any arms or munitions of war from any place in the United States to such foreign country." In view of the accepted significance of the words to export when used in their complete sense and of the fact that in the preceding sentences of the resolution the causes leading to its adoption are expressly stated to be the violence and confusion sometimes promoted in foreign countries "by the use of arms or munitions of war procured from the United States," the insertion of words of definition and the omission from such words of all reference to landing of the prohibited merchandise would seem to make it clear that the prohibition of the resolution was directed against the act of sending from this to the foreign and prohibited country without reference to the completion of such act by the landing or delivery of the prohibited merchandise at its destination; in other words, that the object was to forbid the act of shipment from the United States of the prohibited munitions of war to a foreign country, without reference to the fulfillment of the complete act of export by the landing of the contraband goods. If there be room for hesitancy, that is to say, ambiguity, as to the correctness of this construction of the first section, we think there can be no ground for such doubt if the context of the resolution be considered, that is, if the second section be taken into view as illustrating and making clear the text of the first section. There can be no doubt that the object of the second section was to make the prohibition of the first section operative by punishing violations of its provisions. Now, the second section does not purport to punish the act of exporting, but in express terms it only punishes "any shipment," thus affixing the construction which we have given to the first section and causing it in reason to be impossible to say that the first

section simply prohibits export in the completed sense. And this construction of the second section becomes irresistible when it is observed that for the purpose of preventing misconception the words "any shipment" are explained and their meaning made more emphatic by the declaration that they constitute the act "hereby made unlawful," thus again in express terms affixing a significance to the first section and confirming the meaning which we have given it.

And if the legislative intent manifested on the face of the joint resolution and derived from a consideration of the evil against which it was obviously intended to provide be taken into view, it is not difficult to perceive the reasons which led to the prohibition against and punishment of shipment instead of export in the complete sense. As we have previously observed, the terms of the resolution show that it was the means afforded for the promotion of turmoil and violence in certain foreign countries by the use of arms and munitions of war derived from the United States which gave rise to the passage of the resolution. But to have merely prohibited and punished the export, in the complete sense, of arms and munitions, would not have served to prevent the continued future delivery of such arms, etc., except as the anticipation of punishment might serve as a deterrent. On the other hand, as shipments from the United States were the source of the evil, a prohibition against such shipments and punishment for making them not only exerted all the deterrent influence which could possibly have arisen from punishing export, but besides would reach the acts done in the United States which were the generative source of the trouble and hence afford the means of putting an effective stop to the evil which it was the purpose to suppress. Although no question is raised on the subject, as in consequence of the construction we affix to the joint resolution we shall reverse and remand, we deem it well to say that merely because

resort was had to personal carriage as a means of moving the prohibited articles from this to a foreign country would not render inapplicable the prohibition against any shipment.

Judgment reversed.

UNITED STATES *v.* MESA.

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

No. 864. Argued April 11, 1913.—Decided May 5, 1913.

Decided on authority of preceding case.
199 Fed. Rep. 518, reversed.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States.

No appearance for defendant in error.

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

The defendant in error was indicted upon the charge that within the jurisdiction of the court he "did unlawfully, knowingly, wilfully and with intent to export the munitions of war hereinafter described from the said city of El Paso to Ciudad Juarez, in Mexico, make a certain shipment of certain munitions of war, to-wit: three thousand (3,000) Winchester rifle cartridges of the calibre 44; that is to say, did make a shipment of said munitions of war from said city of El Paso and with said Ciudad Juarez, in Mexico, as the destination of said shipment, by transporting the same in a wagon from a point," etc.

A demurrer to the indictment was heard along with the demurrer to the indictment in the case against Chavez, which we have just decided. The demurrer was sustained and the indictment quashed upon the opinion rendered in the *Chavez Case*. The ruling which we have just made in that case is therefore applicable to this and necessitates a reversal.

Judgment reversed.

CLARKE, TRUSTEE UNDER THE WILL OF PARSONS, *v.* ROGERS, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF SHAW.

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

No. 221. Argued April 16, 17, 1913.—Decided May 5, 1913.

The same person, considered in different capacities, may act as the giver and receiver of a fraudulent preference; and so *held* in a case where a trustee of several trusts, with knowledge of his insolvency, transferred property to one of the trusts to which he was indebted. See *Bush* v. *Moore*, 133 Massachusetts, 192.

The obligation resting on a defaulting testamentary trustee to restore the value of the assets embezzled is of a contractual character and the debt is provable although it is fraudulent and excepted from the discharge.

Under the laws of Massachusetts there may be a contractual obligation of one trust to another for payments improperly made from assets of the latter for the benefit of the former. *Bremer* v. *Williams*, 210 Massachusetts, 256.

Section 17 of the Bankruptcy Act enumerates debts provable under § 63a which are not discharged, and among them are included those that arise by the conversion of trust funds.

Equality between creditors is necessarily the ultimate aim of the Bank-

ruptcy act; and even if the dividend be very small, the court will not construe the act so as to allow one creditor to be preferred above the others.

There may be unity of the person and difference in capacities, but such unity imputes knowledge of the purpose for which the different capacities were exercised.

183 Fed. Rep. 518, affirmed.

THE facts, which involve the provisions of the Bankruptcy Act in regard to preferences and provable debts, are stated in the opinion.

Mr. Felix Rackemann, with whom *Mr. Harrison M. Davis* was on the brief, for appellant:

No successor trustee having been appointed until long after the transaction took place, and at the time of the alleged preference there being no creditor then existing and ascertained, there could be no debt provable in bankruptcy, and no preference within the meaning of the act.

The beneficiaries of the trusts under the Parsons will were not creditors of Shaw. They had an interest in having the trust funds restored, but the value of the missing securities was in no event due or payable to them. *Bennett* v. *Woodman*, 116 Massachusetts, 518.

There is no provable debt on a probate bond until the right to put the bond in suit has become complete. *Harmon* v. *McDonald*, 187 Massachusetts, 578; *Loring* v. *Kendall*, 1 Gray, 305.

There is no provable debt on a probate bond until some person is ascertained, other than the obligor, who will be entitled to receive the amount for which execution may be awarded. *Bennett* v. *Russell*, 2 Allen, 537, 541.

There is no liability apart from the bond. *Brooks* v. *Brooks*, 11 Cush. 18; *Conant* v. *Kendall*, 21 Pick. 36; *Johnson* v. *Johnson*, 120 Massachusetts, 455.

The contractual obligation, without which there can

be no provable debt, must be found in the probate bond. *Wheeler* v. *Freeman*, 13 Pick. 167; *Brooks* v. *Brooks*, 11 Cush. 18.

Apart from the bond, and considering the situation as it would have been had no bond been given or required, there was no contract obligation resting upon Shaw, in his capacity of testamentary trustee.

The obligation to restore the value of assets embezzled cannot be contractual, when the antecedent obligation not to embezzle is not contractual. The liability results from breach of the obligation and cannot be of a different nature. The defaulting trustee is bound to make good a defalcation for the same reason that he is bound to exercise due care in making investments; all his duties and liabilities are derived from the obligation of faithful administration, and that obligation arises, not *ex contractu*, but *ex lege*.

The complex relations involved in a trust cannot be reduced to the ordinary elements of contract. Ward's Pollock on Contracts, p. 231.

The true owner of goods wrongfully converted and sold may waive the tort and recover the money in assumpsit. This is a pure tort liability. Nor will the contract form of remedy lie if the wrong-doer has not sold the goods and received money for them. *Jones* v. *Hoar*, 5 Pick. 285; 1 Cooley on Torts, 3d ed., p. 160; Ward's Pollock on Contracts, p. 238; see Loveland, 4th ed., p. 669. *Crawford* v. *Burke*, 195 U. S. 176, distinguished.

At the time of the alleged preference, there was no one who could have sued Shaw in *indebitatus assumpsit*. He had converted trust securities. The record does not show how he had disposed of them, or whether he had sold them and received money for them. His liability was in the nature of tort. He was a tort-feasor in equity. *Loring* v. *Salisbury Mills*, 125 Massachusetts, 138, 153; *In re Tucker*, 153 Fed. Rep. 91, 96. But there was no one who could

sue him at law, and the doctrines of waiver of tort and *quasi*-contract do not apply, in default of a plaintiff entitled to invoke them. *Gould* v. *Emerson*, 99 Massachusetts, 154, 157; *Johnson* v. *Johnson*, 120 Massachusetts, 165; *Henchey* v. *Henchey*, 167 Massachusetts, 77; *Minchin* v. *Minchin*, 157 Massachusetts, 265.

In the case at bar, the trust was open; there had been no accounting; no money was due any *cestui que trust*, and the amount of the trustee's liability by reason of his breaches of trust remained to be ascertained.

The decree can be supported only on fictions.

By a fiction of law, a contract relation is sometimes implied between two persons in order that one of them may have a remedy against the other in contract form. But in the case at bar, both the contract and the creditor are fictitious. *Eastman* v. *Wright*, 6 Pick. 316, 321.

It is obvious that there can be no real contract, or meeting of minds, or legal obligation between a person acting in one capacity and the same person acting in another capacity. Two persons, at least, are involved in the conception of the simplest legal right or obligation. Therefore, no man can be defendant in an action in which he is also plaintiff, either at law or equity. Lewin on Trusts, 8th Eng. ed., p. 91; 1 Perry on Trusts, 5th ed., p. 11; *Prentice* v. *Dehon*, 10 Allen, 353; *Batchelder, Petitioner*, 147 Massachusetts, 465, 471; *Sigourney* v. *Wetherell*, 6 Met. 553, 557; *Benchley* v. *Chapin*, 10 Cush. 173.

It is not necessary that the debt should have been liquidated, and insolvency of the debtor makes no difference. The presumption is conclusive that the debt has been paid. *Choate* v. *Thorndike*, 138 Massachusetts, 371; *Bassett* v. *Fidelity &c. Co.*, 184 Massachusetts, 210; and see *Ipswich Mfg. Co.* v. *Story*, 5 Met. 310, 313; *Leland* v. *Felton*, 1 Allen, 531; *Mattoon* v. *Cowing*, 13 Gray, 387, 390.

When the right to demand and the liability to pay coexist in one person, the law presumes instantaneous pay-

ment and extinguishes the debt. Woerner, Executors and Administrators, § 311. See Article on Legal Fictions, 7 Harvard Law Review, p. 262.

The trust estate was not Shaw's creditor in a legal sense. Salmond, Jurisprudence, 2d ed., 283; *Taylor* v. *Davis*, 110 U. S. 330, 334.

Perhaps, on technical grounds, the strong equity of the surety under circumstances like those disclosed in this record could not be protected, if a preference were clearly shown. But where a creditor and a preference can only be discovered by resort to novel fictions of law, it would seem that the surety's equity ought to move the court to decide the question of preference or no preference in accordance with the actual facts of the case.

Shaw's knowledge of his own fraud is not to be imputed to the beneficiaries. But if it were possible to regard the beneficiaries as creditors and Shaw as their agent, Shaw's guilty knowledge could not be imputed to his innocent principals. *McNaboe* v. *Columbian Mfg. Co.*, 153 Fed. Rep. 967; *Lindsey* v. *Lambert Assn.*, 4 Fed. Rep. 48.

The equities in favor of the innocent beneficiaries of the Parsons trusts ought to forbid the expedient of inventing fictions in order to make out a voidable preference.

In *Bush* v. *Moore*, 133 Massachusetts, 198, the guardian was not both creditor and debtor; he was debtor and agent of the creditor. See Lowell on Bankruptcy, §§ 93, 100; *Murray* v. *Wood*, 144 Massachusetts, 195.

In England, where unliquidated claims arising from breach of trust are provable by express provision of the statute, 46 and 47 Victoria, c. 52, § 39 (1883), a voluntary payment to make good a breach of trust is not held a preference. *Sharp* v. *Jackson* (1899), A. C. 419; Robson's Bankruptcy, 7th ed., p. 237; *Orret* v. *Corser*, 21 Beav. 52; *Ex parte Shaw*, 1 Glyn & Jameson's Cases in Bankruptcy, 127.

Mr. Melvin M. Johnson, with whom *Mr. Henry M. Rogers* and *Mr. A. Farley Brewer* were on the brief, for appellee.

Mr. Justice McKenna delivered the opinion of the court.

Petition by appellee as trustee in bankruptcy of the estate of John O. Shaw to recover a preference.

The facts are these: The bankrupt, John O. Shaw, was, for a long time prior to the adjudication in bankruptcy, trustee under the will of Samuel Parsons, late of Newton, in the county of Middlesex, Massachusetts, of two trusts, one for the benefit of Charles A., James H. and Henry B. Parsons, and the other for the benefit of E. F. and E. A. Parsons.

After proceedings in bankruptcy had been commenced, Shaw resigned the trusts and his resignation was accepted by the Probate Court of Middlesex County on March 25, 1908, and appellant, George Lemist Clarke, was appointed trustee of the trusts and duly qualified.

In the month of January, 1908, and within four months before the filing of the petition in bankruptcy against him and whilst he was insolvent, Shaw was largely indebted to each of the trusts and to himself as trustee and transferred from himself individually to the trusts and to himself as trustee thereof as follows: To the trust for C. A. Parsons *et al.*, seven of the $1,000 collateral trust 4% bonds of the American Telephone & Telegraph Company (numbers specified), and two $1,000 Chicago, Burlington & Quincy Railroad Company 3½% Illinois Division (numbers specified); to the trust of E. F. and E. A. Parsons, twelve $1,000 Northern Pacific—Great Northern 4% joint bonds, Chicago, Burlington & Quincy collateral.

The transfers were made by Shaw with knowledge of his insolvency and with intent to prefer the trusts and himself

as trustee, and the effect (it is alleged) of such preference, if not avoided, will be to enable the trust estates and himself as trustee thereof (being one of his individual creditors) to obtain a greater percentage of his debts than any other of his creditors of the same class.

The petition prayed that the bonds be declared to be the bonds of petitioner, appellee here, and that Clarke, appellant here, be ordered to execute such instruments as might be necessary to transfer the title to and possession of all the bonds to petitioner.

The answer of appellant denied only that the transfers were made within four months of the bankruptcy, that Shaw was at the time of the transfer insolvent, that all the trusts were his creditors then or have become so since within the meaning of the statute, and denies that he intended by the transfers to give a preference or that they constitute a preference.

The decree of the District Judge was that five of the seven Telephone and twelve of the Northern Pacific-Great Northern Railroad Company 4% joint bonds and all of the coupons thereon payable after January, 1908, were the property of the trustee in bankruptcy, appellee here.

It was further adjudged that the American Telephone & Telegraph Company collateral trust 4% bonds (numbered 20,818 and 20,819) were in part the property of the appellant as trustee and of appellee as trustee. The bonds were directed to be sold. The decree was affirmed by the Circuit Court of Appeals.

The District Court found the facts. They are summarized in its opinion as follows:

"The bankrupt, being insolvent and knowing himself to be insolvent, was discovered by the surety on his bond as trustee under the Parsons will not to be in possession of some of the securities which formed a part of the trust estate and which should have been in his possession as

trustee. He was being urged by the surety to make good this shortage. For the purpose of doing so, he placed the bonds in question in a safe deposit box, taken and agreed on by himself and the surety as a separate place of deposit for the securities belonging to this trust. In the box were placed also those securities belonging to the trust funds which had not gone out of his possession. All the securities thus placed in the box and held as constituting the trust funds have since remained there. The bankrupt has been removed as trustee and the respondent, his successor in the trust, has at present the possession and control of the contents of the box, including the bonds in question.

"The bankrupt had at the time more than twenty-five other trust estates in his charge as trustee. There was, in the case of each, a shortage for which he was responsible and he knew the fact to be so. The total amount of these shortages exceeded $350,000.

"It has not been shown that any of the bonds used as above to make good the shortage in the Parsons trust estate, or that any of the money wherewith the bankrupt purchased those bonds, can be identified as belonging to any one of the other trust estates in the bankrupt's charge. He drew out and used to purchase certain of the bonds a savings bank deposit of $1,500 belonging to one of the Parsons trust funds; but with that exception the money wherewith the bonds were bought as well as the bonds themselves must, for the purposes of the questions to be decided, be regarded as the bankrupt's individual property at the time he set them apart in the manner stated, to be thereafter held as trust property."

The question in the case is, Do these facts show a preference within the meaning of the Bankruptcy Law?

Putting to one side the identity of Shaw as an individual and Shaw as the trustee of the trusts, there are the elements of a preference. In other words, there is indebtedness; Shaw is indebted to all of the estates of which he

was trustee. He used his individual property to pay the indebtedness to the Parsons trust and he thus gave that trust a preference over the others. It was enabled to the extent of the property transferred to obtain a greater percentage of its debts than the other trusts. What, then, stands in the way of setting the transfer aside? The debt was not a provable one in bankruptcy, it is contended, and on that contention the case is rested and to it we may direct our considerations, and in that the provisions of the statute become necessary elements.

Section 60a, as amended, is as follows:

"A person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of the petition, . . . made a transfer of any of his property, and the effect of the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

A creditor is defined to be "any one who owns a demand or claim provable in bankruptcy, may include his duly authorized agent, attorney, or proxy."

Debt includes any debt, demand or claim provable in bankruptcy. 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.

Appellant deduces from these definitions, that no question of a preference can arise except when the transfer is made to the owner of a provable claim, or to his agent, and that no claim is provable except when enumerated in § 63a, and none other can be liquidated under paragraph b. Of the claims enumerated in § 63a the fourth is the only one with which we are concerned. It is as follows: "(4) Founded on an open account, or upon a contract express or implied." The final contention of appellant is that one, to receive a preference, must be a

creditor of the bankrupt upon a contract express or implied. It is not enough that there be some kind of legal or equitable claim against the bankrupt. These postulates laid down, he builds upon them an argument of great technicality to show that the trusts of Shaw were not his creditors and therefore could not receive from him a preference. An obligation to the trusts is not denied, but it is an obligation, it is asserted, which was represented entirely by his bond and had no remedy but by a suit on the bond. The liability of Shaw, it is further contended, considered independently of the bond, was in the nature of a pure tort liability which could not be waived and the remedies of a contract availed of.

That some torts may be waived and be the bases of provable claims is decided in *Crawford* v. *Burke*, 195 U. S. 176, 187. Crawford and one Valentine were stockbrokers and dealers in investments. They had in their possession certain shares of stock which they held as a pledge and security for the amount due them by Burke on the stock. They sold Burke's reversionary interest in the stock whereby it was wholly lost. He sued them in trover. They set up their discharge in bankruptcy. It was held, the court speaking through Mr. Justice Brown, to be clear that the debt of Burke was embraced within the provisions of paragraph a, as one "founded upon an open account, or upon contract, express or implied," and might have been proven had he chosen to waive the tort and take his place with other creditors of the estate. The discharge in bankruptcy was held on other provisions of the act to be a defense. The case was applied and followed in *Tindle* v. *Birkett*, 205 U. S. 183, 186, in an action to recover damages claimed to have been sustained by false and fraudulent representations. It was decided that the claim was one provable under § 63a as "founded upon an open account or upon a contract, express or implied." It is, however, said that these cases are explained and limited

in *Grant Shoe Co.* v. *Laird Co.*, 212 U. S. 445, to instances "where there is a claim arising out of a contract, but of such a nature that there is at the same time an independent remedy in tort." To make this distinction available appellant must establish his contention that there was no contractual relation, either between Shaw and his trusts or the *cestuis que trust* of the trusts; in other words, that the sole liability was upon Shaw's bond. There is no other remedy, is the repeated insistence, and that only after a final accounting has been had in the Probate Court showing a liquidated balance due from the accountant. Then and not until then, as we understand appellant, a creditor emerges with a provable claim. Appellant, however, halts somewhat at the logic of his argument and ventures to say that a decision in his favor does not necessarily involve a decision that a claim upon the bond of the defaulting trustee could not be proved for a dividend in the name of the probate judge. But is not this concession in opposition to the relation asserted to exist between a provable debt and a transfer of property on account of it being a preference?

We have considered the contentions of appellant somewhat minutely, so as to fully present them. The lower courts, while giving attention to the technical elements of appellant's arguments, cut through them to apply the fundamental purpose of the Bankruptcy Law, that is, equality between creditors. The District Court, following *Bush* v. *Moore*, 133 Massachusetts, 198, decided in 1882 under a provision of the Massachusetts insolvency law which was similar to the provision in the Bankruptcy Act of the United States, found no difficulty in the same person, considered in different capacities, acting as giver and receiver of a fraudulent preference. The Court of Appeals met the contention of appellant that there must be a contractual relation and decided that it existed, both on account of the bond and independently of the bond.

The court said: "It is true that, in the ordinary course, enforcing the bond would be at the end of the proceedings and not at the beginning. Notwithstanding, as the equitable rules which govern bankrupts always look to the end and disregard the intervening details as only steps to reach the end, there was in this case a contract from the beginning, that is, the bond, which was capable of liquidation on the rules explained in *Tindle* v. *Birkett*, 205 U. S. 183. Aside from this and independently of the bond, we believe there is an obligation resting on a defaulting testamentary trustee to restore the value of the assets embezzled, which is of contractual character."

But this, appellant contends, is to evolve "two moral persons out of one embezzler." The criticism only can be made by putting out of view what the "one embezzler" represents. He is one being but acts in more than one capacity, and in all of his capacities he has duties and obligations. The relation of a trustee to the trust property is not the same as his relation to his individual property. He certainly may incur obligations to the trust. He can only satisfy the obligations out of his individual property, and by doing so may deplete it, make it deficient, to satisfy its obligations. These are realities, not fictions. We must overlook essential things to disregard them, and hence the decision in *Bush* v. *Moore*, *supra*. Moore was the guardian of his son and wrongfully appropriated to his own use the moneys of his ward. Within six months preceding his insolvency, and being insolvent, intending to restore the funds he had appropriated, he deposited in the defendant bank the necessary sum derived from his private property. His assignees in insolvency sued in equity to recover the sum as a preference, alleging that he at the time was insolvent and acted in contemplation of insolvency. The Massachusetts statute made void any payment or conveyance of property by an insolvent "to any creditor or person having a claim against

him," and gave power to the assignee to recover the property.

These contentions were made: (1) The ward was not a creditor of the guardian or a person having a claim against him. (2) The act of the guardian did not constitute a preference which was avoidable by reason of his insolvency. (3) Had the misappropriation continued there would have been no claim by the ward which could have been the foundation of a suit. (4) His remedy was to summons the guardian into the probate court and then, upon adjudication there, or if he failed to account, there would have been only the remedy for failure to account or to comply with the decree of the court.

The contentions, it will be observed, were like those made in the case at bar. They were all rejected. It was held that the title to the property continued in the ward, the guardian having its custody only, and he having wrongfully used it, there was a just claim on the part of the ward that the integrity of the fund should be restored. The court said: "The title of property of one under guardianship continues always in the ward; the guardian has the custody merely. If, availing himself of that custody, he wrongfully uses it, there is a just claim on the part of the ward that the integrity of the fund shall be restored. It is not important in what form the ward is compelled to seek this remedy, or that the wrongful act of the guardian will not immediately afford a ground of action against him. Even if, upon a settlement in the Probate Court, it might have been held that the lawful and proper charges of the guardian would exceed the amount of his spoliations, there was not the less a just claim that the ward's property which had been unlawfully dealt with should be replaced."

To the contention that two persons were necessary to consummate a preference, one to transfer and the other to receive the property, the court answered: "But where

the same person acts as the giver and receiver of the security, the occurrence and participation of two parties to the fraudulent preference exists. . . . One individual acting in two capacities, debtor and on behalf of the creditor, may constitute the two persons contemplated by the statute." And, supplying the element of knowledge of the insolvency and the preference required by the statute, the court said that the ward was bound by the knowledge of his guardian.

The case is certainly determinative of appellant's contention that accounting in the Probate Court was necessary as a condition to a provable claim, or that a suit on a bond was the only remedy available for the misappropriation of funds by a guardian. This applies as well to a trustee; and that there may be a contractual obligation of one trust to another under the laws of Massachusetts is decided in *Bremer* v. *Williams*, 210 Massachusetts, 256. In that case a person who was the sole trustee of two separate estates paid the taxes due from one of them with money embezzled from the other. It was held that the new trustee of the latter could maintain suit in equity to recover from another unjustly enriched by the embezzlement. The liability of the latter to the former, the court said, grew out of an implied or constructive obligation, and did not rest upon an express trust, and, being such, the statute of limitations would be a bar in equity as well as in law. In other words, the court recognized that from the misuse of the funds the law would imply an obligation to repay. This ruling brings the case at bar within *Crawford* v. *Burke* and *Tindle* v. *Birkett*, even if their application be as limited as appellant contends. It may be questioned if they are so limited. They recognize the relation of § 63a to § 17. Section 17 excludes certain debts from discharge, among others, those created by the bankrupt's "fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary

capacity." It was said in *Crawford* v. *Burke*, "If no fraud could be made the basis of a provable debt, why were *certain* frauds excepted from the operation of the discharge?" The question was pertinent in view of the language of the section. It provides that 'a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as," etc. The relation of the section was also recognized in *Friend* v. *Talcott*, *ante*, p. 27. It is there declared that § 17 enumerates the debts *provable* under § 63a which are not discharged. Among them, we have seen, are those created by fraud, embezzlement, misappropriation or defalcation in any fiduciary capacity. It would seem, therefore, to follow that the conversion of trusts funds creates a liability provable in bankruptcy.

The Court of Appeals expressed the hardship of a contrary conclusion. "Moreover," the court said, "it will be a great hardship if the various estates of which Shaw was trustee cannot recover any part of their loss of about $350,000 by sharing in his bankrupt estate. This may, of course, in this instance, be but a very small dividend, but in another instance it might be very near the face of the default. Any construction which would leave such a result as that cannot, of course, be accepted unless fairly forced upon us."

In this, we think, the court was right. Equality between creditors is necessarily the ultimate aim of the Bankrupt Law, and to obtain it we must regard the essential nature of transactions, not their forms or accidents. As we have said, there may be an unity of the person in the individual and the trustee, of the individual and the guardian; we must look beyond it to the difference in his capacities and the duties and obligations resulting from it. These duties and obligations are as distinct and insistent as though exercised by different individuals and have the same legal consequences. The unity of the person has, of course, an effect. It constitutes such re-

lationship between the different capacities exercised as to impute knowledge of their exercise and for what purpose exercised. *Bush* v. *Moore, supra; Atlantic Mills* v. *Indian Orchard Mills*, 147 Massachusetts, 268, 282; *S. C.*, 102 U. S. 263; *Atlantic Bank* v. *Merchants' Bank*, 10 Gray, 532, cited in *United States* v. *State Bank*, 96 U. S. 30, 36.

Decree affirmed.

MR. JUSTICE HOLMES concurs in the result.

TIACO *v.* FORBES.

TICO *v.* SAME.

SY CHANG *v.* SAME.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

Nos. 254, 255, 256. Argued April 24, 1913.—Decided May 5, 1913.

Where the act originally purports to be done in the name and by the authority of the State, a defect in that authority may be cured by the subsequent adoption of the act.

The deportation of a Chinaman from the Philippine Islands by the Governor General prior to an act of the legislature authorizing such deportation is to be considered as having been ordered in pursuance of such statute.

Sovereign states have inherent power to deport aliens, and Congress is not deprived of this power by the Constitution of the United States.

The ground on which the power to deport aliens rests necessitates that it may have to be exercised in a summary manner by executive officers.

Congress not being prevented by the Constitution from deporting

aliens, the Philippine Government cannot be prevented from so doing by the Bill of Rights incorporated in the act of July 1, 1902.

The deportation of aliens in this case, by the Philippine Government was not a deprivation of liberty without due process of law.

The local government of the Philippine Islands has all civil and judicial power necessary to govern the Islands, and this includes the power to deport aliens.

The extension by Congress of the Chinese Exclusion and Immigration Laws to the Philippine Islands does not prevent the Government of the Islands passing an act removing aliens therefrom.

The English rule is that an act of state is not cognizable in any municipal court. It is within the power of the legislature of the Philippine Islands to declare an act of the executive which is within its power to authorize to be not subject to question or review.

A statute which protects the executive protects the subordinates as well as the chief executive.

Quære whether the Governor of the Philippine Islands has authority by virtue of his office alone to deport aliens, or immunity from action for a deportation made in good faith whether he had the power or not.

Quære whether, historically speaking, prohibition was the proper remedy; but in this case this court should not interfere with the local practice in a matter relating to the administration of local statutes except for good cause shown.

The act of the Philippine legislature passed April 19, 1910, ratifying the action of the Governor General in ordering the deportation of plaintiffs, Chinamen, and declaring it to have been an exercise of authority vested in him by law in all respects legal and not subject to question or review, was within the power of the legislature, and took from the court, in which an action had been brought to enjoin the deportation, jurisdiction to try the case, and the judgment granting a writ of prohibition is affirmed.

THE facts, which involve the power of the Philippine Government to deport aliens, are stated in the opinion.

Mr. Jackson H. Ralston and *Mr. Clement L. Bouvé,* with whom *Mr. W. Morgan Shuster* and *Mr. Frederick L. Siddons* were on the brief, for plaintiffs in error:

The Court of First Instance at Manila had jurisdiction.

The contention that the act was an act of the State or performed by the defendant Forbes in his executive capac-

ity as Governor General did not oust the Court of First Instance of jurisdiction. *Tindall* v. *Wesley*, 167 U. S. 204; *United States* v. *Lee*, 106 U. S. 196; *United States* v. *Peters*, 5 Cranch, 115, 139; *Cunningham* v. *Macon &c. R. R. Co.*, 109 U. S. 446; *Belknap* v. *Schild*, 161 U. S. 10. And see *Ex parte Tyler*, 149 U. S. 164, 190, citing *Pennoyer* v. *MacConnaughy*, 140 U. S. 1, 10; *Stanley* v. *Schwalby*, 147 U. S. 508; *Ex parte Milligan*, 4 Wall. 2; *Kilbourne* v. *Thompson*, 103 U. S. 168.

Not only was the jurisdiction of the Court of First Instance over the persons of the defendants in error and the subject-matter clear, but the remedy of appeal was open to them. *Eleizegui* v. *Tennis Club*, 1 Phil. Rep. 303. There was no ground for the issuance of the extraordinary writ of prohibition. High, Ext. Leg. Rem., § 767, § 764a; *Ex parte Oklahoma*, 220 U. S. 191; *Ex parte Harding*, 219 U. S. 363; *Ex parte Gruetter*, 217 U. S. 586; *Ex parte Nebraska*, 209 U. S. 436; *Re Pollitz*, 206 U. S. 323; *Re Huguely Mfg. Co.*, 184 U. S. 297; *Re Atlantic City R. R. Co.*, 164 U. S. 633; *Re Rice*, 155 U. S. 396; *Ex parte Cooper*, 143 U. S. 472; *Ex parte Gordon*, 104 U. S. 515; *Ex parte Detroit Ferry Co.*, 104 U. S. 519; *Troegel* v. *Judge of City Court*, 35 La. Ann. 1164; *Penn. R. R. Co.* v. *Rodgers*, 52 W. Va. 450; *Ex parte Green*, 29 Alabama, 52; *Ex parte Pettison*, 33 Alabama, 74; *Ex parte State*, 51 Alabama, 60; *Buskirk* v. *Judge of Circuit Court*, 7 W. Va. 91; *Murphy* v. *Superior Court*, 58 California, 520; *State* v. *Burkhardt*, 87 Missouri, 533; *State* v. *Witherow*, 108 Missouri, 1; *State* v. *Kline*, 116 Missouri, 259; *State* v. *Robinson*, 38 La. Ann. 968; *State* v. *Fournet*, 45 La. Ann. 943; *Goldsmith* v. *Owen*, 95 Kentucky, 420; *State* v. *Hocker*, 33 Florida, 283.

The Government of the Philippine Islands has no power to deport aliens.

The authorities cited by the court on the existence of an inherent power to deport foreigners sustain the proposition only as to sovereign states in which that power

is inherent as an essential element of sovereignty. That power does exist inherently in sovereign States. *Chae Chan Ping* v. *United States*, 130 U. S. 531; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Chin Bak Kan* v. *United States*, 186 U. S. 193; *Ekiu* v. *United States*, 142 U. S. 651; *Turner* v. *Williams*, 194 U. S. 279; 1 Vattel, Law of Nations, c. 19, par. 230; 1 Phillimore, Int. Law, 3d ed., c. 10, p. 220; 2 Calvo, Le dr. int., 5th ed., French, par. 700; Bonfils, Manuel du Droit Int. Pub., par 442; Darut, de l'Expulsion des Etrangers: Aix, 1902; 4 Moore, Int. Law Dig., par. 550, p. 68; Martini, l'Expulsion des Etrangers, p. 14; Pradier Fodéré, Traité de Droit Int. Pub., par. 1857.

The Philippine Government, however, is not a sovereign community, at least in an international sense, but a mere dependency of the United States, limited to the exercise of such powers only as those with which it is vested by its organic act. Act of Congress July 1, 1902; *Fourteen Diamond Rings*, 183 U. S. 176, 179; *Snow* v. *United States*, 18 Wall. 317; *Dorr* v. *United States*, 195 U. S. 138, 148, citing Cooley, Principles of Const. Law, 164; *National Bank* v. *Yankton*, 101 U. S. 129; *Murphy* v. *Ramsey*, 114 U. S. 15; *Downes* v. *Bidwell*, 182 U. S. 244, 283; *Am. Ins. Co.* v. *Canter*, 1 Pet. 511, 542; *Territory* v. *Daniels*, 8 Utah, 188, *S. C.*, 5 L. R. A. 144; *United States* v. *Bull*, 15 Phil. Rep. 7; *De Lima* v. *Bidwell*, 182 U. S. 1.

Since the source of all power in the government of the Philippine Islands is the Congress of the United States, it must follow that if it has the power to expel aliens it must have been granted that power by Congress, either directly or by necessary implication.

While Congress may assign to Federal officers, either in the United States or the Philippine Islands, the power to execute the provisions of such acts as Congress may pass regulating the exclusion or expulsion of foreigners from territory subject to the dominion of the United States, it is at least extremely doubtful whether it could

delegate to the Philippine government its sovereign power to exclude aliens. *Stoutenburgh* v. *Hennick,* 121 U. S. 141. In any event this power could only be exercised subject to the limitation of the due-process clause of the Federal Constitution and the Philippine Bill of Rights.

Congress has not delegated to the Philippine Government the power to exclude or expel foreigners.

The power was not delegated by the President's instructions to the Commission of April 7, 1900; the Executive Order of June 21, 1901; the Spooner Amendment; or the Organic Act of July 1, 1902. See 26 Ops. Atty. Gen., Dec. 10, 1906, pp. 91, 96; 24 Ops. Atty. Gen., pp. 534, 541.

Congress had already acted.

Aside from the absence of authority to be found in the organic act of the Philippines conferring the right, Congress, both prior to and after the passage of the organic act, had legislated for the Philippines regarding the regulation of the admission and exclusion of foreigners. See act of April 29, 1902, making all the Chinese exclusion laws in force in the United States applicable to the Philippines; also § 33 of the Immigration Act of March 3, 1903; § 33 of the present Immigration Act in force; § 6 of the act of February 6, 1905.

The regulation of the admission or exclusion of all aliens into or from the Philippine Islands was a subject never entrusted to that government or its officers (except to the extent of enforcing the immigration and exclusion laws of the United States applicable to the Philippines). *In re Allen,* 2 Phil. Rep. p. 630.

The regulation of the conditions under which foreigners may enter into and reside in the territory of the United States is incidental to the general and exclusive power vested in Congress to regulate commerce with foreign nations. *Head Money Cases,* 112 U. S. 580; *Ekiu* v. *United States,* 142 U. S. 651; *Turner* v. *Williams,* 194 U. S. 279; 25 Ops. Atty. Gen., pp. 563, 566.

The Governor General of the Philippines has no such power. *United States* v. *Heinszen & Co.*, 206 U. S. 370; *O'Reilly* v. *Brooke*, 142 Fed. Rep. 859, affirmed 209 U. S. 45, distinguished.

There being no power in the Philippine legislature to legislate regarding the exclusion of foreigners from the Philippines in the first instance, their action could not constitute a ratification of what was done by the Governor General.

The deportation of the plaintiffs in error was without due process of law.

The subject of the exclusion or expulsion of foreigners from any portion of the vast domains of the United States is one over which Congress has complete control. *Oceanic S. Nav. Co.* v. *Stranahan*, 214 U. S. 320, 340, and other cases cited *supra*.

Congress would not concede to a dependent community powers inherent in the United States as a sovereign member of the family of nations, and powers which the various States of the Union have essayed in vain to exercise. *Passenger Cases*, 7 How. 283; *Chy Lung* v. *Freeman*, 92 U. S. 275; *People* v. *Compagnie Trans.*, 107 U. S. 59.

The plaintiffs in error were entitled to maintain their residence in the Philippines under the Chinese Exclusion Laws and for these and other reasons their deportation was illegal and without due process of law.

Mr. Felix Frankfurter, with whom *Mr. Thurlow M. Gordon* and *Mr. George A. Malcolm* were on the brief, for defendants in error.

Mr. Justice Holmes delivered the opinion of the court.

The three plaintiffs in error severally sued the defendants in error, alleging that Mr. Forbes was the Governor

General of the Philippines, Trowbridge Chief of the Secret Service of Manila and Harding Chief of Police of the same; that the plaintiff was a Chinese person lawfully resident in the Philippines, and that the defendants forcibly deported the plaintiff to China and forcibly prevented his return for some months; that the plaintiff returned on March 29, 1910, and that the defendants threatened and were trying to expel the plaintiff again—Trowbridge and Harding acting throughout under the order of the defendant Forbes. There was a prayer for an injunction and damages. The defendants demurred but the demurrer was overruled and a temporary injunction granted. Thereupon Forbes, Harding and Trowbridge sued for writs of prohibition against the judge and the respective plaintiffs, alleging that the expulsion was carried out in the public interest and at the request of the proper representative of the Chinese Government in the Philippines, and was immediately reported to the Secretary of War. The complaints were demurred to, but the Supreme Court overruled the demurrers, granted the prohibition, and ordered the actions dismissed. The judge having declined to join in the applications for writs of error, was made a respondent, and the cases are here on the ground that the plaintiffs have been deprived of liberty without due process of law. Act of Congress, July 1, 1902, c. 1369, § 5. 32 Stat. 691, 692.

The purpose of the first suits, of course, was to make the Governor General personally answerable in damages for acts done by him by color of his office and in pursuance of what he deemed to be his duty, as well as to prevent his exercising similar power in the future. This sufficiently appears by the declarations, which suggest and do not exclude official action, and is alleged in the complaints for prohibition. On April 19, 1910 (Acts of Phil. Leg., No. 1986) in less than three weeks after the original suits were brought, the Philippine legislature passed an act

which, reciting that the Governor General had authorized the deportation 'in the exercise of authority vested in him by law,' enacted that his action was "approved, ratified, confirmed, and in all respects declared legal and not subject to question or review." So that if ratification by that body can dispose of the matter no court has authority to entertain the suits.

The first doubt that naturally would occur is whether if a right of action had vested previously it could be taken away by such a statute. But it generally is recognized that in cases like the present, where the act originally purports to be done in the name and by the authority of the state, a defect in that authority may be cured by the subsequent adoption of the act. The person who has assumed to represent the will and person of the superior power is given the benefit of the representation if it turns out that his assumption was correct. *O'Reilly* v. *Brooke*, 209 U. S. 45, 52. *United States* v. *Heinszen & Co.*, 206 U. S. 370, 382. *The Paquete Habana*, 189 U. S. 453, 465. *Phillips* v. *Eyre*, L. R. 6 Q. B. 1, 23. *The Secretary of State* v. *Kamachee Boye Sahaba*, 13 Moore, P. C. 22, 86. Compare *West Side Belt R. R. Co.* v. *Pittsburgh Construction Co.*, 219 U. S. 92. *Dunbar* v. *Boston & Providence R. R. Co.*, 181 Massachusetts, 383, 385, 386.

Therefore the deportation is to be considered as having been ordered by the Governor General in pursuance of a statute of the Philippine legislature directing it, under their combined powers, and it is unnecessary to consider whether he had authority by virtue of his office alone, as declared by the statute, or whether, if he had not, he had immunity from suit for such an official act done in good faith. The former matter now is regulated by a later statute providing for a hearing, etc. No. 2113. February 1, 1912. On the question thus narrowed the preliminaries are plain. It is admitted that sovereign states have inherent power to deport aliens, and seemingly that

Congress is not deprived of this power by the Constitution of the United States. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707, 728. *Wong Wing* v. *United States*, 163 U. S. 228, 231. *Fok Yung Yo* v. *United States*, 185 U. S. 296, 302. *Turner* v. *Williams*, 194 U. S. 279, 289, 290. Furthermore, the very ground of the power in the necessities of public welfare shows that it may have to be exercised in a summary way through executive officers. *Fong Yue Ting* v. *United States*, *supra*. *United States* v. *Ju Toy*, 198 U. S. 253, 263. *Moyer* v. *Peabody*, 212 U. S. 78, 84, 85. So that the question is narrowed further to the inquiry whether the Philippine Government cannot do what unquestionably Congress might.

As Congress is not prevented by the Constitution, the Philippine Government cannot be prevented by the Philippine Bill of Rights alone. Act of July 1, 1902, c. 1369, § 5. 32 Stat. 691, 692. Deporting the plaintiffs was not depriving them of liberty without due process of law, unless on other grounds the local government was acting beyond its powers. But the local government has all civil and judicial power necessary to govern the Islands. Act of March 2, 1901, c. 803. 31 Stat. 895, 910. Act of July 1, 1902, c. 1369, § 1. 32 Stat. 691. The forms are different, but as in Hawaii the proximate source of private rights is local, whether they spring by inheritance from Spain or are created by Philippine legislation. See *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 354; *Perez* v. *Fernandez*, 202 U. S. 80, 91, 92. It would be strange if a government so remote should be held bound to wait for the action of Congress in a matter that might touch its life unless dealt with at once and on the spot. On the contrary we are of opinion that it had the power as an incident of the self-determination, however limited, given to it by the United States.

By § 86 of the act of July 1, 1902, all laws passed by the Philippine Government are to be reported to Congress,

which reserves power to annul them. It is worthy of mention that the law under consideration was reported to Congress and has not been annulled. The extension of the Chinese exclusion and immigration laws to the Philippine Islands has no bearing on the matter. The right to remain, for instance, under the act of April 29, 1902, c. 641, § 4, 32 Stat. 176, does not prevail over a removal as an act of state.

It is held in England that an act of state is a matter not cognizable in any municipal court. *Musgrave* v. *Pulido*, 5 App. Cas. 103, 108. And that was the purport of the Philippine act declaring the deportation not subject to question or review. As the bill of rights did not stand in the way and the implied powers of the government sanctioned by Congress permitted it, there is no reason why the statute should not have full effect. It protected the subordinates as well as the Governor General and took jurisdiction from the court that attempted to try the case.

Whether prohibition is technically the proper remedy historically speaking, we need not inquire. On such a matter we should not interfere with local practice except for good cause shown. In substance the decision of the Supreme Court was right.

Judgment affirmed.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY *v.* HACKETT.

ERROR TO THE APPELLATE COURT, FIRST DISTRICT, STATE OF ILLINOIS.

No. 889. Submitted February 24, 1913.—Decided May 5, 1913.

This court has heretofore sustained the constitutionality of the statute of Indiana of 1893 abolishing as to railroad corporations the defense to actions for personal injuries sustained by employés of negligence of a fellow-servant. *Tullis* v. *Lake Erie Railroad*, 175 U. S. 348; *Louis. & Nash. R. R.* v. *Melton*, 218 U. S. 38.

If a state statute has been construed by the highest state court it is the duty of this court to determine its constitutionality under the Federal Constitution as so construed.

The Supreme Court of Indiana having held that the statute of 1893 of that State abolishing the fellow-servant defense only applied to railroad employés whose occupation exposed them to hazards incident to operation of trains, this court holds, following its previous decisions, that the statute is not unconstitutional as denying equal protection of the laws.

Quære whether a state statute applicable to all employés of a railroad company whether exposed to hazard of operations of trains or not contravenes the equal protection clause of the Fourteenth Amendment.

The court below was justified in holding on the facts in this case that a yard foreman was in charge or control of the train on which the employé sustained his injuries.

One who did not in the court below plead or prove the settled judicial construction of a statute of another State cannot claim that full faith and credit was denied to the judicial construction of such statute by the courts of the enacting State.

The putting in evidence of opinions of the highest court of a State construing a statute of that State, does not amount to proving a settled construction of that statute.

In order that this court may review the judgment of a state court on the ground that it denied full faith and credit to the judicial construction of a statute of a State by the courts of that State, the right or claim under the full faith and credit clause of the Constitution

must have been set up in the court below. It is too late to set it up in the petition for writ of error from this court.

An unconstitutional statute is not a law, and is as inoperative as though it never had been passed; it can neither confer a right or immunity nor operate to succeed any existing valid law; and so held as to Employers' Liability Act of 1906.

Quære the extent to which the Employers' Liability Statute superseded state statutes upon the same subject.

The purpose of Congress cannot be indicated by a statute which is unconstitutional.

THE facts which involve the constitutionality of the statute of Indiana abolishing as to railroad companies the fellow-servant defense, are stated in the opinion.

Mr. Morse Ives for defendant in error in support of motion to dismiss or affirm.

Mr. E. C. Field, Mr. H. R. Kurrie and *Mr. John D. Black* for plaintiff in error, in opposition thereto.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a personal-injury case. The plaintiff, Haynes L. Hackett, was a yard switchman in the employ of the railroad company. While engaged in switching cars in the yard of the company at Monon, Indiana, on February 4, 1907, he was injured through the negligence of another servant of the company who was his immediate superior as yard foreman. He brought this action in the Supreme Court of Cook County, Illinois, and recovered a judgment for $30,000, for the loss of both legs. This was affirmed by the Appellate Court of Illinois, which was the highest court of the State to which the case could be carried.

The plaintiff's declaration contained thirteen counts. A demurrer to the first count was sustained and it was

dropped out of the case. The remaining counts were based upon the Indiana act of March 4, 1893 (Acts 1893, p. 294, c. 130), and particularly the fourth paragraph thereof. The demurrer to these counts was overruled, and the plea of not guilty was entered, upon which issue was joined.

The Indiana statute provides (§ 1) that "every railroad or other corporation, except municipal, operating in this State, shall be liable in damages for personal injuries suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence, in the following cases." One of the cases described was this: "When such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive, engine or train upon a railway."

Shortly stated the case alleged was that the plaintiff while assisting in the switching of certain cars from one track to another was, through the negligence of the yard foreman, then in control and directing the operation, thrown violently and negligently from one of the cars and run over. The plaintiff in error claimed in the state court that the Indiana statute upon which the action was brought was invalid as a denial to railroad companies of the equal protection of the law guaranteed by the Fourteenth Amendment. This objection was denied, and the ruling is assigned as error.

The constitutionality of the act has been upheld by this court in *Tullis* v. *Lake Erie Railroad*, 175 U. S. 348, and in *L. & N. Railroad* v. *Melton*, 218 U. S. 36.

It is, however, contended that neither of the cases cited brought before this court the precise question here presented, namely, that the act violates the Fourteenth Amendment, because upon its face it applies to "any employé," thereby embracing in one classification those employés subjected to the hazards incident to the actual

operation of railway trains with those in other branches of the service not so subjected, and, therefore, not within the reason for the classification. Upon this assumption it is claimed that the act is one which cannot be upheld as valid as to one class of employés and invalid as to the other embraced within the single classification, and must, therefore, be condemned as wholly invalid under the rule applied by this court in *Employers' Liability Cases*, 207 U. S. 463. But this argument overlooks the fact that the act in question is an act of state legislation, and that its construction is a matter for the state courts of Indiana. If the Supreme Court of Indiana has construed the act as not extending to any class of railroad employés except those whose occupation connects them in some way with the movement of trains where they are exposed to the hazards incident to the operation and movement of trains and engines, and the act as thus construed and applied is a valid enactment, we must accept that as the proper interpretation of the act. The single duty of this court would then consist in determining whether the act as thus construed violated the equality clause of the Fourteenth Amendment of the Constitution of the United States.

In repeated decisions the Indiana Supreme Court has construed the act as one which cannot be invoked by any class of railroad employés not engaged in some branch of service where they are subjected to the hazards incident to the movement of trains or engines, and held that as thus limited the act is valid: *Richey* v. *Cleveland, C., C. & St. L. Ry. Co.*, 96 N. E. Rep. 694; *Bedford* v. *Bough*, 168 Indiana, 671; *Indianapolis Traction & Terminal* v. *Kinney*, 171 Indiana, 612; *Cleveland, C., C. & St. L. R. R. Co.* v. *Foland*, 174 Indiana, 411. Thus the Indiana court, in *Pittsburgh &c. Ry.* v. *Rogers*, 168 Indiana, 483, 484, said:

"It was held by this court in *Pittsburgh &c. R. R. Co.* v. *Montgomery*, 152 Indiana, 1; *Indianapolis Union R. Co.* v. *Houlihan*, 157 Indiana, 494; *Pittsburgh &c. R. Co.* v.

Lightheiser, 168 Illinois, 438; *Pittsburgh &c. R. Co.* v. *Collins*, 168 Illinois, 467; *Pittsburgh &c. R. Co.* v. *Ross*, 169 Indiana, 3; that, as applied to railroads, said Employers' Liability Act was not in violation of the Fourteenth Amendment of the Constitution of the United States, or of any provision of the Constitution of this State. In *Pittsburgh &c. R. Co.* v. *Ross, supra*, we said: 'The validity of this act, so far as it applies to railroads, was upheld in the case of *Pittsburgh &c. R. Co.* v. *Montgomery*, 152 Indiana, 1, and that holding has been twice reaffirmed since this appeal was filed, . . . and the constitutionality of the law must be regarded as settled.'

"Following the case of *Pittsburgh &c. R. Co.* v. *Ross*, we hold that the constitutionality of said law must be regarded as settled and it will not be considered in this case."

In *Indianapolis Traction Co.* v. *Kinney, supra*, the court said:

"Notwithstanding the language of the statute is 'that every railroad, or other corporation except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employé while in its service,' it must not be for a moment understood that the benefits of the statute are extended to all employés of a railroad corporation, or to any other class of employés than those whose duties expose them to the peculiar hazards incident to the use and operation of railroads. There is no reason, in fact or fancy, why the benefits of the statute should be extended to the office and shop employés of railroad corporations, or to others removed from the dangers of train service, and denied to the multitude of other workmen engaged in businesses of like and equal hazard. . . . By this, we do not mean that it is essential to the bringing of an employé within the statute that he should be connected in some way with the movement of trains, but it seems sufficient if the per-

formance of his duties brings him into a situation where he is, without fault, exposed to the dangers and perils flowing from such operation and movement, and he is, by reason thereof, injured by the negligence of a fellow servant described in the act."

That the act, as thus construed and upheld by the highest court of Indiana, does not contravene the equal protection clause of the Fourteenth Amendment is settled by the two decisions of this court cited above. But we do not intimate that the act, if construed as applicable to all employés of a railroad company, would be in contravention of that clause.

The Illinois court held that upon the facts of this case the yard foreman through whose negligence the plaintiff Hackett was injured was in charge of a train within the meaning of the act. The train was in the yard. Its movements were under the foreman's control. The act for which the company was held liable under the statute was, said the Illinois court (170 Ill. App. 156), quoting from *Chicago, Indianapolis &c. Ry.* v. *Williams*, 168 Indiana, 276, "A negligent act occurring at a time when the doer of the act is in charge or control of a train." To hold that the operation in the yard of a company, of a train hauled by an engine, for the purpose of distributing its cars is not an operation of a train or engine within the meaning of the Indiana act, and that the negligence of employés directing and controlling the movements of the train is not the negligence of one in charge of a train within the fair purpose and meaning of the act, would be to make the act meaningless as to the most dangerous class of work which falls to the lot of railroad employés.

We therefore conclude that the contention that the Illinois court erred, either in holding the act valid under the equal protection clause or in its application of the act to the facts of this case, is without merit.

It is then said that the Illinois court denied full faith

and credit to the judicial construction of this act by the Indiana court. The first answer to this is that there is no want of harmony between the construction and application of the act by the Illinois court and the interpretation and application of the act by the Indiana court as indicated by the opinions of that court cited above. A second and sufficient reason is that the plaintiff in error did not plead and prove any settled construction of the act by the Indiana courts. Many opinions of the Indiana court were put in evidence, though not in support of any formal plea of settled construction. Neither did the plaintiff in error specially set up any right or claim under the full faith and credit clause of the Constitution until it did so under its petition for a writ of error from this court. That was too late. Our right to review the judgment of the Illinois court arises under § 709, Rev. Stat., and is, therefore, limited to a Federal right specially set up by the party seeking to take advantage of it and denied by the state court. In *L. & N. Rd. Co.* v. *Melton, supra,* where a similar question arose touching an alleged departure of the Kentucky court from the interpretation placed by the Indiana court upon the statute of Indiana, this court said (p. 52):

"Our duty, of course, is confined to determining whether error was committed by the court below as to the Federal questions involved, and as it is impossible to predicate error as to matters not pleaded or proved in the court below, which were essential to be pleaded and proved, it follows that the contention concerning the denial of the protection of the full faith and credit clause furnishes no ground for reversal."

We conclude, therefore, that we are not concerned in the interpretation placed upon the Indiana act unless it be that that construction offends against some Federal right properly asserted and open to our consideration.

It is then assigned as error that the court below erred

in not holding that the Indiana statute had been superseded by the Federal Employers' Liability Act of June 11, 1906 (34 Stat. 232, c. 3073). It does appear in one or more of the counts of the plaintiff's declaration that the railroad company was engaged in operating a railroad extending into two or more States, and such was the evidence. The first count might be said to declare upon the liability of the company under the act of 1906. Upon that ground the case was removed to the Circuit Court of the United States. But that court remanded it to the state court. Thereupon defendant demurred to the first count and the demurrer was sustained. No exception was saved and no error assigned either in the state court or in this. In no other way was any claim set up or asserted under that Federal act, nor did the state court make any ruling as to the effect of that act upon the Indiana statute, and the judgment of the Illinois court was rested wholly upon the Indiana statute. Not having been specially set up in the state court and there passed upon, it is obvious that the point has not been saved.

But the act of Congress of June 11, 1906, had been held an invalid exercise of the power of Congress, this court saying:

"Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and non-enforcible." The *Employers' Liability Cases*, 207 U. S. 463, 504.

That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law. *Norton* v. *Shelby County*, 118 U. S. 425, 442; *Ex parte Siebold*, 100 U. S. 371, 376.

The second Employers' Liability Act, which avoided the faults of the first, was not passed until after the injury complained of. We pass by as not involved any question as to the extent to which that act operated to supersede the Indiana statute. The situation is not at all like that presented in *Northern Pacific Railway* v. *Washington*, 222 U. S. 370. There a perfectly valid act concerning the hours of service upon railroads engaged in interstate commerce had been passed. The mere postponement of its operation was held not to lessen its effect as a manifestation of the purpose of Congress to regulate a subject which might be the subject of state legislation only when Congress had been silent. The effect of this purpose to take control of the subject was held to supersede an existing state statute dealing with the same matter from the time of the passage of the act of Congress. No such purpose could be manifested by a void statute, since it was not law for any purpose.

We conclude that the judgment of the court below should be

Affirmed.

TITLE GUARANTY & SURETY COMPANY *v.* UNITED STATES, TO THE USE OF HARLAN & HOLLINGSWORTH.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 530. Submitted April 28, 1913.—Decided May 12, 1913.

As the act of August 13, 1894, relative to contractors' bonds prior to the amendment of February 24, 1905, contained no provision as to jurisdiction of courts in which suits could be brought on such bonds, the Circuit Court of the district in which the bondsman, if a surety company, has its principal office, had jurisdiction under the act

regulating surety companies of August 13, 1894, and this jurisdiction extended to suits on bonds executed prior to the amendatory act for materials furnished after the passage of that act.

The act of February 24, 1905, amending the act of August 13, 1894, and requiring that all suits on a contractor's bond be brought in the district in which the contract was to be performed, had merely a prospective operation and no retroactive effect. *Davidson Marble Co.* v. *Gibson*, 213 U. S. 10.

THE facts, which involve the jurisdiction of the Circuit Court of actions brought on contractors' bonds under the act of August 13, 1894, and the construction of the act amendatory thereof of February 24, 1905, are stated in the opinion.

Mr. Russell H. Robbins for plaintiff in error:

The act of February 24, 1905, governs the remedy of the plaintiff for having furnished material for the construction of a public work. By its terms this act went into immediate effect at the time it was passed, and provides for an omnibus action to be prosecuted in the name of the United States in the Circuit Court of the United States in the District where the contract was to be performed, and not elsewhere. Under this act, the jurisdiction of a particular United States Circuit Court is exclusive. *United States* v. *Congress Construction Co.*, 222 U. S. 199.

The earlier statute contained no limitation as to the court in which the suit could be brought, but in their primary purpose both statutes are identical. The statute is, in effect, a pure mechanic's lien statute, and the general rules of construction applicable to mechanics' lien statutes have been held to govern both the earlier and the later statutes. *Hill* v. *American Surety Co.*, 200 U. S. 197, 203. See also *United States* v. *Churchyard*, 132 Fed. Rep. 82; *Jones* v. *Great Southern Hotel Co.*, 86 Fed. Rep. 370, 383; aff'd 193 U. S. 532; *Standard Oil Co.* v. *Trust Co.*, 21

App. D. C. 369; *Marble Co.* v. *Burgdorf*, 13 App. D. C. 506, 519.

Where there has been a change in the statute after the contract has been made and before the labor and materials have been furnished, the lien is to be determined by the law in force when the labor and materials are furnished although a different statute was in effect when the contract was made. *Hauptman* v. *Catlin*, 20 N. Y. 247; *Sullivan* v. *Brewster*, 1 E. D. Smith (N. Y.), 681; *Summerlin* v. *Thompson & Co.*, 31 Florida, 369; *Weaver* v. *Sells*, 10 Kansas, 609; *McCrea* v. *Craig*, 23 California, 522; *Goodbub* v. *Hornung*, 127 Indiana, 181; *Nixon* v. *Cydon Lodge*, 56 Kansas, 298; *Wheaton* v. *Berg*, 50 Minnesota, 525; *Bardwell* v. *Mann*, 46 Minnesota, 285; *Hill* v. *Lovell*, 47 Minnesota, 293; Rockel on Mechanics' Liens (1909), § 7, p. 11.

Whatever rights in the nature of a mechanics' lien Congress may give to a materialman under a public contract must necessarily be measured by the statute in force at the time the materials and labor were furnished. The same rule applies to jurisdiction. *Merchants' Ins. Co.* v. *Ritchie*, 5 Wall. 541, 544; and see also *National Surety Co.* v. *Architectural Co.*, 226 U. S. 276. *U. S. Fidelity Co.* v. *United States*, 209 U. S. 306; *Davidson Bros. Marble Co.* v. *Gibson*, 213 U. S. 10, do not apply.

Even if the application of the later act to the facts at bar would result in depriving the subcontractor of substantive rights as a materialman because its contract had been made prior to the passage of the amendatory act, the later act merely modified an existing remedy and as the materialman's rights are purely statutory and not contractual, it would have been entirely competent for Congress to have abrogated the lien altogether. *People* v. *Adirondack Ry. Co.*, 160 N. Y. 225; aff'd in 176 U. S. 335.

In point of fact, there were no rights in existence at the time of the amendment so far as a lien was concerned which could have been impaired, and a change in the statute

before the defendant in error had incorporated its materials into the work could not affect a statutory right which had not yet come into existence. *Waterworks Co.* v. *Oshkosh*, 187 U. S. 437, 447.

Until the subcontractor, by incorporating its materials into the dry-dock, brought itself within the protective provisions of the statute and accepted the benefit therein provided for it, no rights on its part against the bond in the nature of a mechanic's lien came into existence. When this occurred, the act of February 24, 1905, was in effect, and the exclusive remedy therein provided was a suit in the Circuit Court of the United States for the district in which the League Island dry-dock is situated. *Galveston &c. Ry. Co.* v. *Wallace*, 223 U. S. 481, 490.

Mr. George Wharton Pepper and *Mr. Thomas Stokes* for defendant in error.

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

This is an action upon a contractor's bond executed on May 24, 1904, under the provisions of the act of Congress of August 13, 1894, c. 280, 28 Stat. 278, entitled "An Act for the protection of persons furnishing material and labor for the construction of public works." The question for decision is whether the court below had jurisdiction of the cause.

The bond was executed by the Surety Company in connection with a contract entered into by the Scofield Company with the United States for the erection of a dry-dock at the League Island Navy Yard. The Harlan & Hollingsworth corporation took over a subcontract and constructed a caisson for the dock. To recover a balance owing, the corporation resorted to its remedy on the bond. The bond and various contracts were made prior to 1905.

The above-mentioned act of August 13, 1894, contains no direction respecting where suit upon the bond of a contractor shall be brought by a subcontractor or what courts shall take jurisdiction of the right of action it creates. As the principal office of the defendant Surety Company was located within the district, this action was commenced in the court below as authorized by § 5 of an act of Congress also approved August 13, 1894, c. 282, 28 Stat. 279, regulating surety companies which execute bonds required by the laws of the United States.

The Scofield Company did not defend. The Surety Company, however, entered a plea to the jurisdiction of the court, contending that as the work done and materials and labor furnished by the Harlan & Hollingsworth corporation were done and furnished after the passage of an act approved February 24, 1905, c. 778, 33 Stat. 811, amendatory of the first-mentioned act of 1894, and making important changes in the rights of a subcontractor, the provisions of the amendatory act governed and the action should have been commenced in the district in which the contract was to be performed and executed. A demurrer to the plea was sustained, and for want of an affidavit of defense judgment was entered in favor of the Harlan & Hollingsworth Company, and the case was brought directly here on the question of jurisdiction.

The Circuit Court was clearly right in upholding its jurisdiction. As already stated, the contract between the United States and the original contractor, the bond of the Surety Company and the contract with the plaintiff were all executed prior to the passage of the amendatory act. To hold that the latter act applied, therefore, would be to construe the act as having a retroactive effect. It has, however, been definitely decided that the act was intended to have merely a prospective operation. *U. S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U. S. 306; *Davidson Bros. Marble Co.* v. *Gibson*, 213 U. S. 10. The decisions

lend no support to the contention now urged on behalf of the plaintiff in error that Congress intended the act of 1905 to be retroactive in all cases where the work was done after the passage of the amendment.

Judgment affirmed.

ADAMS *v.* CITY OF MILWAUKEE.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 247. Argued April 23, 1913.—Decided May 12, 1913.

The question whether a classification of milk vendors who produce their milk outside of the city to which they send milk deprives such producers of the equal protection of the law when there are different rules for vendors who produce their milk within the city limits has not been so far foreclosed by prior decisions of this court as to render its discussion unnecessary; and a motion to dismiss is denied.

Whether rules provided to be made by a police ordinance were properly promulgated and whether the officer promulgating them had authority so to do are not Federal questions.

Different situations of the objects regulated by a municipal ordinance may require different regulations.

A classification in a municipal ordinance by which vendors of milk drawn from cows outside the city are subjected to different regulations from those to which vendors of milk drawn from cows within the city, is not, provided, as in this case, the regulations are reasonable and proper, a denial of equal protection of the law guaranteed by the Fourteenth Amendment; and so *held* as to the milk ordinance of Milwaukee, Wisconsin.

The police power of the State is adequate to protect the people against the sale of impure food such as milk.

An ordinance regulating the sale of food products must be summarily enforced and the destruction of impure food, such as milk, is the only available and efficient penalty for its violations and does not deprive the owner of his property without due process of law; and so

held as to the milk ordinance of Milwaukee, Wisconsin. *Lieberman* v. *Van De Carr*, 199 U. S. 552.

This court does not pass upon questions before they have reached a justiciable stage.

As a provision in a municipal ordinance holding health officers enforcing it harmless for the destruction of offending property "if done in good faith" may be separable, this court will not determine whether it is an unconstitutional taking of property without due process of law in an action in which it appears that none of plaintiff's goods have been or could be destroyed before the state court has construed the statute in that respect.

144 Wisconsin, 371, affirmed.

THE facts, which involve the constitutionality under the due process and equal protection clauses of the Fourteenth Amendment, are stated in the opinion.

Mr. Marcus A. Jacobson, with whom *Mr. D. S. Tullar* was on the brief, for plaintiff in error:

The ordinance is class legislation and a violation of the Fourteenth Amendment.

When adopted and when it went into effect, there were no regulations in any way controlling the keeping of cows within the City of Milwaukee and the sale of milk from such cows except Ordinance No. 43, and the rules and regulations which the Health Commissioner had formulated under its authority some time subsequent to the beginning of this action and which, even if properly promulgated, were radically different from the restrictions regulating the selling of milk taken from cows outside of the City of Milwaukee.

The health officer is an administrative officer and has no power or authority to enact laws. See *Adams* v. *Burdge*, 95 Wisconsin, 390, which is practically conclusive that the health officer of the City of Milwaukee had no authority to formulate any rule requiring the application of the tuberculin test to cows kept within the City of

Milwaukee as a condition precedent to the issuance of a permit.

The health officer is a purely administrative officer who cannot enact new laws, and can only exercise reasonable discretion in the carrying out of ordinances which the common council, by virtue of its delegated police powers, does enact. *Potts* v. *Breen*, 167 Illinois, 67; *Dowling* v. *Lancashire Ins. Co.*, 92 Wisconsin, 63; *Hurst* v. *Warner*, 102 Michigan, 238; *Schaezlein* v. *Cabaniss*, 135 California, 466.

The conditions and penalties surrounding the keeping of cows and the sale of milk within the City of Milwaukee were radically different from those surrounding the keeping of cows outside thereof and the sale of milk from such cows within the city. *State ex rel. Greenwood* v. *Nolan*, 122 N. W. Rep. 255; *State* v. *Nelson*, 66 Minnesota, 166.

While the police powers of the State and of the municipality are very broad, in the exercise of such police powers the common council must be reasonable. *State* v. *Redmon*, 134 Wisconsin, 89; *Kellogg* v. *Currens*, 111 Wisconsin, 431.

The classification and distinction attempted in the Milwaukee milk ordinances are arbitrary, made for the purpose of discrimination only, and are entirely without reason or necessity so far as the accomplishment of the object or purpose in hand is concerned—that is, the prevention and spread of tuberculosis within the City of Milwaukee because of the sale of fresh milk.

The ordinance is void and unconstitutional and denies to the appellant and others similarly situated the equal protection of the law, first, because the Health Commissioner of the City of Milwaukee is an administrative officer and has no power or authority to formulate rules or regulations which in their nature are legislative; second, because, even though it be assumed for the sake of the argument that the Commissioner had such power, the same was not

properly exercised, but discriminations and differences relative to the regulations for the keeping of cows and the sale of milk within the city still exist, even though the rules formulated are valid and in full force and effect.

The ordinance is unconstitutional because § 24 authorizes the taking of private property without due process of law, contrary to the Fourteenth Amendment.

It is the declared intention of the defendants to confiscate and destroy all milk shipped to the City of Milwaukee by this plaintiff and others similarly situated where the cows from which such milk is drawn are not tuberculin tested, even though the plaintiff maintains a healthy herd of cattle, keeps his stables wholesome and clean and distributes pure and wholesome milk in the City of Milwaukee so far as he knows without the use of the tuberculin test.

Milk of this kind cannot be confiscated and destroyed simply because it is not accompanied with a certificate of a veterinary or of some person authorized by the Live Stock Sanitary Board of the State of Wisconsin, as provided by said ordinance, certifying that the tuberculin test has been applied. That part of the city ordinance which authorizes the confiscation and destruction of such milk as the court finds this plaintiff has been shipping, and desires to continue shipping, to Milwaukee, is unconstitutional and void. *Wilcox* v. *Hemming*, 58 Wisconsin, 148; *Gosselink* v. *Campbell*, 4 Iowa, 296.

The ordinance in question makes no provision for the assessment of damages for the destruction of the milk, and even goes so far as to provide that if said milk is destroyed under said ordinance, if done in good faith, the party destroying the same shall be held harmless in damage therefor in any suit or demand made. This particular portion is clearly unconstitutional and illegal. *Lowe* v. *Conroy*, 120 Wisconsin, 151. Nor is this frivolous. *Jacob-*

son v. *Massachusetts*, 197 U. S. 11, and *Lawton* v. *Steele*, 152 U. S. 136, distinguished.

We have no quarrel with that proposition, but submit that such authorities as have held that the municipal authorities may confiscate and destroy certain instrumentalities which have been put to illegal uses base their decisions upon the ground that, by statute or ordinance, such instrumentalities have been declared nuisances and may, therefore, be destroyed without hearing or notice. *Bittenhaus* v. *Johnston*, 92 Wisconsin, 588.

To destroy milk presumably pure and in good condition, without any declaration on the part of the legislature or the common council declaring the same to be a public nuisance, is a confiscation of property without due process of law. *Edson* v. *Crangle*, 62 Oh. St. 49; Note to *Daniels* v. *Homer*, 139 N. Car. 219. See also *McConnell* v. *McKillip*, 65 L. R. A. 610.

The confiscation and destruction of presumably pure and wholesome milk merely because the cows from which the same has been drawn were not tuberculin tested, without hearing or test or adjudication, is a taking of property without due process of law and a violation of the Constitution of the United States.

Mr. Daniel W. Hoan, with whom *Mr. John J. Cook* was on the brief, for defendants in error.

Mr. Justice McKenna delivered the opinion of the court.

Error to review a judgment of the Supreme Court of Wisconsin sustaining the validity of an ordinance of the common council of the City of Milwaukee regulating the sale of milk.[1]

[1] No person shall bring into the City of Milwaukee for sale, either by wagon cart, train, or any other kind of vehicle, or keep, have or offer for sale, or sell, in said city, any milk or cream drawn from cows

The ordinance provides that no milk drawn from cows outside of the city shall be brought into the city, contained in cans, bottles or packages, unless they be marked with a legible stamp, tag or impression bearing the name and address of the owner of the cows and unless such owner shall, within one year from the passage of the ordinance, file in the office of the Commissioner of Health a certificate of a duly licensed veterinary surgeon or other person given authority by the State Livestock Sanitary Board to make

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outside of said city, contained in cans, bottles or packages, unless such cans, bottles or other packages containing such milk or cream for sale, shall be marked with a legible stamp, tag or impression bearing the name of the owner of such cows from which such milk was drawn, giving his place of business, including name of city, street and number, or other proper address, and unless the owner or owners of such cows shall, within one year from the passage of this ordinance, file in the office of the Commissioner of Health a certificate of a duly licensed veterinary surgeon, or of any other person given authority by the State Livestock Sanitary Board to make tuberculin tests, stating that such cows have been tested with tuberculin and found free from tuberculosis or other contagious diseases. Such certificate shall give a number which has been permanently attached to each cow, and a description sufficiently accurate for identification, stating the date and place of such examination, and such certificate shall be good for one year from the date of its issuance. Such certificate, however, must be renewed annually and filed in the office of the Commissioner of Health, and each such certificate shall show in each case that the animals from which such milk was drawn are free from tuberculosis or other contagious diseases. All milk and cream from sick and diseased cows, or cows fed on refuse or slops from distilleries, or vinegar factories, unless such refuse or slops be mixed with other dry sanitary grain or food to a consistency of a thick mush, or other than good, wholesome food, or milk that is dangerous or that may affect or be detrimental to life or health, or that has been adulterated, or is below the standard fixed by § 17 of this chapter, or which does not conform to all other provisions of this chapter shall, upon discovery thereof, be confiscated, forfeited and immediately destroyed by or under the direction of the Commissioner of Health, bacteriologist, or officer detailed, who shall, if done in good faith, be held harmless in damage therefor, in any suit or demand made. Ordinance of March 30, 1908, § 24.

tuberculin tests, stating that such cows have been found free from tuberculosis or other contagious diseases. The certificate is required to give a number which has been permanently attached to each cow and a description sufficient for identification. The certificate must be renewed annually and must show that the cows are free from tuberculosis or other contagious diseases.

A short time before the ordinance was to go into effect this suit was brought against the city and Dr. Bading, its Health Commissioner, to restrain the enforcement of the ordinance. After a hearing judgment was entered dismissing the complaint, and the judgment was affirmed by the Supreme Court of the State.

The plaintiff (we shall so call him) alleged that he brought the suit for himself and all other producers of and dealers in pure, wholesome milk, as it involved a question of common interest to many persons. He alleged also the following: He is a farmer, living about seventeen miles from Milwaukee, and maintains a large dairy herd of cattle and is enjoying a profitable dairy business, shipping milk into Milwaukee to certain retail milk dealers in the city. His herd is healthy, so far as he is able to know or judge. He keeps his stables wholesome and clean, and if his cows become sick or affected in any way with any infectious or contagious disease, so far as he is able to learn or discover by giving careful attention to his herd in its feeding and care, he removes such animals immediately. So far as he is able to discover, his herd is absolutely free from disease, and the milk he offers for sale in Milwaukee, or will offer for sale, is and will be, so far as he is able to discover, absolutely pure and wholesome; and all that proves to be impure and unwholesome upon being tested in the usual and customary manner will be withdrawn from sale.

Bading, as Commissioner of Health of the City of Milwaukee, threatens, on and after April 1, 1909, to execute

the ordinance and confiscate, forfeit and destroy all milk shipped by plaintiff and other producers to be sold in Milwaukee contrary to the requirements of the ordinance, unless restrained; and if he does so irreparable injury will be caused plaintiff and such other producers and make their business of maintaining a dairy absolutely unprofitable as well as impracticable.

The tuberculin test required by the ordinance is, as plaintiff is informed and believes, wholly unreliable, untrustworthy and entirely worthless so far as being a guide or protection to the public as to whether or not the cows tested by it are free from the germs of tuberculosis or any other infectious disease.

The milk threatened to be confiscated, shipped to Milwaukee for sale by plaintiff and other producers, when pure and wholesome is not dangerous to public health because perchance the owners of the cows producing the milk have not had the cows tested or have failed to secure the certificate of a veterinary surgeon or other person as required by the ordinance.

It is alleged that the constitution of the State and the Fourteenth Amendment of the Constitution of the United States are violated.

A motion to dismiss is made on the ground that the questions in this case, under the decisions of this court, are so far foreclosed as to make their discussion unnecessary. The motion is overruled.

The particular contention of plaintiff is that the ordinance violates the Fourteenth Amendment to the Constitution of the United States because it discriminates between milk drawn from cows outside of Milwaukee and milk drawn from cows within the city. Therefore the charge is that the ordinance does not affect all persons alike. If we regard the territorial distinction merely, that is, milk from cows outside and milk from cows within the city, there is certainly no discrimination. All producers

outside of the city are treated alike. Plaintiff identifies himself in interest with all of them and sues for all of them. He therefore seeks grounds of comparison other than the locality of the dairies and urges that the discrimination exists in the difference between the tests to which cows kept outside of the city are subject and the test to which cows within the city are subject.

To sustain his contention plaintiff in error cites an ordinance of the city which provides that no cows or cattle shall be kept in the city without permit from the Commissioner of Health, except at places provided or established for purposes of slaughtering, and that the stables and places where such animals may be shall be kept at all times in a cleanly and wholesome condition and properly ventilated, and that no person shall allow any animal to be therein which is affected with any contagious and pestilential disease.

This ordinance was supplemented by various rules made by the Health Commissioner in regard to cleanliness of the stabling of the animals, keeping from them persons infected or who have been exposed to disease, requiring applications for permits to be accompanied by the certificate of the veterinary surgeon showing that the animals have been tested by the tuberculin test and shown by said test to be free from tuberculosis, and that they are not affected with any infectious or contagious disease. If the animals become subsequently infected they are to be removed from the city or disposed of in the manner provided by law.

Three contentions are, notwithstanding, made—(1) The rules were promulgated after this suit was begun. (2) The Commissioner had no authority to make the rules. (3) They are radically different rules from the rules as to cows kept outside of the city.

The third contention is the only one that involves a Federal question. The others involve local questions only,

and the Supreme Court of the State decided that the sale of milk drawn from diseased cows is forbidden within the city; that the health officer may remove a diseased animal to a place where it will not spread infection, and that he may apply any known test to determine whether the animal is afflicted with tuberculosis. Inspection and care, therefore, can be applied to the animals within the city, and it is applied also to the milk drawn from such animals. It cannot be applied to animals kept outside of the city. It can only be applied to the milk drawn from them. The court noticed this difference and the difference in the regulations made necessary by it. "There are brought into Milwaukee," the court said, "from outside of the city about 28,000 gallons of milk every day drawn from more than 10,000 cows. It would be practically impossible to subject this quantity of milk to a microscopic examination or to subject it to what is called in the evidence centrifugal test, which would also require the use of a microscope although not to the same extent. Each animal within the city can be subjected to an individual examination, a microscopic test of samples of its milk, an inspection as to its condition of health, and the tuberculin test applied directly under the orders of the Health Commissioner. This is a sufficient basis for separate legislation relating to milk shipped into the city. There are other regulations covering the sale of milk drawn from cows kept within the city."

We concur in the conclusion of the court. The different situations of the animals require different regulations. Cows kept outside of the city cannot be inspected by the health officers; they can be inspected by a licensed veterinary surgeon and a certificate of the fact and the identity of the cows and the milk authenticated as required by the ordinance. The requirements are not unreasonable; they are properly adaptive to the conditions. They are not discriminatory; they have proper relation to the pur-

pose to be accomplished. That purpose and the necessity for it we cannot question. *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225; *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192; *Crossman* v. *Lurman*, 192 U. S. 189; *New Orleans Gas Light Co.* v. *Drainage Comm. of New Orleans*, 197 U. S. 453.

In *St. John* v. *New York*, 201 U. S. 633, we said that in considering the classification of a law, not only its final purpose must be regarded, but the means of its administration. The case is quite in point. There regulations were attacked as discriminating between producing and non-producing vendors of milk with a view to securing its freedom from adulteration; and adulterated milk was defined by law to be that to which something was added or from which the cream was removed or was naturally deficient or taken from cows fed on certain things or when in certain conditions. The regulations were directed to the inspection of samples of milk from the entire herd. A producing vendor could exempt himself from the penalties of the law by proving that his milk was in the same condition as when it left the herd. The non-producer had not that privilege. St. John, who was a non-producing vendor, offered to prove such fact as to the milk he offered for sale, but the proof was rejected and he was convicted of violating the law. The conviction was sustained against his attack of discrimination in the law. In that case, as in this, a disregard of the regulations was sought to be justified by the assertion of the purity of the milk offered for sale.

Plaintiff also contends that the provision of the ordinance which requires milk that does not conform to its requirements to be confiscated, forfeited and immediately destroyed, takes his property without due process of law.

To sustain his contention, he assumes the purity of his milk, though it has not been tuberculin tested, and then

asserts that "milk of this kind cannot be confiscated and destroyed simply because it is not accompanied with a certificate of a veterinary surgeon or of some person authorized by the Livestock Sanitary Board of the State of Wisconsin, as provided by said ordinance, certifying that the tuberculin test has been applied." But plaintiff overlooks the allegation of his complaint. His allegation is, not that his cows are free from infectious or contagious disease, but only "so far as he is able to learn or discover." And the allegation of his willingness to withdraw tainted milk from sale depends upon the same contingent knowledge or information. He overlooks also the findings of the courts against the sufficiency of his information and their demonstration of the necessity of the tests established by the ordinance. But even if the necessity of the tests be not demonstrated and the beliefs which induced them may be disputed, they cannot be pronounced illegal. In *Laurel Hill Cemetery* v. *San Francisco*, *supra*, we expressed the deference which must be accorded to local beliefs, saying that we would not overthrow an exercise of police power based on them to protect health merely because of our adherence to a contrary belief. It will be observed, therefore, that the contention of plaintiff is without foundation and that the ordinance is not an arbitrary and unreasonable deprivation of property in a wholesome food, but a regulation having the purpose of and found to be necessary for the protection of the public health.

The police power of the State must be declared adequate to such a desired purpose. It is a remedy made necessary by plaintiff acting in disregard of the other provisions of the ordinance, that is, failing to have his cows tested and their milk authenticated as prescribed. The city was surely not required to let the milk pass into consumption and spread its possible contagion. This seems to be the alternative for which plaintiff contends, and might occur. All milk produced outside of the city had amounted, the

Supreme Court said, to 3,500 eight-gallon cans daily. Criminal pains and penalties would not prevent the milk from going into consumption. To stop it at the boundaries of the city would be its practical destruction. To hold it there to await judicial proceedings against it would be, as the Supreme Court said, to leave it at the depots "reeking and rotting, a breeding place for pathogenic bacteria and insects during the period necessary for notice to the owner, and resort to judicial proceedings."

We agree with the court that the destruction of the milk was the only available and efficient penalty for the violation of the ordinance. The case, therefore, comes within the principle of the cases we have cited and of *Lieberman* v. *Van De Carr*, 199 U. S. 552. In other words, as the milk might be prohibited from being sold, at the discretion of the Board of Health, and even prohibited from entering the city (*Reid* v. *Colorado*, 187 U. S. 137), a violation of the conditions upon which it might be sold involves as a penalty its destruction. Plaintiff sets up his beliefs and judgment against those of government and attempts to defeat its regulations, and thereby makes himself and his property a violator of the law. In *North American Storage Co.* v. *Chicago*, 211 U. S. 306, 315, we said, by Mr. Justice Peckham, that food which is not fit to be eaten, "if kept for sale or in danger of being sold, is in itself a nuisance, and a nuisance of the most dangerous kind, involving, as it does, the health, if not the lives, of persons who may eat it." And it was decided that in such case the food could be seized and destroyed, and that a provision for a hearing before seizure and condemnation was not necessary. It was also decided that the owner of the food had his remedy against the arbitrary action of the health officers.

It is, however, said that plaintiff is precluded from such remedy because the ordinance expressly provides that the health officers "shall be held harmless in damages" for

their acts "if done in good faith." It may be that that portion of the ordinance is separable if invalid. The Supreme Court of the State said it was not necessary to pass upon the provision. What view it might entertain it did not clearly express. In determining the validity of the provision the court said that it "must assume that the ordinance is otherwise valid," and that it could not presume that plaintiff would disregard the ordinance held by it "to be valid or place his property in a condition to invite its destruction." "Self-inflicted damage," the court added, "is not recoverable. The open judicial inquiry is in such case: Was the damage self-inflicted?" In other words, as we understand the court, a question upon that portion of the ordinance has not yet reached a justiciable stage. There is certainly no destruction of the milk impending. Indeed, according to the allegations of the complaint, there is a threat only, to be executed if plaintiff should take milk into the city, which, though he alleges he is anxious to do, he may not do.

Judgment affirmed.

BUGAJEWITZ *v.* ADAMS, UNITED STATES IMMIGRATION INSPECTOR.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 239. Submitted April 21, 1913.—Decided May 12, 1913.

Congress has power to order the deportation of aliens whose presence in the country it deems hurtful; and this applies to prostitutes regardless of the time they have been here.

The determination of whether an alien falls within the class that Congress had declared to be undesirable, by facts which might constitute a crime under local law, is not a conviction of crime, nor is deportation a punishment.

The prohibition of *ex post facto* laws in Art. I, § 9 of the Federal Constitution has no application to the deportation of aliens.

There is a distinction between the words "as provided" and "in the manner provided"; the former may be controlled by an express limitation in the statute while the latter must not be so controlled; and so *held* that the limitation in § 3 of the act of February 20, 1907, was stricken out by the act of February 26, 1910, notwithstanding a reference in the latter act to a section in the former act in which the limitation was referred to.

THE facts, which involve the power of Congress to deport aliens and the construction of the acts of Congress relating to deportation of alien prostitutes, are stated in the opinion.

Mr. Joshua Freeman Grozier and *Mr. John A. Deweese* for appellant:

This act deprives the "prisoner" of her liberty "without" due process of law and is contrary to the Fifth Amendment.

This provision of the Federal Constitution means "by process of law" as understood at the time of adopting this provision of the Constitution. "Due process of law" in our judicial system takes the place of the "law of the land" under the Magna Charta. 2 Kent Com. (5th ed.), 13; Story on Const., § 1783; *Taylor* v. *Porter*, 4 Hill, 146; *Fletcher* v. *Peck*, 6 Cranch, 138; *Vandant* v. *Waddell*, 2 Yerger, 260; *Bank of California* v. *Oakley*, 4 Pet. 443.

"By due process of law" is not simply meant an act of Congress, but law in its regular course of administration through the courts of justice. See Kent Com., p. 620; *Green* v. *Briggs*, 1 Curtis, 325; *Menges* v. *Dentler*, 33 Pa. St. 495; *Hoke* v. *Henderson*, 4 Dev. 15; *Jones* v. *Perry*, 10 Yerger, 59; *Brown* v. *Hummel*, 6 Pa. St. 86; 1 Kent Com., § 24 (and note "C").

By "Judicial Power in the Constitution" is meant that source of power which was recognized and understood to be such at the time of the adoption of the Constitution.

See Federalist, 80; 2 Brock, 477. "Persons" in the Constitution of the United States applies to aliens. See *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Wong Wing* v. *United States*, 163 U. S. 238.

The term "person" in the Fifth Amendment is broad enough to include any and every human being within the jurisdiction of the Republic; a resident alien is entitled to the same protection under the law of the country as a citizen is entitled to. *Wong Wing* v. *United States*, 163 U. S. 242; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 368; *In re Oh Long*, 3 Sawy. 157; *Ho Ah Kow* v. *Nunan*, 5 Sawy. 552; *Carlisle* v. *United States*, 16 Wall. 147; *In re Chow Goo Pooi*, 25 Fed. Rep. 77; *In re Lee Tom*, 18 Fed. Rep. 253; *In re Wong Tong*, 6 Sawy. 232.

An alien is a "person" within the meaning of the Fourteenth Amendment. *In re Parrott*, 1 Fed. Rep. 481–511; *State* v. *Montgomery*, 47 Atl. Rep. 165; 94 Maine, 192; 80 Am. State Rep. 386.

An alien is entitled to the protection of the Fourteenth Amendment. *Carlisle* v. *United States*, 16 Wall. 147.

The act of Congress does not only attempt to exclude aliens and to deport aliens, but delegates to the executive branch of the Government the right to try aliens for crimes and to pass judgment in the premises and to deport them as convicted criminals in the judgment of executive branch of the Government. While the Government has the right to exclude aliens and to prevent them from entering the territory of the Government, and also has the right to deport them after they have entered the territory of the United States, (see 149 U. S. 698), the act involved here is not only attacked because it attempts to exclude aliens, but because it attempts to delegate to the executive branch of the Government the right to try aliens, and brand them as criminals, and because they are criminals, to deport them. The act in question must stand together or fall together. It is in-

capable of separation. In other words it is so constructed that the court cannot declare one part constitutional and the other part unconstitutional. It must stand as an entirety, or fall as an entirety. See *People* v. *Cooper*, 83 Illinois, 585; *Ex parte Towels*, 48 Texas, 413; *Santo* v. *State*, 2 Clark (Iowa), 165; *Reed* v. *Railroad*, 33 California, 212; *Campau* v. *Detroit*, 14 Michigan, 276; *State* v. *Commissioners*, 5 Oh. St. 497; *West. Un. Tel. Co.* v. *State*, 62 Texas, 630.

The court cannot construe a constitutional provision as merely directory but as mandatory. *People* v. *Lawrence*, 36 Barber (N. Y.), 117; Cooley on Const. Lim. 74–83.

Anarchy is one of the severest crimes known to the law: even worse than that of treason. An anarchist not only seeks to repudiate his allegiance to his sovereign, not only attempts to destroy the government of his sovereign, but he seeks to destroy all governments. Therefore, anarchy is the blackest crime known to the law. See *Lewis* v. *Daily News*, 32 Atl. Rep. 246; *Spies* v. *People*, 122 Illinois, 1; *People* v. *Most*, 53 N. Y. Supp. 220.

This act authorizes the executive branch of the Government to try, pass judgment upon and convict the most respectable and honorable person within the territory of the United States, who is not a citizen of this Government, of the blackest crime as a reason for deporting said person. The act provides that all prostitutes shall be deported. Prostitution is a crime under the law. See *State* v. *Stoyell*, 54 Maine, 27; *State* v. *Rice*, 56 Iowa, 431; *Springer* v. *State*, 16 Tex. App. 593; *Carpenter* v. *People*, 8 Barber, 610; 108 Missouri, 575; 98 Alabama, 16. Consult also Bouvier's Law Dict.; Anderson's Dict. of Law; Black's Law Dict.

The judicial branch of the Government under our Constitution is the only branch of the Government that has authority to try, convict and to pass judgment as to a

crime. Under the Constitution every "person" within the territory of the United States is entitled to a fair and impartial trial by "due process of law" before being branded as a criminal, and this includes every person, aliens as well as citizens. 3 Am. and Eng. Ency. of Law (1st ed.), p. 681; Cooley on Const. Lim. 87; Story on Const. Lim. 518–585; Federalist, 47; 1 Blackstone Com. 146.

The law being unconstitutional, the prisoner should be discharged, for an unconstitutional law is no law at all. See *Ex parte Seibold*, 100 U. S. 371.

Mr. Assistant Attorney General Harr for appellee:

No point is made, in this case, that Congress did not intend, by omitting the three-year limitation, to remove that limitation upon the authority to deport contained in the act of 1907. Such purpose is clear, and the amendatory act of 1910 has been uniformly so construed. *Mango* v. *Weis*, 181 Fed. Rep. 860; *Brion* v. *Prentis*, 182 Fed. Rep. 894; *Dickman* v. *Williams*, 183 Fed. Rep. 904; *United States* v. *North German Lloyd S. S. Co.*, 185 Fed. Rep. 158; *Sire* v. *Berkshire*, 185 Fed. Rep. 967; *Chomel* v. *United States*, 192 Fed. Rep. 117; *Siniscalchi* v. *Thomas*, 195 Fed. Rep. 701.

Congress can delegate to the Executive branch of the Government the authority to execute the provisions of law with reference to the deportation of aliens. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707, 713; *Wong Wing* v. *United States*, 163 U. S. 228, 237; *The Japanese Immigrant Case*, 189 U. S. 86, 100; *Turner* v. *Williams*, 194 U. S. 279; *United States* v. *Ju Toy*, 198 U. S. 253; *Chin Yow* v. *United States*, 208 U. S. 8; *United States* v. *Wong You*, 223 U. S. 67; *Tang Tun* v. *Edsell*, 223 U. S. 673; *Low Wah Suey* v. *Backus*, 225 U. S. 460, 468.

The Immigration Act, as amended March 26, 1910, is not *ex post facto* legislation as applied to appellant. De-

portation proceedings are not criminal, *Fong Yue Ting* v. *United States*, 149 U. S. 730, and the constitutional provision against *ex post facto* laws applies only to criminal statutes. *Johannessen* v. *United States*, 225 U. S. 227, 242.

Appellant was not arrested for practicing prostitution prior to the statute, but because she was found so engaged after its enactment.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from an order discharging a writ of *habeas corpus* and remanding the petitioner to custody. The ground of the appeal is that the act of March 26, 1910, c. 128, § 2, 36 Stat. 263, 265, relied on as authority for the arrest, impairs the petitioner's constitutional rights. It appears from the petition and the return to the writ that the petitioner is an alien; that she entered the United States not later than January 4, 1905, and that she was arrested on August 3, 1910, on an order of the Acting Secretary of Commerce and Labor directing the Immigrant Inspector to take her into custody and to grant her a hearing to show cause why she should not be deported. The order recited that she was then a prostitute and inmate of a house of prostitution, and that she was a prostitute at the time of entry and entered the United States for the purpose of prostitution or for an immoral purpose. The answer to the return demurs to its sufficiency and denies that she was a prostitute at the time of entry or that she entered the United States for any of the purposes alleged; but we must take it, at least, that she is a prostitute now.

By the act of February 20, 1907, c. 1134, § 3, 34 Stat. 898, 899, any alien woman found practicing prostitution within three years after she should have entered the United States was to be deported "as provided by sections twenty and twenty-one of this act." This section was amended by the act of March 26, 1910, c. 128, § 2,

and the limitation of three years was stricken out, but the amendment still refers to §§ 20, 21, and orders deportation "in the manner provided by" §§ 20, 21. The beginning of these two sections provides for the taking into custody of aliens subject to removal, within three years from entry, and so it has been argued in other cases that the three-year limitation still holds good. The construction of the amendment was not relied on here, but before we can deal with the constitutional question it becomes necessary to dispose of that point. We are of opinion that the effect of striking out the three-year clause from § 3 is not changed by the reference to §§ 20 and 21. The change in the phraseology of the reference indicates the narrowed purpose. The prostitute is to be deported, not 'as provided' but 'in the manner provided' in §§ 20, 21. Those sections provide the means for securing deportation, and it still was proper to point to them for that. *United States* v. *Weis*, 181 Fed. Rep. 860; *Chomel* v. *United States*, 192 Fed. Rep. 117.

The attempt to reopen the constitutional question must fail. It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want. The coincidence of the local penal law with the policy of Congress is an accident. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707, 728, 730. *Wong Wing* v. *United States*, 163 U. S. 228, 231. *Zakonaite* v. *Wolf*, 226 U. S. 272, 275. *Tiaco* v. *Forbes*, ante, p. 549. The prohibition of *ex post facto* laws in Article I, § 9, has no application, *Johannessen* v. *United States*, 225 U. S. 227, 242, and with regard to the petitioner it is not necessary to construe the statute as having any retrospective effect.

Judgment affirmed.

SCHWARTZ *v.* ADAMS.

WEINER *v.* ADAMS.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Nos. 240, 241. Submitted April 21, 1913.—Decided May 12, 1913.

Decided on authority of preceding case.

THE facts are stated in the opinion.

Mr. Joshua Freeman Grozier and *Mr. John A. Deweese* for appellant.

Mr. Assistant Attorney General Harr for appellee.

MR. JUSTICE HOLMES. In accordance with a stipulation of counsel the same judgment will be entered in the above cases as in *Bugajewitz* v. *Adams*, *ante*, p. 585.

Judgments affirmed.

NORFOLK & WESTERN RAILWAY COMPANY *v.* DIXIE TOBACCO COMPANY.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 265. Argued April 28, 1913.—Decided May 12, 1913.

Under *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, and *Galveston, Harrisburg &c. Ry. Co.* v. *Wallace*, 223 U. S. 481, which sustained the Carmack Amendment, stipulations in a bill of lading for interstate shipment that no carrier shall be liable for damages not occurring on its portion of the through route, are void; and the initial carrier is liable whether the through route connections are designated by it or by the shipper.

111 Virginia, 813, affirmed.

THE facts, which involve the constitutionality of the Carmack Amendment when applied to interstate shipments on through routes where the connecting carriers are designated by the shipper, are stated in the opinion.

Mr. Francis Markoe Rivinus (by special leave), with whom *Mr. S. Griffin*, *Mr. Thomas Reath* and *Mr. Theodore W. Reath* were on the brief, for plaintiff in error:

Obeying the canon of construction that of two possible constructions, one constitutional and the other unconstitutional, the constitutional construction will be adopted, this court has construed the Carmack Amendment to fasten liability on the primary carrier only if that carrier has by some voluntary act accepted liability to destination. *Lake Shore & Mich. Southern R. Co.* v. *Smith*, 173 U. S. 684; *A. C. L. R. R. Co.* v. *Riverside Mills*, 219 U. S. 186; *G., H. & S. A. R. R. Co.* v. *Wallace*, 223 U. S. 481.

An initial carrier cannot refuse a shipment designated for a point beyond its own line. *A. C. L. R. R. Co.* v.

Riverside Mills, supra; Seasongood v. *Tenn. & Ohio River Transp. Co.*, 21 Ky. Law Rep. 1142; *Inman* v. *St. L. Southwestern Ry. Co.*, 14 Tex. Civ. App. 39; Hutchinson on Carriers, 3d ed., § 226; *Galveston Comm. Assn.* v. *A., T. & S. F. Ry. Co.*, 25 I. C. C. Rep. 216.

At common law a carrier was not obliged to issue a bill of lading, but the Carmack Amendment creates a substantive duty to issue a receipt or bill of lading which shall describe the true place of destination for every interstate shipment. *Johnson* v. *Stoddard*, 100 Massachusetts, 306; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Wallace*, 223 U. S. 481; *Enterprise Transp. Co.* v. *Penna. R. R.*, 12 I. C. C. Rep. 327.

Plaintiff in error in issuing the bill of lading with final destination (Marshall, Texas) shown therein complied with the express requirement of the statute and did not act voluntarily.

The Carmack Amendment does not apply to the plaintiff in error as it by no voluntary act assumed a relation with or liability for loss on any connecting carrier.

No appearance for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an action brought by the defendant in error to recover for damage to tobacco shipped by it on the railroad at Bedford City, Virginia, to Marshall, Texas. The plaintiff got a verdict and judgment, which was affirmed by the Supreme Court of Appeals (111 Virginia, 813), the case having been taken there on the ground that the act of June 29, 1906, c. 3591, § 7, 34 Stat. 584, 595, amending § 20 of the Act to Regulate Commerce, of February 4, 1887, c. 104, 24 Stat. 379, 386, is unconstitutional. This section requires any common carrier receiving property for trans-

portation from a point in one State to a point in another to issue a receipt or bill of lading for the same; makes the receiving carrier liable for loss caused by any common carrier *in transitu;* and provides that no contract shall exempt it from the liability thus imposed.

The bill of lading stipulated that no carrier should be liable for damages not occurring on its portion of the through route. There was evidence that the tobacco was damaged after it left the railroad company's hands; and the defendant asked an instruction that if the jury believe that it delivered the tobacco in good order to the next carrier the verdict should be in its favor. This instruction was refused and the defendant excepted. There was evidence also that the plaintiff chose the route for the tobacco, being partly by sea and a different one from that which the railroad would have adopted, which would have been all rail. The railroad had no through route or rate established with the line of steamers by which the tobacco went. Instructions were asked and refused, subject to exception, that the bill of lading controlled, and that the above statute, so far as it attempts to invalidate limitations or liabilities like that quoted above, is void.

The Supreme Court of Appeals followed the ruling in *Atlantic Coast Line R. R. Co.* v. *Riverside Mills,* 219 U. S. 186 (to which may be added *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Wallace,* 223 U. S. 481), as conclusive. The plaintiff in error contends that these cases may be distinguished on the ground that in both of them it was to be presumed that the carrier was a voluntary party to a through route and rate, whereas here the stipulation against liability beyond its line and the fact that it had no through route with the steamship company exclude that presumption. It argues that as it was bound to accept goods destined beyond its line for delivery to the next carrier and was required by the statute to give a through bill of lading, if on such compulsory acceptance

it is made answerable for damages done by others its property is taken without due process of law. But in the former case there was the same stipulation in the bill of lading, and the supposed through routes were only presumed. In the second case the carrier is spoken of as voluntarily accepting goods for a point beyond its line, but there too there was the same attempt to limit liability, and in the present case the acceptance was voluntary in the same degree as in that. There is no substantial distinction between the earlier decisions and this.

Judgment affirmed.

CONSOLIDATED TURNPIKE COMPANY *v.* NORFOLK & OCEAN VIEW RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 152. Petition for rehearing submitted April 28, 1913.—Decided May 12, 1913.

Petition for rehearing granted, not because of doubt of correctness of the decree, but to prevent misconception concerning the reasons for dismissing the writ of error in this case, *ante*, p. 326.

The certificate of the judge of the court below that a Federal question was raised and passed upon is not, in the absence of any journal entry, a certificate of the court, but this court may, if there is a recital in the certificate that the court orders the certificate to be made, accept it as incorporating into the record the necessary proof of existence of a Federal question. *Marvin* v. *Trout*, 199 U. S. 212, distinguished.

Where the judgment of the state court rests upon a question of general law broad enough to support the decision, this court will not consider the Federal question, although it may have been raised in, and passed upon by, the court below. *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468.

This court is not justified in taking jurisdiction on the bare claim that property has been taken without compensation, unless the averments of fact raise real and substantial questions which are not so devoid of merit as to be frivolous or which have not been foreclosed by prior decisions of this court.

The state courts of Virginia having held that a railroad company which had acquired title to land on which it had built its roadbed could condemn the interest in the land of a mortgagee in possession without paying for its own improvements, this court declines to review on the ground that the question of whether the mortgagee was deprived of his property without due process of law is frivolous.

The rule of the common law that fixtures annexed to the realty become a part thereof and subject to existing liens thereon is subject to many exceptions: in Virginia a corporation possessing the power of eminent domain may enter and use for public utility purposes and condemn the interest of the mortgagee without being obliged to pay more than the value of the land without such improvements.

Petition to rehear, 228 U. S. 326, dismissing writ of error to review 111 Virginia, 131, denied.

THE facts, which involve the jurisdiction of this court to review judgments of the state courts where the Federal question is so devoid of merit as to be frivolous, are stated in the opinion.

Mr. Charles H. Burr for plaintiff in error.

Mr. Henry W. Anderson and *Mr. E. Randolph Williams* for defendant in error.

Opinion of the court on petition to rehear, by MR. JUSTICE LURTON.

We gave leave to file the application for rehearing, not because of any doubt as to the correctness of the decree previously announced, but because of our desire to prevent any misconception concerning the reasons by which our previous conclusion to dismiss was sustained. It is insisted that the certificate of the presiding judge of the

court below, reciting that a Federal question was raised and passed upon by the court when it considered and disposed of the petition to rehear, was plainly not the certificate of the judge alone, but that of the court itself, and, therefore, was sufficient to demonstrate the existence of jurisdiction under the ruling in *Marvin* v. *Trout*, 199 U. S. 212.

The judgment of the inferior court in *Marvin* v. *Trout* had been affirmed without any opinion. Thereafter the Ohio Supreme Court ordered what is termed "a journal entry" to be made, certifying that the plaintiff in error had claimed that the judgment affirmed was founded upon certain sections of the Revised Statutes of Ohio, and that the plaintiff in error had "in his petition asserted that the said sections of the Revised Statutes were in contravention of specified provisions of the Constitution of the United States," and that the judgment of affirmance was in favor of the validity of said statutes. This court said that the certificate was "a certificate from the court as distinguished from one by an individual Judge."

In the present case, while it is true that the certificate of the presiding judge contains a recital to the effect that "the court orders it to be certified and made a part of the record in this case and the Honorable James Keith, President Judge of said Supreme Court of Appeals, does now certify," etc., there is no journal entry as to the matter and nothing is otherwise contained in the record giving the slightest intimation that a Federal question was raised and decided or the nature and character of such question, if any.

The distinction between this case and *Marvin* v. *Trout* is therefore this: Here there is nothing in the record proper showing that a Federal question was considered and passed upon by the court below, although there is a certificate of the presiding judge to the effect that such was the case,

while in the *Marvin Case* there was a record disclosure of the existence of the Federal question which was in effect also certified to by the presiding judge of the court below. In other words, the distinction between the two cases in no way involved the accuracy of the certificate of the presiding judge, but whether conceding—as of course must be done—its complete accuracy, it was sufficient to show the existence of jurisdiction in the absence otherwise in the record of anything establishing that a Federal question was below considered and decided. Despite this difference and to prevent any possible inference that there was any intention to doubt in the slightest degree the accuracy of the statement contained in the certificate of the presiding judge of the court below, we have concluded that as it is recited in the certificate that it was made by the order of the court itself for the purpose of affording record evidence of the fact that a Federal question was considered and disposed of, that we may treat the certificate to that effect as incorporating into the record the necessary proof of the existence of some Federal question as the basis upon which our authority to review may be exerted.

Assuming, therefore, that this certificate operates to show that some Federal question was decided when the petition to rehear was refused, yet if it also appears that the judgment of the state court against the plaintiff in error was based upon a question of general law broad enough to support the decision, this court will not consider the Federal question, though it was considered and determined by the court below adversely to the plaintiff in error. *Murdock* v. *City of Memphis*, 20 Wall. 590, 636; *Hale* v. *Akers*, 132 U. S. 554; *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468.

The bare claim that the judgment operated to take property of the plaintiff in error without compensation is not enough to justify this court in taking jurisdiction unless it also appears from the averments of fact upon

which the claim must depend that the question is one real and substantial and not so utterly without merit as to be frivolous, or a question concluded by previous decisions of this court: *New Orleans Water Works* v. *Louisiana*, 185 U. S. 336; *Equitable Assurance Society* v. *Brown*, 187 U. S. 308, 314; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102. In *Equitable Assurance Society* v. *Brown*, *supra*, it was said (p. 311): "There must be a real, substantive question upon which the case may be made to turn, that is, a real and not a merely formal Federal question is essential to the jurisdiction of this court." The writ in that case was dismissed, the court saying (p. 314): "That although a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit."

The unsubstantial character of the Federal question in the present case will appear when we come to examine the facts upon which it depends.

The condemnation proceeding was in the right of the Bay Shore Company, a public service corporation of the State of Virginia, possessed of the right of eminent domain. That company was in possession of the land sought to be condemned, it being a long, narrow strip acquired for the purpose of constructing thereon a line of electric railway. It had entered under a warranty deed from the Consolidated Turnpike Company, another public service corporation of Virginia. The whole of the property of the latter corporation was under two mortgages made by it to secure issues of negotiable bonds, the land acquired under the deed of the Turnpike Company being but a part of the property subject to the aforesaid mortgages. The principal defendant below was, and the real plaintiff in

error here is, Walter H. Taylor, as trustee under both mortgages. The purpose of the condemnation proceeding was to condemn the interest of the mortgagees and any other adverse interest affecting the title of the Bay Shore Company. Though the entry was under the deed of the Turnpike Company, and, therefore, subject to the pre-existing liens of Taylor, trustee, the possession was taken for the purpose of placing thereon the railway tracks and of later extinguishing the interest of the mortgagees by condemnation or otherwise. The claim of the condemning plaintiffs was that the Bay Shore Company, as a corporation, having the right of eminent domain, might thus enter by permission of the mortgagor company, and later condemn the mortgagee's interest by paying the actual value of the land, without considering the improvements which it had placed thereon after entry and before the institution of the proceeding. The judgment of the court below was that the only compensation which might be demanded by the mortgagees was the actual value of the land, and that they had in such a proceeding no right to require the improvements placed thereon by the condemning railway company to be considered in awarding damages.

The contention of the plaintiffs in error is that the permanent fixtures annexed to the mortgaged land passed by virtue of the mortgages to the trustee therein, and that there cannot be any condemnation which does not value such fixtures in assessing the value of the land taken. This was the claim which the Virginia court denied, holding that such a public service corporation had the right to enter under the deed of the mortgagor company and later condemn, compensating the mortgagees for the land only.

The contention here made is that under the Virginia Eminent Domain Statute the Bay Shore Company, as a public service corporation, had no power to condemn the property of the Consolidated Turnpike Company, another

public service corporation, and that, therefore, the basis for the right of condemnation exercised in the state court did not exist.

It was not necessary to acquire any right, title or interest which belonged to the Turnpike Company. Its title and right had been theretofore acquired through its deed, and all that was sought to be condemned was such right, title and interest as was in Taylor, Trustee. That was subject to condemnation, and the single question which was or is debatable is whether the Bay Shore Company, which had entered under that deed, might condemn the mortgagee interest without paying for its own improvements.

The rule of the common law, to which the plaintiffs in error refer, that fixtures annexed to realty become a part thereof and subject to existing liens thereon, is one subject to many exceptions. One of these is that applied by the Virginia court, namely, that when a corporation possessing the right of eminent domain enters upon lands necessary for its public purposes, under the deed of a mortgagor in possession, and places permanent improvements thereon in good faith, it may later condemn the interest and title of the mortgagee without being required to pay more than the value of the land without the improvements placed thereon with intent to acquire the entire title. *Searl* v. *School District*, 133 U. S. 553, 561; *St. Johnsbury &c. Rd.* v. *Willard*, 61 Vermont, 134; *Jones* v. *N. O. Rd. Co.*, 70 Alabama, 232; *Justice* v. *Valley &c. Rd. Co.*, 87 Pa. St. 28; 2 Lewis Em. Dom., § 759, 3d ed.

From this it abundantly appears that the decision of the Virginia court was placed upon the general law of the State, and that when the Bay Shore Company entered upon the strip of land desired for a right of way under the deed of the Turnpike Company, it might place thereon its tracks and appurtenances, with the right to condemn the interest of preëxisting mortgagees upon paying the

actual value of the land without the improvement placed thereon by it.

The claim that in thus holding and deciding the court below denied to the plaintiff in error due process of law under the Fourteenth Amendment is neither real nor substantial, but so entirely without merit as to justify this court in refusing to take jurisdiction.

The petition to rehear is accordingly denied.

MR. JUSTICE PITNEY concurs in the result.

BAILEY *v.* SANDERS.

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

No. 271. Submitted April 30, 1913.—Decided May 12, 1913.

On the facts disclosed by the record in this case, the finding by the Land Department that there was an agreement to convey by the homesteader was not arbitrary or unsupported by evidence.

While, in a contest before the Land Department, the decision should be confined to the questions put in issue by the parties, there is no objection to the decision of other questions to which the hearing was extended by consent of the parties.

Under §§ 2289, 2290, Rev. Stat., the right to enter a homestead is for the exclusive benefit of the entryman who cannot alienate before the claim is perfected; nor is this affected by the act of March 3, 1891, giving the right to commute the entry.

Entering into a forbidden agreement to alienate a homestead entered under §§ 2289, 2290, Rev. Stat., ends the right of the entryman to make proof and payment and renders him incompetent to further proceed with his entry. *Hafemann* v. *Gross*, 199 U. S. 342.

177 Fed. Rep. 667, affirmed.

THE facts, which involve the right of a homesteader to alienate the land he seeks to enter before he has finally perfected the entry, are stated in the opinion.

Mr. Douglas W. Bailey pro se and *Mr. Henry H. Gilfrey* for appellant.

No appearance for appellee.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to determine which of two claims to a tract of land in the State of Idaho is the better one. The tract is within the ceded portion of the Nez Perce Indian Reservation, which was brought within the operation of the homestead law by the act of August 15, 1894, 28 Stat. 286, 332, c. 290. Bailey, the plaintiff, claims as the grantee once removed of William W. Hately, who made a preliminary entry of the tract in 1899, commuted the entry in 1901, and received the usual receipt and certificate. Sanders, the defendant, claims under an entry subsequently made and upon which he has obtained a patent. The real controversy is over the effect to be given to certain contest proceedings in the Land Department which resulted in the cancellation of Hately's entry and in the allowance of that of the defendant. In his bill of complaint the plaintiff sets forth all or the major part of the proceedings and evidence in the contest and calls in question the cancellation of Hately's entry. A demurrer to the bill was sustained by the Circuit Court and the bill was dismissed. The decree was affirmed by the Circuit Court of Appeals, 177 Fed. Rep. 667, and the plaintiff brings the case here.

We shall refer briefly to such parts only of the case made by the bill and the exhibits as have a direct bearing on the questions requiring decision by us.

As soon as Hately's entry was commuted he conveyed the land to one Beach, as the result of negotiations with Bailey, the plaintiff, who claimed to be acting for Beach.

The contest against the entry originated in a charge preferred by Sanders to the effect that a fraud had been perpetrated in obtaining the conveyance to Beach and that Bailey had for a long time been resorting to irregular methods to secure the land. The charge was somewhat vaguely stated and pointed more to a fraud on Hately than to one on the United States, but the Commissioner of the General Land Office regarded it as requiring investigation and ordered a hearing in the local office, of which Hately, Beach and Sanders were to be notified and in which each was to be heard, "in order that all the facts in the case might be brought out." The hearing was had, Hately and Sanders appearing in person and Beach being represented by Bailey. Upon the evidence adduced the local officers found, among other things, that two or three months before Hately made his commutation proof an agreement was made between him and Bailey whereby the latter was to pay the expense of the commutation and Hately was to convey the land to Bailey for an additional consideration of $600 when the commutation was effected, and that the conveyance to Beach was made at Bailey's instance in pursuance of the agreement. By successive appeals the contest was carried before the Commissioner of the General Land Office and the Secretary of the Interior, with the result that the finding of the local officers was sustained and the entry cancelled because of the agreement to convey. The conveyance from Beach to Bailey was made after the contest was heard by the local officers and while it was pending on appeal before the General Land Office.

1. It is insisted that no evidence was adduced in the contest tending to show the making of such an agreement as was described in the finding of the Land Department, and therefore that the cancellation of the entry was wholly arbitrary and unauthorized. The evidence is set forth in one of the exhibits to the bill, and it there appears that

Hately gave the following testimony: "Q. When did you first come to know Mr. Bailey, or where did you first meet him? A. Some time in January, 1901, Woodland, Idaho [the entry was commuted in March following]. Q. What, if any, conversation did he have with you on that occasion concerning the land in controversy? A. He didn't say much about it. . . . Q. What did Mr. Bailey say to you about proving up on your land, assisting you to prove up, if anything at that time? A. He said he had some folks that wanted a piece of land in the timber. Well, he wanted a deed to the place, and I told him if I had to make the deed what it would take to get the land. Q. How much did you tell him you would take? A. I told him it would take $600 besides the expense. Q. Were you living upon your land at that time? A. Yes. Q. Was there any special agreement made by you and Mr. Bailey at your house or place? A. He drawed up some kind of an agreement, but I don't know what it was. Q. Did he read it to you and inform you of the purport of the paper? A. Yes. Q. Did Mr. Bailey subsequently have you appear before some officer in order to consummate your final proof of the land in question? A. He did. Q. When did Mr. Bailey have you execute this deed which has been offered in this case, marked Exhibit 'A' [deed to Beach] alleged to have been signed by yourself and wife? A. Some time in March, 1901." There was also testimony to the effect that shortly before the hearing Beach disclaimed any personal interest in the land; and in the decision of the local officers, which is an exhibit to the bill, it is stated that the commutation price was paid by Bailey, and that, although present at the hearing, he refused to be sworn. In these circumstances we think it cannot be said that the finding of the Land Department respecting the agreement to convey was arbitrary or without evidence to support it.

2. Another objection urged against the action of the Land Department is that the charge upon which the hear-

ing was ordered did not clearly or certainly assail Hately's entry on the ground that, before perfecting it, he had entered into a prohibited agreement to convey the land to another. It is true that the charge was vaguely stated, but it does not appear that any prejudice resulted from this. The principal testimony relating to the agreement was given by Hately, and no objection was made to his being interrogated on that subject. Nor was any effort made to weaken that part of his testimony by cross-examination. Bailey, with whom Hately said the agreement was made, represented Beach at the hearing and could have contradicted Hately's testimony, if it was not true, but he did not attempt to do so. True, there is in the bill an allegation that the local officers refused to permit Beach to adduce evidence in rebuttal, the nature of which is not stated in that connection, but it appears from the exhibits to the bill that this evidence related to a matter which is of no moment here, namely, the reason why Beach had not paid a draft given by Bailey to Hately for the deed from the latter. The real situation, then, in respect of the proof of the prohibited agreement is that it was introduced without objection, in circumstances where it could have been controverted if untrue, and that no attempt was made to dispute it. This being so, the present objection must fail as did a similar one in *Lee* v. *Johnson*, 116 U. S. 48. There an unsuccessful homestead claimant, whose entry had been cancelled as the result of a contest before the Land Department, sought to charge the successful claimant, whose entry had been passed to patent, as a trustee of the title. The contest before the Land Department had been initiated by a charge that the first entryman had abandoned the land for more than six months, and the ultimate decision of the Secretary of the Interior directing the cancellation of the entry was based upon a finding, not that the entryman had abandoned the land, but that he was seeking, by a seeming compliance

with the forms of law, to obtain the land for another. The suit proceeded on the theory that the Secretary's decision was inconclusive because resting upon a point not in issue between the contestants, and the Supreme Court of Michigan sustained that theory. But when the case came here it was held that, as it appeared from the evidence presented in the contest, and particularly from the testimony of the entryman, that he was not acting in good faith for himself but with the purpose of acquiring the title for another, the Secretary had not exceeded his authority, but had only exercised "that just supervision which the law vests in him over all proceedings instituted to acquire portions of the public lands." Doubtless it is true, as a general rule, that in a contest before the Land Department the decision should be confined to the questions put in issue by the parties; but we think it is also true that when, with their acquiescence, the hearing is extended to other questions, there can be no objection to the decision of the latter.

3. It is further contended that the homestead law does not prohibit, but impliedly permits, an entryman to agree, in advance of commuting his entry, to sell the land, and therefore that the Land Department made a mistake of law in canceling Hately's entry because of his agreement with Bailey. The contention is not sound. Section 2289 of the Revised Statutes, as amended by the act of March 3, 1891, 26 Stat. 1099, c. 561, creates the homestead right and names the beneficiaries. Section 2290, as amended by the same act, requires any person applying to enter land under the preceding section to make affidavit that, among other things, "he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself, or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatso-

ever, by which the title which he or she might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person, except himself, or herself." It was under these sections that Hately's preliminary entry was made. Section 2291, in prescribing the time and manner of making final proof, requires the applicant to make "affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred eighty-eight," which permits alienation for church, cemetery, school and other enumerated purposes, none of which is present here. Thus, the homestead law not only proceeds upon the theory that the land is to be acquired for the exclusive benefit of the entryman, but contains provisions which make it impossible for him to perfect his claim, after alienation or contract therefor, without committing perjury. True, § 2301, as amended by the act of March 3, 1891, *supra*, under which Hately's entry was commuted, says nothing about alienation, but its only purpose is to give the entryman an option to substitute the minimum price of the land for a part of the five years of residence and cultivation otherwise required. In other respects the operation and application of §§ 2290 and 2291 are not affected by it. We are therefore of opinion that the Secretary of the Interior did not err in ruling, as he did, that "entering into such forbidden agreement ended the right of the entryman to make proof and payment and rendered him incompetent to further proceed with his entry." See *Anderson* v. *Carkins*, 135 U. S. 483, 487; *Hafemann* v. *Gross*, 199 U. S. 342, 345.

Other contentions are advanced in the brief for the appellant, but of them it suffices to say that in our opinion they have less merit than those before mentioned.

Decree affirmed.

LEWIS PUBLISHING COMPANY *v.* WYMAN.

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

No. 179. Argued March 11, 1913.—Decided May 12, 1913.

The admission of a magazine to second-class mail privileges on the petition of the owners made pending a suit to enjoin the enforcement of an order excluding the magazine from such privileges renders the contentions of plaintiff moot and it is no longer in a position to ask for an injunction.

When the question involved in a bill becomes moot, the court should not retain the bill in order to determine plaintiff's liability on a bond, it not appearing in this case that plaintiff is in any danger from an action to enforce the bond.

A suit, which has become moot, will not be retained in order to determine appellant's liability on bonds, when there is nothing in the record on which the rights of the parties may be adjudicated.

A suit, which has become moot, will not be retained in order to secure an accounting for amounts paid after its commencement, when it appears on the face of the bill that plaintiff in order to recover far larger amounts paid prior to the commencement of the suit, must bring an action at law in which all amounts paid could be included.

An order made by the Postmaster General admitting a magazine to second-class mail privileges on certain conditions, made pending a suit to enjoin an order excluding the magazine, is a matter of administration, and affords no ground for relief in the suit for injunction against enforcing the order of exclusion, or for retaining that suit after it has become moot by reason of such order.

182 Fed. Rep. 13, affirmed.

THE facts are stated in the opinion.

Mr. Shepard Barclay, with whom *Mr. P. H. Cullen* and *Mr. Thos. T. Fauntleroy* were on the brief, for appellant.

Mr. Solicitor General Bullitt for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

This action was commenced by the appellant in the month of March, 1907, in a state court in Missouri, and was removed, on the application of the defendants, now respondents, into the Circuit Court of the United States. The plaintiff's petition averred that it was and for more than three years last past had been a corporation organized under the laws of South Dakota and doing business in the State of Missouri, operating a publishing plant at Winner Station, a sub-station of the St. Louis Postoffice; that the defendants were respectively postmaster and assistant-postmaster of St. Louis; that one of the publications issued, printed and circulated by the plaintiff was called the "Woman's Magazine," a monthly publication issued periodically to hundreds of thousands of subscribers, and admitted many years before by the Postoffice Department as second-class mail matter at the St. Louis Postoffice; that differences had arisen between the plaintiff and the defendants and the Postoffice Department respecting the right of the plaintiff to transmit the Woman's Magazine through the mails at the pound rate; that defendants were threatening to deprive the plaintiff of its right to use and enjoy the second-class mail privilege without a hearing upon the question whether it should be annulled or suspended; that its legitimate list of subscribers exceeded in number 840,000, and plaintiff was entitled to mail under the second-class privilege approximately twice that number; and that such threatened suspension would work irreparable damage and loss to the plaintiff; wherefore plaintiff prayed for an injunction to restrain the defendants from detaining any copies of the magazine in transmission through the mail (within the number of 1,600,000 copies), that the court would ascertain and adjudge by its decree the amount of the legitimate subscription list of the magazine as of March 1, 1907, and

for prior months since September, 1905, to the end that the controversy raised by the defendants might be terminated, "and that said defendants as postmaster and assistant be perpetually enjoined from interfering with the full use and enjoyment of said second-class privilege by plaintiff according to the finding and decree of this court, ascertaining the proper and just extent and limits thereof, as herein prayed." There was also a prayer for a temporary injunction, and for other and further relief. Upon submission of the bill of complaint and verifying affidavit the Circuit Court granted a temporary restraining order, and an order to show cause why an injunction *pendente lite* should not be allowed. Upon the hearing of this order an injunction was refused, on the ground that no permit had ever been granted allowing the Woman's Magazine the second-class privilege, except a temporary permit issued August 21, 1902, which by its terms was to continue "until the Postoffice Department shall determine whether it is admissible as second-class matter;" that the only determination of the application was that made by the Postoffice Department in March, 1907, refusing the privilege; that the law did not require the department to grant a hearing upon the question of admitting the magazine to the second-class privilege, and that there was no provision of law for reviewing the action of the Postmaster General in the matter.

The action proceeded, and while it was pending, and on September 24, 1907, a new application was made by the appellant to the Postoffice Department for the entry of the Woman's Magazine as second-class matter, and this application was granted in December, to take effect as of September 24th. Defendants filed a supplemental plea setting up this order, and that by virtue of it the publication in question was being received and carried by the Postoffice Department at the second-class rate. The appellant replied, and the action proceeded to final hear-

ing, resulting in the dismissal of the bill. The complainant appealed to the Circuit Court of Appeals, where the decree was affirmed, a majority of the court holding that the questions upon which the appellant's right to equitable relief depended had become moot questions, and that its claim for reimbursement for certain payments made *pendente lite* for postage in excess of the amount calculated at the second-class pound rate was the proper subject-matter of a suit at law, leave to bring which was reserved in the decree. 182 Fed. Rep. 13.

It appears that the "Woman's Magazine" was, except for a change of name, identical with a previous publication called the "Winner Magazine," to which the privilege of the second-class rate was accorded by the Postoffice Department in the year 1899. The application for change of name was made in the year 1902. By Postal Laws and Regulations (1902), § 443, in case of a change of name of a publication already entered as second-class matter, publishers are required to apply for reëntry the same as if the publication were a new one. Such an application was made in the present case, and a temporary permit was issued by the defendant postmaster at St. Louis, and confirmed by the Postoffice Department, to continue "pending consideration of the application for its reëntry as second-class matter upon change of name from 'The Winner.'" This was in accordance with Postal Laws and Regulations, § 441. Little or nothing seems to have been done respecting this application until March, 1905, when an investigation was commenced, as the result of which, on June 5th, the publishers were required to show cause why the authorization for the admission of the Woman's Magazine to the second class of mail matter should not be revoked, upon the grounds, "First, it is primarily designed for advertising purposes; Second, it is primarily designed to advertise the other businesses in which the stockholders and officers of the publishing company, and

especially E. G. Lewis, are interested; Third, it is primarily designed for free circulation, or for circulation at nominal rates." Under date of April 12, 1906, defendant Wyman notified the appellant that "From facts obtained, which in my judgment justify me in the conclusion that the legitimate subscriptions to the Woman's Magazine are not to exceed 539,901, and that you are entitled to transmit through the mails at the pound rate not to exceed 1,079,802 copies of that publication, including sample copies, you are hereby notified that the transient second-class postage at the rate of one cent for each four ounces or fraction thereof must be prepaid by stamps affixed on all copies of said publication in excess of your legitimate mailings, as above indicated, hereafter presented by your company." The restriction of the second-class privilege to a number of copies not more than double the legitimate list of subscribers was based upon §§ 436 and 456 of the Postal Laws and Regulations. This notice served to renew the controversy between the appellant and the Postoffice Department, a controversy that continued until March 4, 1907, when the Postmaster General made an order that in effect limited the second-class privilege of the Woman's Magazine to 539,901 copies for legitimate subscribers, and a like number in addition for sample copies, sustained the action of the postmaster at St. Louis based upon that finding, and required the postmaster to remit to the Department the excess postage that had been collected by him, and to demand from the publisher the balance due the Government at the transient second-class rate upon all excess copies of the publication mailed on and after October 1, 1905. At the same time the Postmaster General denied "the pending application submitted August 22, 1902, for entry of this publication as second-class matter," upon the following ground—"Upon a hearing granted the publisher April 30th and May 1st, 1906, and upon a careful and thorough investigation of

all of the evidence by the Department, I find that the publication does not have a legitimate list of subscribers; that it is designed and published primarily for advertising purposes; and that it is being circulated at a nominal rate contrary to the law and the regulations of the department."

It was and is contended by the appellant that this order, instead of being the denial of an application for admission to the second-class privilege, was in effect the suspension or annulment of an existing privilege; that this could not be done without a hearing because of the provisions of the act of March 3, 1901, 31 Stat. 1107, c. 851; and that there had not been any proper hearing.

One of the matters in contention between the parties at the time of the inception of the action was the actual extent of the *bona fide* circulation of the magazine; the appellant averring that it had a "legitimate list of subscribers" exceeding in number 840,000, and that under the established practice, allowing as many sample copies in addition, it was entitled to the pound rate upon at least 1,600,000 copies of each issue. It was this that gave rise to the prayer of the original petition for an ascertainment of the amount of the legitimate subscription list and for an injunction to restrain the defendants from detaining any copies within the number of 1,600,000.

We agree, however, with the Court of Appeals, that the new application made pending the suit, and the order of the Postoffice Department thereon admitting the magazine to the second-class privilege as of September 24, 1907, which privilege the appellant has ever since enjoyed, render the above contentions moot questions, inasmuch as the appellant is no longer in a position to ask for an injunction.

It is contended that the bill ought to have been retained, and other equitable relief accorded to the appellant thereunder, principally for three reasons—

First, that upon the granting of the temporary restraining order in March, 1907, the appellant, pursuant to the order of the court, gave a bond to defendants in the penal sum of $10,000, conditioned that if upon a later hearing or final hearing it should be determined that this restraining order was improperly issued the appellant would pay to the postmaster or to the Government all sums of money lost by the Postoffice Department by reason of the granting of the restraining order. But so far as appears no action has been taken or threatened looking to the enforcement of this bond, and so it would be improper to retain the main cause, after the primary object to be accomplished by it has been accomplished by voluntary action of the parties *pendente lite*, in order to determine whether any and what relief should be accorded respecting the bond. Besides, it was not determined at any hearing in the suit that the restraining order was improperly issued. On the contrary, the bill was dismissed because of a subsequent change in the situation. There is nothing to show that appellant is in any danger from an action to enforce this bond.

Some mention is made of indemnity bonds demanded of appellant by the defendant postmaster and given by the appellant and sureties, as security for excess postage. There is nothing before us, however, to show the facts respecting these bonds, or any reason for retaining the suit in order that the rights of the parties under them may be adjudicated.

Secondly, it is said that because the defendant postmaster insisted that the Woman's Magazine did not have the number of subscribers claimed by the appellant, he demanded during the period from April, 1906, to May, 1907, payments of alleged excess postage as a condition to mailing the copies that were being sent out monthly, and that because of that demand appellant made monthly payments under protest aggregating $20,650. Reference

is made to the prayer of the bill,—"that this court may ascertain and adjudge by its decree herein the amount of the legitimate subscription list of said Woman's Magazine, as of March 1, 1907, and for prior months since September, 1905, to the end that there may be a close of the unseemly controversy raised by said defendants," etc. But this prayer was manifestly incidental to the main prayer for an injunction. There is nothing in the facts that would justify the retention of the bill in order to secure an accounting respecting the transactions that antedated the commencement of the action. Of the $20,650 in question, all but $3,500 appear to have been paid prior to the inception of the suit. The smaller amount only would in any view be within the fair scope of inquiry under the bill, and it would still be necessary for appellant to resort to an action at law for the previous payments. No sufficient reason is shown for retaining the bill in order to determine this controversy in the court of equity.

Thirdly, the order made *pendente lite* by the Postmaster General admitting the magazine to the second-class privilege as of September 24, 1907, was accompanied with an order that ascertained the legitimate list of subscribers, for the purpose of adjusting the postage that had been paid at the full rate for the October issue, at the number of 343,341, and authorized the postmaster to accept pound-rate postage on mailings as to subscribers of that number of copies, and an equal number of sample copies, and required him to charge postage at the transient second-class rate—one cent for each four ounces or fraction thereof—upon the mailings in excess of the number mentioned. Also, it is contended that the Department refused to allow the appellant to send copies to those whose subscriptions expired during a considerable part of the interval of suspension. But these are matters of administration, for the orders in question appear to have been made by the Postmaster General with respect to the new ap-

plication for admission to the second-class privilege that was made pending the suit, and granted, as already mentioned. They afford no proper ground for any kind of relief in the present action.

Decree affirmed.

SOUTHERN PACIFIC RAILROAD COMPANY *v.* UNITED STATES.

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

No. 269. Argued April 30, 1913.—Decided May 26, 1913.

The Land Grant Adjustment Acts of 1887 and 1896 did not provide for any recovery of interest on amounts for which the railroad companies were required to account for lands erroneously patented to them and sold by them to *bona fide* settlers; and there was no liability for such interest until the determination of the amounts for which the companies were liable to account.

In view of the whole situation, and all the circumstances involved in the determination of the amounts for which the Southern Pacific Railroad Company was liable to account under the Land Grant Adjustment Acts, *held* that such company was not liable for interest until after the amount due from it to the Government had been liquidated, and should be computed only from the date of the commencement of the suit brought by the Government to recover the same.

187 Fed. Rep. 737, modified and affirmed.

THE facts, which involve the construction of the Land Grant Adjustment Acts and the liability of the Southern Pacific Railroad Company thereunder for interest on amounts received by it for land erroneously patented to it, and the date from which such interest should be computed, are stated in the opinion.

Mr. Maxwell Evarts for appellant:

The United States was not entitled to recover any interest upon the amounts found to be due to it from the railroad by reason of the sale to *bona fide* purchasers of land which had been erroneously patented to the Railroad Company.

Congress never had in mind in these *Bona Fide* Purchasers Acts anything more than to make the Government whole as if the erroneous patents had not been granted. The erroneous patents were no fault of the Railroad Company. It was only after years of litigation that the patents were held to be erroneous. At the time the lands were granted nobody conceived that the lands were improperly patented or that the Railroad Company was not entitled to them. The Railroad Company has been guilty of no wrong and the Government is not undertaking to punish it for anything which it has done. If there was any wrong committed by erroneously issuing the patents to the Railroad it was a wrong committed by the United States and not by the Railroad. The Government issued the patents, not the Railroad. See 19 Op. Atty. Gen. 68, 72; Cong. Rev., Vol. 28, p. 1936.

If the Government is entitled to interest it can only be (1) from the date of the suit, or (2) from the date when the purchasers from the Railroad Company were held to be *bona fide* purchasers. By § 4 of the act of March 3, 1887, the Railroad Company is given ninety days after demand within which to pay to the Government $1.25 per acre for the land erroneously patented to it and conveyed by it to *bona fide* purchasers.

The date from which interest can be claimed (if it can be claimed at all) would be after the expiration of three months or ninety days from the demand of the Secretary of the Interior, and in the absence of knowledge of that date that interest can be claimed only from the time of the filing of the bill in this cause.

There is no theory upon which interest can be recovered in this case from March 2, 1896. The statute does not provide that in any action brought by the Government to recover the minimum government price for lands erroneously patented to a railroad company and sold by it to *bona fide* purchasers interest should be recovered from the date of the act.

Mr. Assistant Attorney General Knaebel, with whom *Mr. W. W. Dyar* was on the brief, for the United States:

Interest was recoverable. In California, where this litigation was prosecuted, it is proper and lawful to allow interest for the use or forbearance or detention of money (Civ. Code, § 1915), and seven per cent, the rate assessed by the Circuit Court, is the lawful rate in that State in cases similar to the present.

In this country interest is the natural growth, or incident, of money, and bears the same relation to it that rent does to land. *Woerz* v. *Schumacher*, 161 N. Y. 534, 536; *Spalding* v. *Mason*, 161 U. S. 375, 395; *Stewart* v. *Barnes*, 153 U. S. 456, 462; 22 Cyc., p. 1473.

Whether interest should or should not be allowed often rests largely in the discretion of the court.

In this case, as observed by the court below, the Railroad Company has held in its possession and enjoyed the use of money which, *ex æquo et bono*, belonged to the United States. It would be indeed remarkable if a court of equity were to allow this company the free use of public funds, to which it had no right, which it was its duty not to use but to pay over, and the payment of which, contrary to its duty, it has resisted to this day. *National Bank* v. *Mechanics' Bank*, 94 U. S. 437, 439.

The right to maintain the suit does not rest upon the adjustment acts. They do not impose, and perhaps could not impose, any obligation upon the company to pay the

moneys herein demanded. The Railroad Company never had any right to the lands in question. By mutual mistake, however, of the Land Department and the company, patents were issued and accepted. Thereafter the company sold the lands to good-faith purchasers and received and retained the purchase moneys. In this situation the Government had the right, independently of any statute, to recover the moneys so received. *Southern Pacific R. R. Co.* v. *United States*, No. 1, 200 U. S. 341, 352.

Interest being recoverable on a demand of this character, there is nothing in the adjustment acts to take away the right thereto. *Stewart* v. *Barnes*, 153 U. S. 456, 462.

Interest was properly calculated from March 2, 1896, the date when the last of the adjustment acts became effective. By the decisions in 146 U. S. 570 and 615, it had been determined that the Railroad Company had no right to the lands in controversy and that by that act, and on its date, the titles of the *bona fide* purchasers were confirmed. As the lands then went to the purchasers (*United States* v. *Southern Pacific*, 168 U. S. 1, 52), the right to the purchase money, to the extent of $1.25 per acre, accrued to the United States. The company being under an equitable obligation to account to the United States, if it continued to hold the moneys, was bound to pay the legal rate of interest thereon.

The duty to account actually arose before the act of 1896 was passed. *United States* v. *Southern Pacific R. R. Co.*, 146 U. S. 570; *United States* v. *Colton Marble Co.*, 146 U. S. 615; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1.

It is no hardship for one who has had the use of money owing to another to be required to pay interest thereon from the time when the payment should have been made. *Spalding* v. *Mason*, 161 U. S. 375, 396.

The mere pendency of litigation does not suspend interest unless the money is paid into court. Neither does

the uncertainty of the outcome. *Potter* v. *Gardner*, 5 Pet. 718, 721.

If any demand were necessary, a demand was made by the institution of suit No. 184, in 1891. *Kaufman* v. *Tredway*, 195 U. S. 271.

The 90-day period mentioned in § 4 of the act of 1887 respects only the duty of the Attorney General to bring suit. The dates when the tracts were finally entered were all prior to March 2, 1896. It was then, obviously, that the claims were "confirmed" and the demands made. Most of the patents were also prior to that date, though a few were subsequent.

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

The grant made to the Southern Pacific Railroad Company by § 23 of the act of Congress approved March 3, 1871, 16 Stat. 573, c. 122, overlapped a prior grant made to the Atlantic & Pacific Railroad Company by the act of July 27, 1866, 14 Stat. 292, c. 278. A forfeiture of the latter grant by the act of July 6, 1886, 24 Stat. 123, c. 637, was construed by the Land Department as causing the lands within the overlap to inure to the benefit of the Southern Pacific Company under its grant of 1871. In consequence, patents for a large quantity of land in California within the overlap were issued to the Southern Pacific Company.

The act of March 3, 1887, 24 Stat. 556, c. 376, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes," among other things provided for the immediate adjustment of all railroad land grants made by Congress; and upon the completion of such adjustment, if it should appear that lands had been, from any cause, erroneously

certified or patented by the United States to or for the use or benefit of any company claiming by, through, or under grant from the United States to aid in the construction of a railroad, it was made the duty of the Secretary of the Interior to demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and, if such company should neglect or fail to so reconvey such lands to the United States within 90 days after such demand, it should thereupon be the duty of the Attorney General to commence and prosecute in the proper courts, the necessary proceedings to cancel all patents, certificates, or other evidences of title theretofore issued for such lands, and to restore the title thereof to the United States. By § 4, citizens or persons who had declared their intention to become citizens and who had purchased lands from the railroad company in good faith, were authorized, on proof of the fact after the adjustment of the grant, to acquire patents from the United States. And it was among other things further provided that after the issue of patent, demand should be made for payment by the company, which had disposed of such lands, of an amount equal to the government price of similar lands; and in case of neglect or refusal to make payment within ninety days thereafter, the Attorney General was directed to cause a suit or suits to be brought therefor.

Referring to suits brought under this act of 1887, in an opinion delivered in *United States* v. *Southern Pacific R. Co.*, 39 Fed. Rep. 132, the District Court said (p. 137):

"While in these cases but a comparatively small amount of land is involved, the suits, it seems from a decision of the Secretary of the Interior rendered June 23, 1888, and reported in volume 6 of the decisions of the Department of the Interior, page 816, were instituted by the Government to test its right to a large amount of land similarly situated. That decision was made upon an application

on the part of the Southern Pacific Railroad Company that it be called on, under the act of Congress of March 3, 1887, for a reconveyance of the lands which were held by the Land Department to have been improperly patented to said company, so that upon a refusal to reconvey, suits might be brought by the Government to set aside such patents, and that no further patents should be issued to said company for lands in the limits of the forfeited grant to the Atlantic & Pacific Railroad Company; and also that the then subsisting withdrawal of lands within the primary grant limit of the Southern Pacific Railroad, (branch line,) which are also within the granted and indemnity limits of the Atlantic & Pacific Railroad, should remain undisturbed until the rights of the Southern Pacific Company could be determined by suits before the courts."

The court then observed, in substance, that the Secretary of the Interior acted favorably upon the application so far as related to the bringing of the test suits and for that purpose had divided "the lands covered by the grants into three classes, to-wit: (1) Lands within the common primary limits of the grant to the Atlantic & Pacific Railroad Company and of the grant to the Southern Pacific Railroad Company, (branch line); (2) lands within the primary limits of the grant to the Southern Pacific Railroad Company, (branch line), and within the indemnity limits of the grant to the Atlantic & Pacific Railroad Company; (3) lands within the indemnity limits of the grant to the Southern Pacific Railroad Company, (branch line), and within the primary limits of the grant to the Atlantic & Pacific Railroad Company."

The suits just referred to would seem to have been the first of the test suits. They were brought in 1889 by the United States in the Circuit Court of the United States for the Southern District of California for the purpose of quieting the title of the United States, to various tracts of land situate within the overlapping limits,

aggregating about 5342 acres and claimed by the defendants, viz: the Southern Pacific Company and other corporations and individuals asserting title under that company. The first of the cases involved lands within the grant or place limits and the second lands within the indemnity limits. No money recovery was prayed, other than costs of suit. The cases were ultimately decided in this court on December 12, 1892. *United States* v. *Southern Pacific Railroad Company*, 146 U. S. 570; *United States* v. *Colton Marble & Lime Company*, 146 U. S. 615. A third suit was begun by the United States in 1891, also to quiet title, cancel patents, etc., in respect to lands within the overlap. The Railroad Company, and the trustees under a mortgage, and also certain individuals and corporations were made defendants. The land affected by the suit aggregated about 700,000 acres—61,939 acres of which had theretofore been patented to the Railroad Company, and applications were pending for patents as to 72,000 acres. Although this suit sought to quiet the title of the Government to lands claimed by numerous individual defendants by purchase from or contract with the railroad company, the decree entered in the Circuit Court provided that it should not "affect any right which the defendants, or any of them, other than the Southern Pacific Railroad Company, now have or may hereafter acquire in, to, or respecting any of the lands hereinbefore described in virtue of the act of Congress entitled 'An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes,' approved March 3, 1887."

Despite the contention of the Railroad Company that the decisions in the former cases reported in 146 U. S., settled merely the status of the particular lands involved in that suit, it was held that those decisions were conclusive as to all the lands within the overlap. (168 U. S. 1).

Therein also, in an opinion delivered on October 18, 1897, after stating that the Circuit Court should have determined the rights of the defendants, other than the Railroad Company, in the lands in dispute, by virtue of the act of 1887, it was said (p. 66): "The effect of the decree is to leave undetermined the question whether the defendants who claim under the Southern Pacific Railroad Company are protected by that act or any other act of Congress." And the decree of affirmance rendered by this court was made subject "to the right of the government to proceed in the circuit court to a final decree as to those defendants."

While the last mentioned suit was pending in this court, Congress passed an act, approved February 12, 1896, 29 Stat. 6, c. 18, amendatory of the act of 1887, wherein it was further provided:

"That where such purchasers, their heirs or assigns, have paid only a portion of the purchase price to the company, which is less than the Government price of similar lands, they shall be required, before the delivery of patent for their lands, to pay to the Government a sum equal to the difference between the portion of the purchase price so paid and the Government price, and in such case the amount demanded from the company shall be the amount paid to it by such purchaser."

Congress also, on March 2, 1896, 29 Stat. 42, c. 39, passed another act relating to the same general subject as the act of March 3, 1887. The act of 1896, among other things, provided for the extension of time within which suits might be brought to vacate and annul land patents, and provided that no patent to any lands held by the *bona fide* purchaser should be vacated or annulled, but the right and title of such purchaser was by the act confirmed. In this connection it is to be borne in mind that the act of 1887 contemplated that the original erroneous patents or certifications should be annulled, and that new patents

should issue to *bona fide* purchasers from the railroad company, which should relate back to the date of the original certification of patent.

On the filing in the Circuit Court of the mandate of this court in the cause last referred to, the United States dismissed further proceedings as to certain defendants other than the Southern Pacific Railroad Company, and the trustees in the mortgage executed by that company, respecting certain tracts of land, and at the same time moved for a further decree against certain other defendants respecting particular tracts of land claimed by them. The decree of the Circuit Court (98 Fed. Rep. 46), determined as to various defendants claiming lands aggregating 43,315.67 acres for which no patents had been issued by the United States, that they were citizens of the United States and *bona fide* purchasers of the lands claimed by them "and entitled to make payments to the United States, and secure patents from the United States therefor, upon complying with the provisions of the act of March 3, 1887, in that behalf." As to other defendants claiming lands aggregating 9284.39 acres for which patents had been issued to the railroad company, it was adjudged that they were *bona fide* purchasers from and under the railroad, within the meaning of § 4 of the act of 1887, and within the meaning of the act of March 2, 1896. The title of these latter defendants and of their heirs, grantees and assigns to the lands claimed, was by the decree confirmed. The Government appealed the case to the Circuit Court of Appeals upon the contention that the court erred in adjudging that the defendants were *bona fide* purchasers within the meaning of the acts of Congress of 1887 and 1896, and on the affirmance by a decree of the Circuit Court of Appeals brought the case to this court where it was determined on January 27, 1902, by the opinion reported in 184 U. S. 49. And the record of the case so decided, introduced into the record before us by stipula-

tion, shows that in that case the Government not only prayed confirmation of the titles of the defendants found to be *bona fide* purchasers within the meaning of the act of March 3, 1887, but also that the United States "may have judgment against the defendant railroad company for the sum of two dollars and fifty cents per acre for all such lands, if any, which this honorable court may find to be held by the defendants here as such *bona fide* purchasers for value." The decree did not however provide for a pecuniary recovery and it does not appear why the Government failed to seek a decree in that respect.

On April 13, 1899, soon after the decision reported in 168 U. S. 1, an additional suit was commenced by the United States against the Southern Pacific Company, in regard to lands within the overlap, which was ultimately decided by this court on February 19, 1906, in an opinion reported in 200 U. S. 341. The defendants, in addition to the Railroad Company and the trustees under certain mortgages, were a number of individuals sued as representatives of a class. The relief sought was the confirmation of the titles of *bona fide* purchasers, the cancellation of the patents for other lands, and the recovery of the value of the lands conveyed by the Railroad Company to *bona fide* purchasers, in accordance with the Adjustment Acts of 1887 and 1896. A money recovery was had at the rate of $1.25 per acre, where the Railroad Company realized that amount on the sale by it, and interest was allowed at the rate of six per cent. per annum, from the date of the decree. *Southern Pacific R. Co.* v. *United States*, 133 Fed. Rep. 653, 654.

The United States filed its bill in this case on January 28, 1903,—about one year after the decision of this court in the case reported in 184 U. S. 49,—invoking the aid of equity as stated in the opinion below, "on the grounds of discovery, accounting, the establishment of a trust and the enforcement of a lien." The ultimate relief

sought, however, was a decree against the Railroad Company, under the acts of March 3, 1887 and March 2, 1896, for the statutory price of lands located within the overlap and described in two exhibits, A and B, which had been erroneously patented to the Railroad Company prior to the passage of the adjustment act of March 3, 1887, and which had been sold by the company to purchasers whose titles had been confirmed. Recovery of interest was not prayed. Exhibit A, embraced lands sold by the Railroad Company to *bona fide* purchasers who had applied to the Secretary of the Interior, under the provisions of the adjustment acts for and had received confirmation of their titles, to the respective lands purchased by them. The lands embraced in Exhibit B were all confirmed by the decree of the case reported in 184 U. S. 49, the purchasers being parties defendant in that suit. Some 1900 acres of the lands set out in Exhibit A were the subject of the suit reported in 146 U. S. 570, although the purchasers were not joined, and the remaining lands in that exhibit formed part of the lands which were the subject of the suit reported in 186 U. S. 49, the purchasers being parties defendants in that suit. A final decree was entered against the company (157 Fed. Rep. 96), for the principal sum of $40,124.30, together with interest thereon at the rate of seven per cent. per annum from March 2, 1896. This decree was affirmed by the Circuit Court of Appeals (186 Fed. Rep. 737), whereupon the Railroad Company took this appeal.

Presumably in view of the decision of this court in the case reported in 200 U. S. 341, the only assignment of error urged at bar concerns the award of interest, the main contention on behalf of the Railroad Company being that the statutes of 1887 and 1896, correctly construed, negative any right to interest, and in any event the date fixed by the court below from which interest was to run was erroneous.

It may not be doubted that testing the right to recover interest exclusively by the face of the Adjustment Acts such right would not obtain, since those acts expressly provide for the payment of a specified amount, the minimum statutory price of the land, without any expressions tending to support the conclusion that liability for interest was contemplated. On this subject, it was said in 200 U. S. at page 353:

"The acts of Congress really inure to the benefit of the Railroad Company and restrict the right of the Government, for they provide that the recovery shall in no case be more than the minimum Government price. In other words, the Government asks only its minimum price for public land, no matter what the value of the tracts or the amounts received by the company may be."

But it is unnecessary to further pursue this matter, since it is conceded by the Government that the right to recover interest here asserted depends not upon an express liability imposed by the adjustment acts but upon general principles of law as applied to the facts of the case. Primarily the argument causes the liability for interest to depend upon the fact that the Railroad Company received from those to whom it had sold the lands, the price thereof, of which moneys it has since had the possession, and therefore it should be condemned to pay interest from the time the money was received. As already pointed out, however, this theory conflicts with the plain purpose of the adjustment acts which was simply to provide for the settlement of a situation which had arisen by a common mistake, the Government taking back the land which had been patented and which the Railroad Company had not conveyed and confirming to *bona fide* purchasers the titles to lands which had been conveyed to them by purchase from the railroad, the Government to receive for such lands, merely the minimum statutory price, a provision which excludes the conception that it was conceived that

a liability was created, based upon an accounting between the Government and the railroads of benefits and profits. It is, however, insisted that upon principles of equity interest should be allowed for the following reasons: a. In view of the definite nature and liquidated character of the obligation of the railroad company to pay as manifested by the terms of the acts of 1887 and 1896, and b, as the result of the legal proceedings taken by the United States to enforce liability under the adjustment acts and the course of judicial decision thereon, all of which we have previously stated. The subjects are so interblended that we consider them together.

The interest, as we have already stated, was allowed below, from March 2, 1896, the date of the last adjustment act, as to which it is insisted in argument as follows:

"Then, certainly, if not before, the United States became the equitable assignee *pro tanto* of the purchasers' rights to recover what they had paid to the company through an innocent mistake; and then certainly, if not before, the company came under an equitable obligation to account to the United States. If it continued to hold the moneys beyond that time, it would be only reasonable and equitable to require it to pay the legal rate of interest."

But as we have pointed out, both the Adjustment Acts of 1887 and 1896 provided for no recovery of interest and in the bill in the case before us which is expressly based upon those acts there is no prayer for interest. It certainly cannot be admitted on the one hand, as has been done, that the act did not provide for interest, and yet it be on the other hand asserted that the act, intrinsically considered, imposed the liability for interest from the date of its passage. Indeed, both the adjustment acts, as we have already pointed out, were long since treated by this court as contemplating action by the Government to ascertain and fix the liability which arose from their enactment.

Now the history we have given of the various suits concerning the lands within the overlap shows that the case reported in 168 U. S. 1 and 184 U. S. 49, involved the question of who were *bona fide* purchasers of the larger part of the lands the statutory price of which is sought to be recovered in this suit, and that the United States appealed the case to this court, contesting the correctness of the holding of the courts below, as to defendants being *bona fide* purchasers, a question whose decision was essential to fix a pecuniary liability upon the company, which question was not and could not have been determined until the decision of this court on January 27, 1902.

The very foundation of the liability having thus been in litigation by the action of the Government, there is no reason for holding that, until that controversy was determined the pecuniary liability of the railroad company was so liquidated as to justify the awarding of interest. The question, therefore, is limited to determining whether the effect of the decree in the case decided in 1902, was to so fix the liability as to justify the awarding of interest from that date. We think not, for the following reason: In the suit which was terminated by the decree entered in 1902, the Government asked that in cases where the purchasers from the Railroad Company were found to have acted in good faith, within the meaning of the adjustment acts, it be decreed entitled to recover $2.50 per acre, instead of $1.25 allowed by the adjustment acts. While the decree of 1902 determined who were *bona fide* purchasers, contrary to the contention of the Government, it did not pretend to fix the resulting pecuniary liability or embrace affirmative language conclusively protecting against the enlarged claim which the Government made in the suit. Under these circumstances, we think it cannot be said that such a conclusive liquidation arose or was deemed by the Government to have arisen as to justify an award of interest. This conclusion is also fortified by the fact that

when subsequently, in 200 U. S. the Government obtained a decree for the price of similar land sold to *bona fide* purchasers, interest was awarded to it only from the date of the decree without apparently objection being made on the part of the United States. This is further fortified by the fact that in the bill in this suit, filed after the decision in 1902, no demand was made for interest.

Looking comprehensively at the whole situation, especially the decision rendered in 1902, considering that the withdrawal by the United States of the previously asserted right to greater compensation than the minimum statutory price, which was a necessary consequence of the filing of its bill in this case, of the averment of demand which the bill contained and the absence of any objection on the part of the defendant company because of prematurity, we think it is just to say that the liability for interest upon the statutory price arose at the date of the commencement of the suit and no sooner; and, therefore, that error was committed both in the trial court and in the Circuit Court of Appeals in not confining the commencement of the running of interest to that date.

It follows that the decree of the Circuit Court of Appeals to the extent that it affirmed the judgment allowing interest prior to January 28, 1903, be and the same is modified, and as so modified is affirmed and the cause is remanded to the District Court with instructions to enter a decree conformably to this opinion.

Modified and affirmed.

MERCHANTS NATIONAL BANK OF NEW YORK AND BANQUE COMMERCIALE DE BALE *v.* SEXTON, TRUSTEE IN BANKRUPTCY OF KESSLER & COMPANY.

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

No. 287. Argued May 2, 1913.—Decided May 26, 1913.

This court does not assent to the principle that one who takes an assignment of part of a claim secured by a common fund can, in the absence of a special agreement or necessary implication arising from particular circumstances, acquire more than a proportional right to the common security or the power to exclude his assignor in the event of a deficiency from participating therein to the extent of the portion retained.

The effect of bankruptcy is to so fix the relative rights of the different classes of creditors that it is not in the power of any class to set aside or frustrate as against the other, rights fixed by the adjudication in the assets of the estate, and it is the duty of the trustee to conserve and administer such rights.

A trustee, acquiring by purchase with assets of the general estate some of a series of notes on all of which the bankrupt is liable as endorser but which are all secured *pro rata* by a special fund with other notes of the same series and held by third parties, is subrogated by operation of law, as well as by subd. *c* and *f* of § 67 of the Bankruptcy Act, to all the rights of the parties from whom he purchased the notes and is entitled to share *pro rata* in such special fund as a holder of such notes.

The effect of a bank setting off against the bankrupt's credit balance a debt for which it holds collateral is to subrogate the trustee to all the rights of the bank in such collateral.

THE facts, which involve the power of the Trustee in Bankruptcy to use the funds of the estate on behalf of the general creditors to properly administer it and to conserve their rights, and the proportions in which the Trustee and creditors specially secured by a special fund shall share in such fund, are stated in the opinion.

Mr. George Zabriskie and *Mr. Henry G. Gray* for appellants submitted.

Mr. Wallace MacFarlane, with whom *Mr. Samuel J. Rosensohn* was on the brief, for appellee.

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

In July, 1904, Kessler & Company, bankers, contracted to give the R. B. McLea Company, engaged in business as importers and jobbers of dry goods, a line of credit up to $50,000 and in addition to advance money on the invoice price of goods imported and for the purpose of paying the duties thereon. The advances, it was agreed, should be evidenced by negotiable notes of the company in such amounts and to be furnished at such times as desired by Kessler & Company. It was also agreed that the company would hold its stock in trade as a security for all the advances to be made with interest charges and commissions, and that the company, when required to do so, would execute any assignments or deeds reasonably necessary to the accomplishment of the purpose in view. It was moreover agreed that all sales of merchandise made by the company should be subject to approval by Kessler & Company, and when approved, Kessler & Company would guarantee the amount and that the account sales should be transferred to them as security, the accounts, when collected, to be applied to the extinction of the debt. On October 30, 1907, Kessler & Company made a general assignment and were adjudicated bankrupts on November 6 following, when Lawrence E. Sexton was designated as receiver and was appointed trustee on December 30. In the nearly three and one-half years which elapsed between the agreement of July, 1904, and the adjudication in bankruptcy, in 1907, Kessler & Company advanced a

large amount of money to the company, and at the date of the bankruptcy there were outstanding notes to the amount of $96,000 given by the company under the agreement. Only one note for $7,000 was then held by Kessler & Company, the other notes having been used by the firm in the course of its business as collateral security for money by it borrowed, as follows: With the Merchants Bank of New York City, notes for $30,000; with the Bank Commerciale de Bale, notes for $15,000; with the National City Bank of New York City, notes for $39,000, and a note for $5,000 with Kessler & Company, Limited, Manchester, England.

It is not disputed that at the time Kessler & Company delivered the notes as collateral or when the arrangements were made for obtaining the credit to secure which the collaterals were given, the nature and character of the contract with the company was as stated and it is not controverted that as the result of these statements and the delivery of the collateral notes, holders of the notes became entitled to participate in the security. After the appointment of the receiver pending a rule taken by him against the company for the purpose of asserting his rights to the accounts and stock of merchandise securing the notes, an agreement was made between the receiver and the company which was sanctioned by the court and put in the form of an order in substance providing as follows: First, directing the receiver to collect any unpaid account sales of the company assigned under the contract of 1904 to Kessler & Company and forbidding the company from interfering with the discharge by the receiver of this duty; second, directing the company to pay over to the receiver the proceeds of any assigned account sale which had been collected by the company after the service upon them of the rule to show cause on November 16, 1907; and third, providing that an inventory be taken by the receiver and the company, of all merchan-

dise purchased "during the life of the contract" between the company and Kessler & Company, the possession of which was in controversy between the parties, without prejudice to the right of the trustee when appointed to enforce any claims as such trustee arising from sales or deliveries of merchandise by the McLea Company prior to November 16, 1907. The McLea Company was authorized to deliver any of the inventoried merchandise in fulfillment of orders theretofore received and to make further sales and deliver goods so sold, all however with the approval of the receiver. Provision was made for the deposit by the receiver of the proceeds of the accounts and by the McLea Company of the proceeds of the merchandise, to await further action, it being specially declared that the making of the order was without prejudice to any of the rights of the McLea Company as against Kessler & Company, the receiver or trustee in bankruptcy when appointed, and that the consent of the McLea Company to the order should not be construed as an admission against its interests or waiver of its rights. The trustee realized from the accounts a sum slightly in excess of $32,000, and the McLea Company, acting under the agreement approved by the court realized from the stock of goods a sum slightly in excess of $12,000, making about $44,000 held as security under the contract of 1904 for the payment of the McLea notes. The Merchants Bank and the Commercial Bank of Bale by proceedings not necessary to state, acquired for a small price, which was credited on the debt due them by Kessler & Company, the collateral notes of the McLea Company. On some or all of these notes, judgments were obtained and execution issued or threatened to be issued against the stock of the McLea Company. That company and the two banks thereupon entered into an agreement by which the stock of merchandise was assigned to a named trustee with the duty, as the stock was realized on, to turn over the

proceeds for the purpose of paying the two banks. As this agreement was made after the rule to show cause, issued on behalf of the receiver and the order of the court consequent thereon, it was expressly provided in the agreement that it was not intended to violate the order of the court, but that it was subject to the approval of the court.

At the time of the adjudication in bankruptcy, Kessler & Company had a deposit account in the National City Bank to which there was a credit balance of $27,000. Although it is not controverted that the bank held as collateral the McLea notes to the amount of $39,000, there is a contention as to the adequacy of the proof, showing the amounts due that bank, back of which the notes were held as collateral. We content ourselves, however, on this subject with saying that we think it is not subject to be controverted on the record that the National City Bank had a claim for $39,000 and that it set off the deposit of $27,000 against this claim of $39,000 and that the trustee, in order to protect the bankrupt estate, paid the additional $12,000 and received from the National City Bank the $39,000, of McLea collateral notes, along with some other collaterals, the nature and amount of which is not disclosed.

The Merchants Bank and the Commercial Bank of Bale, having made a claim to a special right to the proceeds of the stock of merchandise, concerning which they had made the agreement above stated with the McLea Company, their claim was referred for consideration, to a special master. The receiver, the two banks, and Kessler & Company, Limited, of Manchester, being before the master, an agreement was entered into by which it came to pass that the master was called upon to consider and determine upon the facts, as we have stated them, the special rights of the parties in and to the fund derived from the stock of merchandise of the McLea Company

and the amount which had been collected from the account sales of merchandise.

Prior to the arising of the controversy now before us, it seems that a somewhat similar contest had arisen in the Kessler & Company bankruptcy, and had been decided by the District Court. The facts in such prior case were these: Kessler & Company had made an agreement with the firm of Milne, Turnbull & Company, to give financial assistance and take charge of the collection of account sales, etc., upon terms and conditions substantially like those embraced in the contract with the McLea Company which is now under consideration. Under that contract, Kessler & Company had received notes, had transferred some of the notes as collateral to the Merchants National Bank, and to Kessler & Company, Limited, of Manchester and had retained the remainder. Under these circumstances the question which arose was, how should a sum of money derived from the account sales or stock of Milne, Turnbull & Company, which was a security for the outstanding notes, be distributed among the holders of the notes; that is, it being insufficient to pay all the notes, should it be ratably applied, or was Kessler & Company as assignor to be excluded from the distribution until the assignees had been paid? Considering that the question was open and not settled, under the local law of New York, the court came to determine it by its appreciation of principles of general law and held that as Kessler & Company, as transferror, occupied a trust relation, that firm could not be allowed to violate its trust by diminishing the security which otherwise would be attributable to the transferred notes. Considering the relation of the transferees between themselves, it was decided that although the act of Kessler & Company, after having transferred some of the notes, in transferring others, was a breach of trust, the second transferee was unaffected thereby and therefore the fund was subject to be distributed between

the two transferees *pro rata* to the exclusion of Kessler & Company, or its trustee. The court said:

"It seems to me that that is exactly the situation here: Kessler was solely entitled to receive the proceeds of the accounts payable pledged by Milne, and he so remained down to the time of these bankruptcies. These accounts were, to be sure, security for all the notes that Kessler had, but when he assigned some of the notes he became a trustee for his assignee to the extent of the face value of the notes in question.

"It can hardly need authority to show that in a court of equity the *cestui que trust* is actually seized of the trust property; he may alien it, and any legal conveyance by him will have the same operation in equity upon the trust as it would have had at law upon a legal estate. *Croxall* v. *Shererd*, 5 Wall. 281, 18 L. Ed. 572.

"It can make no difference that a holder of collateral securing several notes assigns them successively and thereby diminishes the value of each note in the event of deficiency. Each *cestui que trust* takes his chances of that, but if (in this case) Kessler became a trustee for the bank by the act of assignment, no act of his, nor any change in his circumstances can change his relation to the *cestui que trust* he himself created. To the extent of his ability he is at all times bound to account for the trust he had himself created, and that duty has by operation of law descended to his trustee in bankruptcy."

In the light of this ruling in the previous case, the special master, in deciding this controversy concluded that the receiver of Kessler & Company as assignor was not entitled, as to the $7,000 or the $39,000 of McLea notes which he held, to participate in the distribution and therefore the fund should be ratably distributed between the Merchants Bank, the Bank of Bale and Kessler & Company of Manchester. Under this view the master concluded that it was unnecessary to consider the claim made

by the two banks that because of the agreement with the McLea Company subsequent to the bankruptcy they were exclusively entitled to the proceeds of the stock of merchandise.

When the District Court came to consider a motion to confirm the report, its previous decision in the Milne, Turnbull & Company case was pending undetermined on appeal in the Circuit Court of Appeals. While adhering to the ruling made in that case, it was nevertheless decided that the master had erred in considering that case as decisive of the right of the trustee as the holder of the $39,000 of collateral notes, to participate in the security to the extent that the general funds of the bankrupt estate had discharged the principal debt of the National City Bank, on the ground that to the extent of such payment, the trustee, as the representative of the general creditors, was, by operation of law subrogated to the rights of the bank. In addition to this general right of subrogation, it was held that the right of the trustee to participate to the extent stated was secured by the provisions of subdivisions c and f of section 67 of the Bankruptcy Act. Disposing of the right asserted against the proceeds of the stock of merchandise, it was decided that whatever might have been the infirmity, for want of delivery, if any, of the agreement constituting the stock as a security it was too late to raise such question on behalf of the Merchants Bank and the Bank of Bale, after the trustee had virtually, as a result of the agreement, sanctioned by an order of the court, taken possession of the stock for the purpose of carrying out the agreement. Thereafter, the ruling made in the Milne, Turnbull & Company case was affirmed by the Circuit Court of Appeals upon substantially the reasoning which controlled the court below (*In re Milne*, 185 Fed. Rep. 244) and that court, in affirming the action of the trial court taken in this case, also approved and adopted the

reasoning which caused the trial court to permit the trustee to participate, to the extent stated, in the fund held by him as security for the payment of the collateral notes. The court however, while referring to the right asserted by the Merchants Bank and the Bank of Bale, to exclusively participate on special grounds in the proceeds of the stock, made no ruling on the subject; and error with reference to that matter, as well as with regard to the ruling, permitting the trustee to participate to the extent allowed in the funds securing the collateral notes, are the subjects which we are called upon to consider on this appeal taken by the Merchants Bank and the Bank of Bale.

Although it be conceded for the sake of argument that the power conferred upon Kessler & Company to control the sales of merchandise, did not operate to take this case out of the rule as to delivery, which was upheld in the cases relied upon, we nevertheless put out of view the contention of the two banks, concerning their particular right to the merchandise fund, for the following reasons: *a*, because we think the trial court was clearly right in holding that after the trustee had virtually exerted, under the sanction of the court, with the assent of the McLea Company, the power to take legal possession of the stock, it was too late for the two banks as a result of an agreement with the McLea Company, thereafter made, to raise the question of whether the original agreement as to the stock between Kessler and the McLea Company was ineffective to operate a lien as to creditors because of the want of delivery; *b*, as the two banks were seeking to enforce the contract and the lien arising therefrom, so far as the avails of the account sales were concerned, we do not think they could be heard to disintegrate the contract by enforcing rights given under one provision and repudiating another provision, the two being under the contract indissolubly associated, the one being the complement of the other.

Underlying the question of the right of the trustee to participate to the extent of the general estate absorbed in acquiring the $39,000 of collateral notes in the fund securing all such notes is the ruling made by the court below in *In re Milne, supra.* As, however, no appeal was taken in the *Milne Case* and the trustee has not here appealed and it is possible to dispose of the case upon the grounds upon which it was rested below, without reëxamining the broader and more fundamental ruling involved in *In re Milne,* we shall confine our attention to the narrower question here arising. In doing so, however, in view of the importance of the subject and of its far-reaching effect, we do not desire, even by implication, to be understood as giving our assent to the principle that one who takes an assignment of part of a claim secured by a mortgage or other lien upon a common fund, thereby, in the absence of special agreement or necessary implication arising from particular circumstances, acquires anything more than a proportional right to the common security, or the power to exclude his assignor in the event of a deficiency, from participating in such fund to the extent of the portions of the claim held by him. Moreover, for the same reason which causes us to make the reservation just stated, we also desire to expressly exclude any inference that our opinion is that under the contract here involved, and the facts here disclosed, there was either an express agreement or anything justifying an implication which would take the case out of the rule of proportional distribution, if that rule were otherwise applicable.

By the effect of the bankruptcy, the rights of the parties became fixed. The collateral note holders had a fund specially applicable to the payment of their debt, and the general creditors had the general fund to which alone they could look for the discharge of what was due them. It was in the power of neither class to set aside or frustrate as against the other the rights fixed by the adjudication

and which it was the duty of the trustee to conserve and administer. The fund on deposit to the credit of the general estate was an asset of that estate. True, it was subject to be set off, that is, compensated, by the debt due to the National City Bank. But the exercise by that bank of the right of set-off did not change the character of the two funds and could not confer upon the National City Bank the power to pay its debt out of the general fund and thereby diminish the general estate and increase the share of the security fund distributable among those entitled to participate in that fund. The impossibility, legally, of bringing this result about, at once demonstrates the application to the situation of the elementary principle of legal subrogation which for the protection of the general fund gives to that fund and to its representative, the trustee, the right to exercise against the special fund, recourse to the extent necessary to prevent the inequality and destruction of right which otherwise would result. To suppose that that principle here finds no application, because Kessler & Company itself, the bankrupt, if it had held the collateral notes could not enforce them under the principle decided in *In re Milne ub. sup.*, as lucidly pointed out by the court below, is but to disregard the situation resulting from the adjudication in bankruptcy and to destroy the equality of distribution, which it was the purpose of that act to secure. Nothing could more clearly demonstrate this conclusion, than a consideration of the result to be brought about by taking the opposite view, since if that is done, the situation existing at the time of the adjudication would be seriously changed, the rights of the general creditors would be lost, and those of the secured creditors would be greatly enlarged. But resort to the principle of legal subrogation is not here necessary, as the subject is fully covered by subdivisions c and f of § 67 of the bankruptcy act, especially as elucidated by *First National Bank* v. *Staake*, 202 U. S. 141. Moreover,

even though it be admitted that there would be a possibility if the text were narrowly considered, to take this case out of the operation of the section, its obvious spirit and intent, as illustrated and made cogent by the entire text of the act, by the purpose which it was intended to subserve, the distinction between secured and unsecured creditors which it draws, all conclusively demonstrate the correctness of the principle which the court below applied, and by which it held this case was not controlled by the doctrine by it announced in *In re Milne.*

Affirmed.

WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING COMPANY *v.* INTERNATIONAL CURTISS MARINE TURBINE COMPANY.

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 1032. Petition for writ of certiorari submitted April 14, 1913.—Decided May 26, 1913.

This court does not sanction the procedure of the trial court in virtually declining to examine the merits of the case and entering a *pro forma* decree for the sake of expediting the hearing of the case on appeal, even though the court were actuated in so doing by a sense of public duty.

Under § 120 of the Judicial Code, which is a reënactment of a provision to the same effect in the act of March 3, 1891, a judge who has heard the case in the first instance may not sit in the Circuit Court of Appeals for the purpose of reviewing his own action, even though in the court below he merely entered a decree *pro forma* without expressing any opinion on the merits and no objection was raised by either party to his sitting in the Circuit Court of Appeals.

The trial and disposition of a case by a court organized in violation of a direct provision of statute is such a grave error and involves con-

siderations of such public importance as make it the duty of this court to allow a writ of certiorari without considering the merits.

Where it is manifest on the petition for certiorari that the judgment sought to be reviewed was rendered by a court not properly organized, this court need proceed no further; in such a case the writ of certiorari may be granted, the petition stand as a return to the writ, the judgment reversed and the cause remanded.

THE facts, which involve the construction of § 120 of the Judicial Code prohibiting the judge passing on the cause in the first instance from sitting in the Circuit Court of Appeals, and the procedure of this court in regard to a case here on petition for certiorari in which such a condition exists, are stated in the opinion.

Mr. James R. Sheffield, Mr. Clifton V. Edwards and *Mr. Samuel Dickson* for the petitioner.

Mr. Frederick P. Fish and *Mr. R. N. Dyer* for the respondents.

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

The Curtiss Marine Turbine Companies, the respondents, as the owners of several United States letters patent, sued the Cramp & Sons Ship and Engine Building Company, the petitioner, for infringement, because that company had contracted with the Navy Department to build certain torpedo boat destroyers to be propelled by turbine engines, which were to be constructed by the Cramp Company in accordance with specifications which, it was alleged, would cause the engines when built in accordance with the contract, to infringe the patents sued upon.

The Cramp Company questioned the jurisdiction of the court on the ground that as it had made or proposed to make no engines which could under any possible view be

an infringement of the patents sued on, except the engines which it was engaged in making for the United States, for use in its war vessels, there was no right to an injunction and therefore no jurisdiction in equity. Defenses as to the merits of the cause were also set up challenging the novelty of the matters covered by the patents sued upon and denying in any event that the engines to be built under the contracts would infringe the patents relied upon. When the case was ripe for hearing, on February 1, 1911, it was argued and taken under advisement by the court. On April 10, the court announced the following memorandum opinion:

"Since the argument of this case the current business of the court has engaged my time so fully that I have not been able to consider it. If it is to receive the study it requires, at least two or three weeks' continuous attention would be necessary. Other matters also, to which I need not refer more particularly, have concurred to prevent me from taking it up, and I have therefore decided to enter a *pro forma* decree, in order to send the controversy to the Court of Appeals as speedily as possible. I wish to add with emphasis that the decree now to be entered in favor of the defendants is not to be construed as affording the slightest intimation of my opinion concerning the merits. I have formed no opinion whatever on that subject; but, as the unusual importance of the suit will certainly carry it to the appellate courts, I feel justified under the circumstances in making a purely formal disposition of the matter in its present stage.

"The clerk is directed to enter a decree dismissing the bill. For the present, no order concerning costs will be made in this court."

A *pro forma* decree was entered against the complainants dismissing the bill. The case having been taken to the Circuit Court of Appeals, that court found that one of the patents sued upon was valid and had been infringed. The

decree of the District Court was therefore reversed and the case was remanded with directions to enter a decree for damages but without allowing an injunction. For the purpose of hearing and disposing of the case, the Court of Appeals was composed of two circuit judges and of the district judge who had heard the case below, had announced the memorandum opinion and had entered the *pro forma* decree of dismissal. In disposing of the case the court, referring to the action of the trial court in entering the *pro forma* decree, said:

"In order to secure an early hearing by a full bench of this court and with its consent a formal decree was entered by stipulation. On appeal the cause is now really heard at first instance, and finally by this court."

On the refusal by the court below, of an application to rehear, the application for certiorari, which we are now considering, was made. It is based upon the following grounds which it is insisted involve considerations apart from questions of mere error, of so grave a character and of such general importance as to justify the allowance of the writ of certiorari for their correction. First, the action of the trial court in failing to examine and pass upon the case, and in entering a merely *pro forma* decree as a means of expediting the ultimate and final decision of the cause in the Circuit Court of Appeals. Second, the participation by the District Judge who had heard the case below and had entered the decree which was under review in the hearing and decision of the case in the Circuit Court of Appeals. Third, the public consideration which the decision of the cause involves as demonstrated by the fact that the only act of infringement relied upon, consisted in the execution by the defendants of a contract with the Government for the construction of vessels of war.

As to the first ground, however much we may appreciate the sense of public duty which led the trial court virtually to decline to examine the merits of the case and enter the

pro forma decree so that no time might be lost in taking the case to the Circuit Court of Appeals, we do not wish to be understood as giving our sanction to such procedure. Although we say this, we nevertheless think the contention which is based upon the action of the court, in this respect, is without merit, first, because no objection seems to have been made concerning the matter in the trial court, and none, it also seems, was raised on the hearing in the Circuit Court of Appeals. Indeed, that court, as we have pointed out, considered that the action of the trial court was the result of a stipulation between the parties. While it is true the accuracy of this conception of the situation is questioned in the brief filed on this hearing, by the petitioners, it is not suggested that any objection was made in the trial court to the entry of a merely *pro forma* decree or that any error was predicated upon such action when the case was heard in the Circuit Court of Appeals.

The second proposition is of graver moment because of the proviso to § 120, of the Judicial Code, saying "that no judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals." This provision is but a reënactment of a prohibition found in the Judiciary Act of March 3, 1891, 26 Stat. 826, chap. 517, and its controlling application to this case is not open to controversy. *Rexford* v. *Brunswick-Balke Co., ante,* p. 339, 344, and cases cited.

But it is said, although the strict letter of the prohibition may be here applicable, its spirit and purpose are not here controlling because the judge who heard and disposed of the case in the first instance, and who sat in the Circuit Court of Appeals for the purpose of reviewing his own action did not in substance form or express an opinion on the case in the first instance, but merely entered a *pro*

forma decree for the purpose of enabling the case to be heard for the first time by the reviewing court acting *pro hac vice* as a court of first instance. This contention is devoid of merit, since it must rest upon the conception that a trial judge, despite the express prohibition of the statute, may endow himself with power to sit in the Court of Appeals and review a decree by him rendered if only from a mistaken sense of duty he has adjudicated the merits of a case without considering them. It is urged, however, that as no objection was made to the participation of the trial judge in the hearing and decision of the case in the Circuit Court of Appeals, and indeed that consent was given to his doing so, the objection is not now open, and the statute therefore should not be applied. Conceding, however, that the asserted consent was given, the error of the conclusion based upon it is conclusively demonstrated by the construction long since affixed to the statute, and quite recently reiterated and enforced in *Rexford* v. *Brunswick-Balke Company*, *supra*. Indeed, as pointed out in the *Rexford Case*, the comprehensive and inflexible character of the prohibition was intended to prevent resort to consent of the party or parties as a means of qualifying a judge to participate in the decision of a case in the Circuit Court of Appeals, when without such consent, because of the prohibition of the statute, he would be disqualified from so doing, a purpose whose public policy is not difficult to understand.

As the considerations just stated demonstrate that the case was tried and disposed of below, by a court organized, not in conformity to law, but in violation of the express prohibitions of the statute, we think it plainly results that an error of so grave a character and involving considerations of such public importance was committed as to cause it to be our duty to allow the writ of certiorari, without at all considering for the purpose of such allowance the questions urged concerning the merits of the cause.

In view, however, of the character of the error which causes us to allow the writ, that is, the mistaken organization of the court below, the question naturally arises, what is our immediate and further duty; that is, must we, after granting the writ, permit the case to remain on the docket until in turn it is reached for hearing, or should we at once, on the allowance of the writ, remand the case so that it may be heard and disposed of in the court below, conformably to the statute? If the first course be pursued, it is obvious not only that delay must follow, but that when the merits are heard we will be virtually exerting the powers of a court of first instance, since we will be called upon, not to review the action of a court below, organized conformably to law, but to decide, virtually in the exercise of original jurisdiction, questions which the law contemplated should be previously passed upon by an inferior court lawfully constituted. Under such circumstances we think, as pointed out in *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267–268, our duty is not to hold the case upon the docket, for ultimate decision upon the merits, but to at once reverse and remand to the court below so that the case may be heard by a competent court, conformably to the requirements of the statute. When on approaching in the *Lutcher & Moore Case* the consideration of the merits of the case, pending because of a previous allowance of a writ of certiorari, it developed that the Court of Appeals had virtually failed to decide the case and therefore that a review of the merits here would be in substance but the exercise of original jurisdiction it was held that the duty was not to do so, but to remand the cause to the Circuit Court of Appeals, so that that court might properly discharge the duty cast upon it by law. Such conclusion is of course cogently applicable here, where the question is not merely an error committed by the Circuit Court of Appeals in failing to decide the merits, but an error resulting from the fact

that the Circuit Court of Appeals which passed upon the case, was virtually no court at all, because not organized in conformity to law.

Our orders will therefore be:

Writ of certiorari granted; the record of such writ to stand as a return. And,

The decree of the Circuit Court of Appeals will be reversed and the cause remanded with directions for further proceedings in conformity to this opinion.

MATTER OF THE APPLICATION OF SPENCER, EX PARTE.

MATTER OF THE APPLICATION OF SCHOLL, EX PARTE.

MATTER OF THE APPLICATION OF MOYER, EX PARTE.

MOTIONS FOR LEAVE TO FILE APPLICATIONS FOR WRITS OF HABEAS CORPUS.

Nos. 16, 17, 18, Original. Argued April 28, 1913.—Decided May 26, 1913.

It is only in exceptional cases that this court will interfere by *habeas corpus* with the course, or final administration, of the criminal justice of the States by their respective courts, *Urquhart* v. *Brown*, 205 U. S. 179, and this rule applies as well after, as before, sentence.

Justice is satisfied by the opportunity given to defendants accused of and tried for crime in the state courts to set up their Federal rights in those courts, and the course of criminal justice will not be deranged and possibly defeated by permitting the defenses based on such rights to be raised for the first time by *habeas corpus* in the Federal courts after sentence in the state court.

The writ of *habeas corpus* is not to be used as a writ of error.

Where, as in Pennsylvania, the judgment of the trial court in criminal cases is subject to modification, as well as affirmance or reversal, by the appellate court, and a sentence partly legal and partly illegal under the state law can be modified by striking therefrom the illegal part, such sentence is erroneous and not void; this court will not, therefore, on *habeas corpus* pass upon the question of legality of the part of the sentence complained of. The proper procedure is to review the judgment on appeal. *Ex parte Lange*, 18 Wall. 163, distinguished.

It is not the duty of this court to anticipate the decision of the state court as to the effect of one state statute upon an earlier one, or to declare which of two rules supported by conflicting decisions the state court will apply.

THE facts, which involve the jurisdiction and practice of this court in regard to issuing writs of *habeas corpus* in cases where the petitioners have been sentenced in the state courts, are stated in the opinion.

Mr. M. C. Rhone and *Mr. W. H. Spencer*, with whom *Mr. F. P. Cummings* was on the brief, for petitioners:

The Indeterminate Sentence Act, in force at the time the crime was committed, restricted the minimum sentence of imprisonment to not more than one-fourth of the maximum; for the particular crime charged in this case, the highest minimum possible was six months; that law was repealed after the commission of the crime without any saving clause, and a new indeterminate sentence law was passed leaving it entirely within the discretion of the court as to the minimum sentence of imprisonment to be imposed; the court imposed a minimum sentence of eighteen months imprisonment; the new law is, therefore, *ex post facto* as to a crime committed before its passage. *In re Medley*, 134 U. S. 160; *Fletcher* v. *Peck*, 6 Cranch, 87; *Kring* v. *Missouri*, 107 U. S. 221; *Calder* v. *Bull*, 3 Dallas, 386; *Commonwealth* v. *Shopp*, 1 Woodward (Pa.), 123.

Such new law as to the petitioner being *ex post facto*,

and the part of the sentence based thereon being invalid, then, having complied with the valid part of the sentence by paying the fine and costs of prosecution, the petitioner is entitled to a discharge from further imprisonment for such offense. *People* v. *Lipscomb* (*Tweed's Case*), 60 N. Y. 559; *Ex parte Lange*, 18 Wall. 163; Hurd on Habeas Corpus, Ch. 6, § 2.

Extending the minimum term of imprisonment from 6 months to 18 months, inflicts a heavier punishment upon the petitioner, and deprives him of a substantial right or benefit; and in relation to the offense and its consequences, it alters the situation of the petitioner to his disadvantage. As it does all of these things, the law is *ex post facto*, as to him.

For authorities bearing on the system of indeterminate sentences which has worked a revolution in criminal procedure, see *Miller* v. *State*, 49 N. E. Rep. 894.

As to the effect and character of the release upon parole, see *People* v. *Cummings*, 88 Michigan, 249; *State* v. *Peters*, 43 Oh. St. 629; *Re Conditional Discharge of Convicts*, 51 Atl. Rep. 10.

The express design of the Indeterminate Sentence Act is to ameliorate the situation of the convict and to mitigate his punishment, not to aggravate it, as it would do, if the sentence were for the maximum period.

It is thus seen that the right of the convict to apply for his discharge at an early day is a very substantial one; and to deprive him of this right, or to postpone its exercise for a considerable length of time, is to substantially increase his punishment. Cases *supra* and *Thompson* v. *Utah*, 170 U. S. 343. To deprive him in any manner of such right or privilege would be to increase the penalty. *Murphy* v. *Commonwealth*, 172 Massachusetts, 267.

For definition and general nature of *ex post facto* laws, see cases *supra* and 12 Am. & Eng. Enc., 2d ed., p. 525; *United States* v. *Hall*, 2 Washington, 366; *In re Murphy*,

87 Fed. Rep. 549; *Commonwealth* v. *McDonough*, 13 Allen, 581; *Wilson* v. *Ohio & Miss. R. R. Co.*, 64 Illinois, 542.

Petitioner could not be sentenced under the act of 1909, as that act was repealed, without any saving clause, and where a statute is repealed without a saving clause, a pending proceeding under it falls. 12 Cyc., p. 956; *Hartung* v. *People*, 22 N. Y. 95; 12 Am. & Eng. Ency., p. 530.

The Court of Quarter Sessions was without jurisdiction to impose any imprisonment in the penitentiary for the offense committed, and particularly had no jurisdiction to impose a sentence with a minimum of 18 months.

Where the court imposes a sentence which is part valid and part invalid, it is valid to the extent that the court had power to impose it, although it is void as to the excess. 12 Cyc., p. 782; *In Re Johnson*, 46 Fed. Rep. 477; *Ex parte Lange*, 18 Wall. 163.

If the judgment is void or is simply in excess of that which the law does authorize, and the same, in so far as it is authorized by law, has been performed, it may be assailed collaterally and *habeas corpus* is a proper remedy. *Ex parte Bowen*, 6 So. Rep. 65 (Fla.), citing *In re Crandell*, 34 Wisconsin, 177; *Ex parte Gibson*, 61 California, 619; *People* v. *Lipscomb*, 60 N. Y. 559; *In re Feeley*, 12 Cush. 598; Hurd on Habeas Corpus, Ch. 6, § 2.

Where an illegal sentence has been imposed, a prisoner may be remanded for a new sentence which is legal, provided no part of it has been performed by the prisoner. But where a sentence has been imposed, which is part legal and part illegal, and the legal part of the sentence has been performed, the power of the court is exhausted and no second or further sentence can be imposed. *Ex parte Lange*, 18 Wall. 163.

Mr. Max L. Mitchell and *Mr. N. W. Edwards*, with whom *Mr. A. M. Hoagland* and *Mr. John C. Bell*, Attorney

General of the Commonwealth of Pennsylvania, were on the brief, for the respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

These applications were filed and rules to show cause were issued. They were argued together and may be disposed of in one opinion.

The petitions alleged the following:

Petitioners were indicted in the Court of Quarter Sessions of the Peace, in the county of Lycoming, State of Pennsylvania, upon a charge of conspiracy to cheat and defraud, which the indictment charged was executed on the tenth day of September, 1910.

The trial took place in June, 1912, and petitioners were each sentenced to "pay a fine of $500, costs of prosecution, and undergo an imprisonment in the Eastern Penitentiary at Philadelphia, for an indeterminate period, at separate and solitary confinement, at labor, the minimum of which should be eighteen months and the maximum two years."

The costs and fines have been paid. In execution of the sentences of imprisonment, Robert J. McKenty, warden of the penitentiary, holds petitioners in custody in violation of § 10 of Article I, of the Constitution of the United States, which forbids any State to pass an *ex post facto* law, and in violation of the Fourteenth Amendment to the Constitution of the United States in that petitioners are deprived of their liberty without due process of law.

At the time the offense was committed (September 10, 1910), the laws of Pennsylvania provided, in § 128 of the Crimes Act of March 31, 1860, P. L. 382, that one convicted of the crime of conspiracy to cheat and defraud should be, on conviction, "sentenced to pay a fine not exceeding $500.00 and undergo an imprisonment at

separate and solitary confinement, at labor, or by simple imprisonment not exceeding two years." This act was amended and modified by the act of May 10, 1909, P. L. 495, known as the first Indeterminate Sentence Act, which provided, *inter alia*, as follows:

"Whenever any person convicted in any court of this Commonwealth of any crime shall be sentenced to imprisonment in either the Eastern or Western Penitentiary, the court, instead of pronouncing upon such convict a definite or fixed term of imprisonment, shall pronounce upon such convict a sentence of imprisonment for an indefinite term, stating in such sentence the minimum and maximum limits thereof, fixing as the minimum time of such imprisonment the term now or hereafter prescribed as the minimum imprisonment for punishment of such offense; but if there be no minimum time so prescribed, the court shall determine the same, but it shall not exceed one-fourth of the maximum time, and the maximum limit shall be the maximum time now or hereafter prescribed as a penalty for such offense."

By the terms of these two acts, which were the law for petitioners' punishment at the time their crime was committed, the most severe punishment which could be inflicted upon each of them was a fine of $500, and imprisonment in the penitentiary for the minimum term of six months, and a maximum term of two years.

Nearly a year after the crime was committed the legislature of Pennsylvania repealed the act of May 10, 1909, without any saving clause, and enacted the act of June 19, 1911, under which petitioners were sentenced. By the terms of the latter act the length of the minimum term of imprisonment is wholly within the discretion of the court, provided it does not exceed the maximum term.

Petitioners will contend that the maximum sentence which could have been inflicted upon them, if the court selected the alternative imprisonment rather than the

simple imprisonment as provided in the act of 1860, would have been "not less than six months nor more than two years at separate and solitary confinement, at labor."

Petitioners, however, were sentenced each to pay a fine of $500 and costs, and to be imprisoned for an indeterminate period, the minimum of which should be eighteen months and the maximum two years.

To the rules to show cause, the answer of the warden has been filed. It asserts the legality of the sentences and the following reasons why the writs should not issue: Petitioners, after sentence, took an appeal to the Superior Court of Pennsylvania, where the sentences were affirmed. Subsequently they presented a petition to the Supreme Court of the State praying for a special allocatur to allow an appeal from the judgment of the Superior Court, which petition was refused. In neither court did they raise the question of the constitutionality of the statute of June 19, 1911, or complain that the sentences were imposed under an *ex post facto* law, excessive or in other respects unconstitutional.

Afterwards, petitioners petitioned the Supreme Court of the State for a writ of *habeas corpus* to the sheriff of Lycoming County, in whose custody they then were, for delivery to the warden, and in their petition raised the same questions which they now raise in their petitions here. The court refused the petition. The petitioners then applied to the judge of the District Court of the United States for the Middle District of Pennsylvania for *habeas corpus*, raising the same questions as here. The petition was refused. This action of the courts is averred to be an adjudication of the questions here involved. And it is averred that the view most favorable to petitioners is that the sentences imposed upon them are legal and valid sentences for a term of at least six months, and they have not yet served so much of the term.

The petitions and answer to them indicate the contentions of the parties. The petitioners contend that their sentences are illegal in that they were imposed under a law which is *ex post facto* and violates Article I of the Constitution of the United States, and that they are deprived of their liberty in violation of the Fourteenth Amendment. Respondent opposes the contentions and urges besides that they have been adjudicated against petitioners and that they are seeking to use *habeas corpus* as a writ of error to review and reverse the judgment of the courts of Pennsylvania. One of the contentions of respondent is that it is too late for petitioners to avail themselves of the objections they urge to their sentences; another contention is that their applications are premature, the sentences being at least valid for six months, which had not expired when the petitions were filed.

Petitioners certainly had ample opportunity to avail themselves of the objections they make to the validity of the sentences. They had it when they were brought up for sentence. They had it when they appealed to the Superior Court. They had it when they applied to the Supreme Court to allow an appeal from the judgment of the Superior Court. And this would have been the orderly course, and efficient as orderly. It would have been orderly because their objections would then have been made in the courts ordained to administer the law applicable to the crime; efficient, because if error was committed against constitutional rights it could have been reviewed and corrected by this court. And surely even a defendant in a criminal case cannot complain if in the tribunals in which he is arraigned for crime, he has opportunity to deny the crime, require its proof, resist unjust or excessive punishment and have a review of all rulings through the successive state tribunals and finally in the ultimate court of review upon questions under the Constitution of the United States. This being a defendant's opportunity, we

have declared many times that it would only be an exceptional case when we should interfere by *habeas corpus* with the course or final administration by the state courts of the criminal justice of a State. The cases are very numerous. They are cited in *Urquhart* v. *Brown*, 205 U. S. 179 and *In re Lincoln*, 202 U. S. 178. In those cases, following other cases, the rule is laid down and some of the exceptional circumstances which might justify its departure are indicated, and the discretion which this court may exercise. In *Bailey* v. *Alabama*, 211 U. S. 452, reviewing a judgment of the Supreme Court of Alabama which affirmed a judgment of a lower court denying a discharge on *habeas corpus* to the plaintiff in error, we said (p. 453): "If the Supreme Court had affirmed the denial of the discharge on the ground that the proper course was to raise the objections ruled upon at the trial of the principal case on the merits and to take the question up by writ of error, it would have adopted the rule that prevails in this court and there would be nothing to be said."

It is true the rule has been announced in cases where *habeas corpus* was applied for in advance of final decision in the state courts; but the principle of the rule applies as well after decision. The rule would be useless except to enforce a temporary delay if it did not compel a review of the question in the state court and, in the event of an adverse decision, the prosecution of error from this court. In other words, if it gave freedom to omit such defenses in the state court and subsequent review by this court, and yet the accused have an absolute right to *habeas corpus*. And this case shows the necessity of the application of the rule. We have pointed out the opportunity petitioners had to object to their sentences when they were imposed and successively to attack their validity in the appellate tribunals of the State and in this court. And this satisfies justice. More than this, that for which petitioners con-

tend, will make unstable and uncertain the administration of the criminal laws of the States. If defenses may be omitted at trials, rights of review omitted, and yet availed of through *habeas corpus*, the whole course of criminal justice will be deranged and, it may be, defeated. This is the practical result in the case at bar. Petitioners contend for a discharge, having fulfilled what they consider the legal part of their sentences, but which is manifestly below what in the law of the State is fixed for their crime. And, illustrating their arguments, petitioners told us of other cases which are waiting to come forward with an appeal for like remedy and jail delivery.

These views dispose of the petitions and we are not called upon to express opinion as to whether the act of 1911 is *ex post facto* because increasing the punishment of petitioners' crime after it was committed, or whether, as decided by the Supreme Court of the State in *Commonwealth* v. *Kalck*, neither that act nor the act of 1909 was intended to fix the punishment for any crime, nor to repeal the laws then in existence prescribing penalties and punishments for different crimes. We may observe that the court, further characterizing the acts, said "they undertook to regulate, not the law which fixed the punishments, but the sentencing of convicts, and the method of releasing them on parole." And, further, that the purpose of the acts "was to regulate the control and discipline of persons convicted of crimes, with a view to their reformation." The final conclusion of the court was that the statutory punishment was neither changed nor increased by the act of 1911. "'The maximum sentence,'" the court said, "'is the only portion of the sentence which has legal validity, and the minimum sentence is merely an administrative notice by the court to the executive department, calling attention to the legislative policy that when a man's so-called minimum sentence is about to expire, the question of grace and mercy ought to be considered and the

propriety of granting a qualified pardon be determined.'" See *Commonwealth* v. *Brown*, 167 Massachusetts, 144.

The court decided, therefore, that both the acts of 1909 and 1911 prescribed a maximum sentence for crime and that the provisions for indeterminate sentence with provision for clemency were matters of grace and could be varied by the legislature and could not be condemned as *ex post facto* laws.

The remarks of the court are pertinent to the next contention of petitioners, which is that the sentences have a legal part, to-wit, the fine of $500 and costs, and an illegal part, to-wit, the imprisonment, and that having fulfilled the legal part they are entitled to be discharged from the illegal part. In support of the contention they invoke *Ex parte Lange*, 18 Wall. 163. In that case a circuit court of the United States imposed a sentence of a fine of $200 *and* one year's imprisonment, the statute authorizing only a fine *or* imprisonment. The fine was paid, and on the next day the prisoner was brought before the court by *habeas corpus* and an order was entered vacating the former judgment and the prisoner again sentenced to one year's imprisonment. It was held that the court had not power to vacate the judgment and resentence the prisoner, that such action was double punishment for his offense, the legal part of the former sentence having been satisfied. It was further held that the judgment was void, not merely erroneous, and the prisoner was entitled to be discharged upon petition in *habeas corpus*. Two answers are opposed to the contention that the case is controlling of the case at bar. The case was put upon the ground that the Circuit Court had exhausted its power. In the case at bar the judgment of the Court of Quarter Sessions was subject to review and modification by the Supreme Court. Section 1, P. L. 785, 4 Stew. Purd. Dig. 4514, § 30; *Daniels* v. *Commonwealth*, 7 Pa. St. 371; *Torrence* v. *Commonwealth*, 9 Pa. St. 184;

Beale v. *Commonwealth*, 25 Pa. St. 11; *White* v. *Commonwealth*, 3 Brewster, 30.

In *Daniels* v. *Commonwealth*, the court said that under the power given by the statute cited above it was authorized not only to reverse or affirm but to modify a judgment, "that is, to change its form, vary, or qualify it, and this as well in criminal as in civil cases." Exercising this power, the court struck from a sentence an illegal part and affirmed it in all other respects. The same power was exercised in *Beale* v. *Commonwealth*. In *White* v. *Commonwealth*, a judgment in excess of what was authorized by the statute was reversed and the prisoner resentenced.

The sentences imposed on petitioners were, therefore, not void but erroneous only, and subject to change or modification by the Supreme Court, or reversal, and petitioners subject to resentence, and *Ex parte Lange* does not apply. In *In re Lincoln*, 202 U. S. 178, *habeas corpus* was denied because there was an appeal from the judgment attacked which could have been taken to the Circuit Court of Appeals, applying the rule which we have so often expressed, that the writ of *habeas corpus* is not to be used as a writ of error. And the reason is manifest. When the orderly procedure of appeal is employed, the case is kept within the control and disposition of the courts, and if the judgment be excessive or illegal it may be modified or changed and complete justice done, as we have said, to the prisoner and the penalties of the law satisfied as well. This comment is applicable to the case at bar. The Supreme Court of the State has decided, as we have seen, that neither the act of 1909 nor that of 1911 repealed the act of 1860, *supra*, which defined the statutory crime of conspiracy, and imposed upon those guilty of it a punishment by fine not exceeding $500 and imprisonment not exceeding two years.

The question then occurs, What is the effect of the act

of 1911 upon the act of 1909, assuming the former to be unconstitutional? The Supreme Court of the State, as we have seen, has declared it constitutional, but the question has not been presented to the court as to what would be the effect of the act of 1911 if declared by this court to be unconstitutional. Necessarily this court would leave to the Supreme Court of the State the decision of that question, it being a state question. It would not be our duty to decide it or to anticipate the decision of that court, which might indeed reconcile the acts with the constitutional rights of petitioners. The repealing clause of the act of 1911 is not in absolute form. It repeals only acts which are inconsistent with the act of 1911. It may be declared that a void act cannot be legally inconsistent with a valid one. *Shepardson* v. *Milwaukee &c. R. R. Co.*, 6 Wisconsin, 605; *State* v. *La Crosse*, 11 Wisconsin, 51; *Chapman* v. *Detroit*, 14 Michigan, 276; *Childs* v. *Shower*, 18 Iowa, 261; *Board of County Commissioners* v. *First National Bank*, 6 Colo. App. 423; *Trustees* v. *Laird*, DeG., M. & G. 732. See *Schneider* v. *Staples*, 66 Wisconsin, 167. There may be cases the other way, as, it may be said, *Medley, Petitioner*, is. 134 U. S. 160, 174. Which is the more logical rule we are not called upon to pronounce, nor to say which, under the circumstances, the Supreme Court of Pennsylvania might apply.

Rules discharged; petitions dismissed.

SUSQUEHANNA COAL COMPANY *v.* MAYOR AND COUNCIL OF THE CITY OF SOUTH AMBOY.

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

No. 301. Argued May 6, 7, 1913.—Decided May 26, 1913.

Where the trade in an article can only be accommodated by storage at some point in transit from the point of shipment in one State to final destination in another, and there is a business purpose and advantage in the delay during which the article secures the protection of the State where it is stored, there is a cessation of interstate commerce and the article is subject to the dominion of, and taxation by, the State. *Bacon* v. *Illinois*, 227 U. S. 504.

Coal shipped from Pennsylvania to South Amboy, New Jersey, and intended for further shipment to ports in other States or countries, but not definitely determined, and stored while awaiting orders or means of transportation for orders already received, *held* that there was in this case more than mere incidental interruption and the coal was subject to taxation by the municipality within whose jurisdiction it was stored.

Quære, whether in New Jersey a decision as to the legality of a tax for one year is *res judicata* as to same grounds in regard to a tax for a later year on the same property.

THE facts, which involve the right of the State to tax coal brought from another State while it is awaiting shipment to ports in other States and countries, are stated in the opinion.

Mr. Alan H. Strong, with whom *Mr. James B. Vredenburgh* was on the brief, for appellant.

Mr. Frederic M. P. Pearse for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Bill in equity to restrain the collection of taxes levied by the City of South Amboy upon coal belonging to plain-

tiff in error on the ground that the coal was in transit from points in the State of Pennsylvania through the State of New Jersey to destinations outside of the latter State and being, as it is alleged, in interstate commerce, the taxes on it were illegally levied because in contravention of the commerce clause of the Constitution of the United States.

Plaintiff in error is a Pennsylvania corporation and a dealer in coal, buying three-fifths of what it sold in the years 1906, 1907 and 1908 and producing two-fifths itself. Plaintiff in error shipped its coal from its mines in Pennsylvania to New York and the States east thereof by the Pennsylvania Railroad across New Jersey, to leave the latter State at Harsimus Cove, Greenville or South Amboy piers, the termini of the road on New York harbor. In the year 1906 it shipped 1,582,000 tons of coal; in 1907 it shipped 2,010,200 tons, and in 1908 it shipped 2,050,500. Of these amounts, 3½%, 4½% and 6%, respectively, were unloaded at South Amboy. The balance of the amounts shipped passed through Harsimus Cove and Greenville piers. The cars, on arrival at the latter points, were floated across the harbor and transferred to railroads on the opposite side. The bills of lading for the coal thus shipped were made out to designated purchasers as consignees; the coal which arrived at South Amboy was consigned to plaintiff in error at such place and was intended to be transferred to bottoms at tidewater and shipped to States east of New Jersey. "This coal," we quote from the opinion of the District Court, "was forwarded from the mines on orders from the complainant's Philadelphia agents who issued such orders upon requisitions made upon them from complainants' New York agents. Neither the agents at the mines nor at Philadelphia knew for which particular customers the coal thus forwarded to South Amboy, was intended. Complainant had a number of regular customers east of New Jersey, to whom it promised to make deliveries on monthly contracts; the

exact requirements of such customers, in tonnage and kind of coal, were known only to the New York agents. These agents from time to time totaled such requirements plus other orders for coal, and issued their requisition based upon such totals, to the Philadelphia agents. Such requirements and the shipments made thereunder, varied in tonnage and kind of coal. At South Amboy complainant had an agent who, upon the orders of the New York agents, superintended the loading upon such bottoms of the kind and amount of coal required for designated customers. When so loaded, the master of the bottoms issued bills of lading in the name of the complainant as shipper, and particular persons as consignees. These bills of lading were sent to complainant's New York agents, whereupon the latter made out invoices to the consignees. Up to the time of loading the bottoms, the title of the coal was in complainant.

"If, upon arrival of the coal at South Amboy, bottoms were on hand to take the kind of coal arriving, such coal was transferred from the cars to the bottoms. If not, such coal was dumped into a coal depot or storage yard of the railroad company, located about two thousand feet from the piers, equipped with derricks for the loading and unloading of coal, and where the different kinds of coal of the complainant were put into piles, which would be subsequently transferred into bottoms; not necessarily the first bottoms arriving as the preference was given to coal subsequently arriving and still in cars. In the year 1906 the expense of dumping the coal from the cars and its subsequent transfer into bottoms was borne by the railroad company. Subsequently, such expense was borne by complainant."

It appears from the testimony that the amount of coal in the depot or storage yard at South Amboy varied. "It went," it was testified, "to 10,000 tons, but it ranges from 20,000 up to 150,000 tons."

The conclusion of the District Court was that by the storage of coal, plaintiff in error "obtained two beneficial results. First, cars arriving when no bottoms were on hand could be released and demurrage charges saved; second, when bottoms arrived and no cars were on hand containing the kinds of coal desired, such vessels could be loaded from the piles, resulting in a saving of time in the departure of such bottoms." In other words there was something more than the submission to delay in transportation and the acceptance of its consequences. The situation was made a facility of business, a business conducted through agents and employés. And, it will be observed, there was valuable property kept in the State represented by the coal, varying in quantity from 10,000 tons to 150,000 tons. There was something more, therefore, than an incidental interruption of the continuity of its journey through the State.

The principal witness in the case for plaintiff in error, assenting to the testimony of its vice-president given before the State Board of Equalization, testified that without regard to any orders, even anticipating the market, the attempt was to keep a certain amount of coal on hand at South Amboy. This anticipation, the witnesses explained, was an anticipation of orders from regular customers in the near future, the witness saying that while there was no order for it, still there was an implied order; "that is, an implied order and a regular condition of trade, and to supply that trade we keep that coal there. . . . The condition was, to take care of the trade that was regular, and this coal was not kept there for that purpose, it was there from an overplus, or inability to load it in boats, and therefore was to fill these implied contracts and orders—they weren't orders, but were implied contracts." This is confusing, but it is manifest that the coal was used to fill anticipated orders, orders not immediately made but, it may be, certain to be made. It

does not appear how they could be filled, uncertain in time as they were, except from the accumulations at South Amboy. Indeed it is in the testimony that without such accumulations the orders might strike a period when there were no cars and no coal and then customers would suffer.

It is clear, we repeat, that such trade could only be accommodated through the storage of coal somewhere, and plaintiff in error availed itself of the conditions to put the storage in New Jersey.

The coal, therefore, was not in actual movement through the State; it was at rest in the State, and was to be handled and distributed from there. Therefore, the principles expressed in *General Oil Co.* v. *Crain*, 209 U. S. 211, and *Bacon* v. *Illinois*, 227 U. S. 504, are applicable to it. The products in neither of those cases were destined for sale in the States where stored; the delay there was to be temporary, a postponement of their transportation to their destinations. There was, however, a business purpose and advantage in the delay which was availed of, and while it was availed of, the products secured the protection of the State. In both cases it was held that there was a cessation of interstate commerce and subjection to the dominion of the State.

In *Bacon* v. *Illinois*, the grain which was taxed had been shipped by the original owners, who were residents of southern and western States, under contracts for its transportation to New York and Philadelphia and other eastern cities, with a reservation to the owners to remove it from the cars at Chicago for certain temporary purposes "or change the ownership, consignee or destination thereof." The grain, while in transit, was purchased by Bacon, he succeeding to the rights of the vendors. Upon arrival of the grain at Chicago he exercised the right to remove it from the cars to his private elevator to avail himself of the privilege reserved. The privilege being exercised, he turned the grain over to the railroad com-

panies for transportation in accordance with original contracts. After commenting upon the power he had over the grain while in Chicago, we said (p. 516), "He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way without discrimination." For this conclusion cases were cited. It was further said (p. 517), "The property was held within the State for purposes deemed by the owner to be beneficial; . . ."

In *General Oil Co* v. *Crain*, oil contained in tanks at Memphis, Tennessee, was subject to an inspection tax. The oil was shipped to Memphis from producing and refining points in Ohio and Pennsylvania and handled in tank cars and other receptacles to be forwarded to customers in Arkansas, Louisiana and Mississippi, in which States the oil company had many regular customers from whom it always had on hand many unfilled orders for oil to be delivered as soon as possible or convenient. At Memphis the oil company maintained two tanks, one of which was plainly marked: "Oil already sold in Arkansas, Louisiana and Mississippi," and which remained in Memphis only long enough (a few days) to be properly distributed according to the orders therefor. The other tank or vessel was for oil sold in those States and kept separate and apart until orders should be received from customers in those States. The oil was never sold otherwise than upon such orders. We said of this situation that the company was doing business in the State and that its property was receiving the protection of the State. Its oil was not in movement through the State. To the contention that the oil was only there for distribution and to fulfill orders already received, we said (p. 231), "It required storage there—the maintenance of the means of

storage, of putting it in and taking it from storage." In that case and in *Bacon* v. *Illinois* we considered the cases relied on here by plaintiff in error in which particular exercises of the state power were decided to be in conflict with the paramount authority of Congress over interstate commerce. We need not again review the cases. We are not unmindful of their principle and reasoning and the difficulty presented in them and presented here of marking the line of dominion between the National and state jurisdiction. The one is as necessary as the other to be preserved.

It is contended by defendant in error that the basis of the taxes of all three years is the same and that the taxes of 1906 were attacked by proceedings in the New Jersey state courts, the same grounds of illegality being asserted there as here (*Susquehanna Coal Co.* v. *South Amboy*, 76 N. J. L. 412; 77 *id.* 796), and that therefore the decision of the state court is *res judicata*. The views we have expressed make it unnecessary to pass upon the contention or to consider—the question not being raised—whether the decision as to the taxes in 1906 is an adjudication also under the laws of the State of the taxes of 1907 and 1908. See *New Orleans* v. *Citizens Bank*, 167 U. S. 371; *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 573; *Citizens Bank* v. *Parker*, 192 U. S. 73.

Judgment affirmed.

WOOD *v.* CHESBOROUGH.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 257. Argued April 24, 25, 1913.—Decided May 26, 1913.

If the judgment of the state court rests on Federal and non-Federal grounds, and the latter be sufficient to support it, there can be no review by this court. *Preston* v. *Chicago*, 226 U. S. 447.

The application of laches and the statute of limitation does not present a Federal question.

This court can only review findings of fact by the state court to the extent necessary to determine whether, there being no evidence to support them, a Federal right has been denied by them, or where conclusions of law as to a Federal right and questions of fact are so intermingled as to make such review necessary for the purpose of passing on the Federal question. *Chapman* v. *Goodnow*, 123 U. S. 540.

The highest court of the State having held, following its former decisions on the same subject, that the plaintiff's cause of action was barred by laches and *res judicata*, the judgment rests on non-Federal grounds sufficient to sustain it.

This court will not review the judgment of the highest state court in accepting its former decisions as determining the law of the State and give a different interpretation of that law. To do so would give this court power to review all judgments of state courts where Federal questions are set up and to substitute its judgment for that of the state courts as to state laws.

Writ of error to review 95 Mississippi, 63, dismissed.

THE facts, which involve the jurisdiction of this court to review a judgment of the state court when the same rests on non-Federal as well as Federal grounds, are stated in the opinion.

Mr. Duane E. Fox and *Mr. Frank Boughton Fox*, with whom *Mr. Robert E. Bunker* was on the brief, for plaintiffs in error.

Mr. T. M. Miller for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This suit concerns the title to certain lands in the State of Mississippi. There was an original and an amended bill. The original bill was one to quiet title simply. An answer was filed to it which, among other defenses, set up the decree, hereafter referred to, and adverse possession under the decree. Other defendants were brought in and an amended bill filed. The bills allege the following: Plaintiffs derive title through patent to the State under the Swamp Land Act of Sept. 28, 1850, 9 Stat. 519, c. 84, and patent from the State to the Pearl River Improvement and Navigation Company in 1871, certain conveyances on account of a sale for taxes, and an act of the legislature of the State approved April 19, 1873, by which, it is alleged, all the acts, deeds and proceedings of the Pearl River Improvement and Navigation Company were ratified, approved and confirmed.

On the fourteenth of October, 1891, the defendant, the Southern Pine Company, brought a suit making three of the plaintiffs in this suit defendants, in which it was alleged, among other things, that the company was the owner of the lands described and that the plaintiffs herein asserted title thereto and prayed that it be cancelled, as it cast a cloud upon the title of the company. The plaintiffs (defendants in that suit) made their answer a cross-bill and prayed that the title of the Southern Pine Company be cancelled as a cloud on their title.

Plaintiffs employed one E. E. Baldwin, who was then and for many years thereafter engaged in the practice of the law at Jackson, Mississippi, to conduct the suit for them. By virtue of his employment he appeared at the November term of court in 1891 and at each subsequent

term until the July term, 1895. During that time nothing was done in the case. Baldwin was paid to conduct the suit from its inception to its termination, but, unknown to plaintiffs, early in October, 1895, he was afflicted with a severe stroke of paralysis and another in May, 1896, and from that time plaintiffs were informed and believed that he became mentally and physically incapacitated from looking after his engagements.

At the July term, 1896, while plaintiffs were absent from the State, they being non-residents, and while Baldwin, their counsel, was incapacitated and not cognizant of what was going on, the Southern Pine Company set down the case for final hearing, and at its request a decree was rendered cancelling plaintiffs' title to the lands as a cloud upon that of the Southern Pine Company. The record was made part of the bill. Neither of the plaintiffs had any knowledge or information of the rendition of the decree nor of the incapacity of their counsel until the latter part of the year 1900 or the first of the year 1901, when they began to take steps to assert their rights in the premises.

Plaintiffs allege that under the circumstances the decree should be set aside and held to be absolutely void. And it is alleged that while the suit was pending the Southern Pine Company conveyed the lands to the defendant, A. M. Chesborough, who conveyed undivided interests therein to other defendants, and that they claim title to the lands by virtue of the conveyances and the decree in favor of the Southern Pine Company.

There were demurrers to the bills, which were overruled, and defendants answered. The answer denied the validity of the acts of 1871 and 1873, under which plaintiffs claimed, and the validity of the title asserted through them; admitted that the Southern Pine Company brought suit as alleged by plaintiffs and that a decree was rendered therein and averred that the latter was *res judicata;*

alleged the belief that Baldwin, plaintiff's counsel, abandoned the defense of that suit for the reason that the Supreme Court of Mississippi had decided in the case of *Hardy* v. *Hartman*, 65 Mississippi, 504, and the United States Circuit Court for the Eastern District of Mississippi, in *Bradford* v. *Hall*, that the patents issued to the Pearl River Improvement and Navigation Company were null and void and no defense could have been interposed to the suit. To the amended bill as a bill of review defendants pleaded the statute of limitation of two years and laches.

Testimony was submitted and there was an agreed statement of facts. A decree was entered dismissing the original and amended bills. It was affirmed by the Supreme Court of the State. 95 Mississippi, 63.

The Supreme Court rested its decision entirely upon the decree rendered in the suit of the Southern Pine Company, and, stating the facts, said that the Southern Pine Company claimed by virtue of patents issued by the State subsequent to 1871, and plaintiffs (defendants in that suit) claimed under the Pearl River Improvement and Navigation Company act of 1871, dealt with in the case of *Hardy* v. *Hartman*, 65 Mississippi, 504. The case, the court further said, was continued from term to term and was finally submitted upon the pleadings, certain exhibits and documentary evidence, and a decree rendered for the company confirming its title and cancelling that of the defendants. The decree was not appealed from within the two years allowed by law for taking appeals. In 1902, six years after the rendition of the decree, plaintiffs filed their original bill. Upon hearing and being met by a plea of *res judicata*, they filed an amended bill seeking to have the decree set aside because their attorney was too ill to give the case proper attention. This illness the court, however, said came to the knowledge of plaintiffs three and one-half years before it was sought to set aside the decree. "In this state of facts," the court continued,

"there is no escape from the authority of *Brooks* v. *Spann*, 63 Mississippi, 198, and an attentive examination of that case will show that it can make no difference whether the amended bill is or is not technically a bill of review. Furthermore, we do not think there is such diligence shown by appellants in this case as would entitle them to vacate the former decree even though no statute of limitations barred the way. We cannot see our way clear to go further than this and decide the other important and interesting questions presented since the action of the court in upholding the plea of *res judicata* disposes of the case."

It will be observed that the trial court based its decision upon the effect of the decree in favor of the Southern Pine Company as an adjudication of the issues and that the Supreme Court rested its decision mainly upon the statute of limitations and laches.

A motion is made to dismiss on the ground that the case was decided upon non-Federal questions sufficient to sustain the judgment. The motion is resisted by plaintiffs. They contend that the ground urged for its support does not apply because they "consistently pleaded and continually urged constitutional immunities" and that the jurisdiction of this court "cannot be ousted by mere action of the state court in ignoring and refusing to consider such constitutional questions," by assuming that its decision on a point of local law is decisive of constitutional questions; "particularly when the decision of the points of general and local law necessarily include a consideration of the constitutional immunities." An elaborate argument is submitted to establish these contentions. The foundation of it is that Federal questions were essentially involved and their decision was evaded by the Supreme Court. These questions arose, it is contended, by the impairment of the contract constituted by the acts of 1871 and 1873, under which plaintiffs claim title, by the repeal of those acts by the legislature of the State and the

cancellation of the titles founded upon them in the hands of *bona fide* transferees and by executive action pursuant to the repealing acts granting the lands to others. Such action, it is contended, "impaired the obligation of contracts by legislative enactment and deprived the plaintiffs of property without due process of law."

The contention undoubtedly presents a Federal question, and, on account of it, it is said that we may review the local questions on which, we have seen, the Supreme Court of the State based its decision. It is, however, argued that "if the pleadings or proceedings in the state court present or disclose the assertion of a Federal right or constitutional immunity, this court has jurisdiction to review the decision of the state court, even though that decision is based entirely upon the questions of local law, and the decision of this court may decide those questions only." This is, in effect, saying that in all cases if there be local and Federal questions we may pass upon both and reverse the state court upon both. And yet it is well established that if there be Federal and non-Federal grounds, and the latter be sufficient to support the judgment of the state court, there can be no review by this court. And certainly the application of laches and the statute of limitations does not present a Federal question. *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468; *Preston* v. *Chicago*, 226 U. S. 447, 450.

Plaintiffs, however, advance their contention with confidence and attempt to support it by a citation of cases. We need not review them all. They do not impugn the doctrine that there may be a non-Federal question decided broad enough to support the state court's decision which we are without power to review, though there may also be Federal questions in the case. They only hold that the sufficiency of the Federal right set up cannot be evaded if necessary to the determination of the case, and, it may be admitted, that of such necessity this court must in

each instance decide. *Huntington* v. *Attrill*, 146 U. S. 657, is an example, and also *Cresswill* v. *Knights of Pythias*, 225 U. S. 246, and *Kansas City Southern Railroad Co.* v. *Albers Commission Co.*, 223 U. S. 573. *Chapman* v. *Goodnow*, 123 U. S. 540, is an illustration of the doctrine and its explanation. In *Cresswill* v. *Knights of Pythias* it is decided that this court will review the finding of facts by a state court (a) where the Federal right was denied as a result of them and there is no evidence to support them, a question of law hence resulting for decision; and (b) where a conclusion of law as to a Federal right and finding of fact are so intermingled as to cause it to be necessary, for the purpose of passing on 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.

Neither condition exists in the case at bar. It comes, instead, under the principle of *Chapman* v. *Goodnow*. There the Federal question alleged to have been involved in a former decree, and to which due faith and credit under the Constitution of the United States, it was insisted, should have been accorded, was held to be superseded by a new promise. So in the case at bar. The rights of plaintiffs based on the act of 1871, under which the patent to the Pearl River Improvement and Navigation Company was issued, and the confirmatory act of 1873 were determined in the suit of the Southern Pine Company against certain of the plaintiffs and through whom title is deraigned. That decree stood as an obstruction to the assertion of plaintiffs' title. They attacked it in their amended bill and sought to have it reviewed and set aside. The trial court denied the prayer of the bill and held the decree *res judicata*. The Supreme Court decided that the statute of limitations of the State precluded the relief sought, and for the decision cited *Brooks* v. *Spann*, 63 Mississippi, 198. The court further decided that "even though no statute

of limitations barred the way" there was no "such diligence shown by plaintiffs to entitle them to vacate the former decree."

In *Brooks* v. *Spann*, to avert the effects of a plea of *res judicata* against the cause of action set up, an amendment was made which asserted not only the original grounds of recovery but also averred that the suit, the decree of which was so pleaded, was instituted and prosecuted without the consent, knowledge or procurement of the party against whom it was rendered. A demurrer to the bill set up, among other grounds, the statute of limitations of the State. Commenting on the decree, the court said that it presented, if valid, an insurmountable obstacle to the suit; it had to be attacked and nullified, or all controversy over its subject matter was by it forever foreclosed. Holding that the suit was barred by the statute of limitations, the court said: "There is no statute of limitations applicable by its terms to the right to annul the decree, but in the absence of such statute the court will adopt that one which is applicable to analogous rights. By sections 2680 and 2681 of the Code of 1880 the time in which bills of review and appeals may be prosecuted is limited to two years, and by section 2075 a like limitation is imposed upon the rights to surcharge and falsify the accounts of executors, administrators and guardians. It thus appears that for errors of law or fact, in the classes of cases named in these statutes, a uniform limitation of two years has been declared, and within such time, we think, persons having notice of decrees affecting their rights, which for fraud or other sufficient reasons should be vacated by the courts, ought to take action, failing in which, relief should be denied. *Plymouth* v. *Russell Mills*, 7 Allen, 438; *Evans* v. *Bacon*, 99 Massachusetts, 213; *Gordon, Admr.*, v. *Ross*, 63 Alabama, 363."

The Supreme Court, in the case at bar, accepted this decision as determining the law of the State, and we cannot

review its judgment and give a different interpretation of that law. That case and this have many features of resemblance. The suit and decree pleaded in that case was a suit and decree in the state court. The suit at bar was commenced in the state court, and the decree pleaded and which is sought to be set aside was rendered in the same court. It was subject, therefore, to the local procedure and local laws. If we should assert a power of review in such case we could exercise like power in all cases where Federal questions are set up and substitute our judgment for the judgment of the state courts as to the state laws.

We may say, in conclusion, that there are many cases illustrating the power of the States over the pleadings and practice in their courts and the right to prescribe within what time and upon what conditions suits can be commenced and maintained. *Texas & New Orleans R. R. Co.* v. *Miller*, 221 U. S. 408; *Brinkmeier* v. *Missouri Pacific Railway Co.*, 224 U. S. 268.

The motion to dismiss must be, and it is, granted.

Dismissed.

CHICAGO DOCK AND CANAL COMPANY *v.* FRALEY, AS ADMINISTRATRIX OF CLAFFY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 286. Argued May 2, 1913.—Decided May 26, 1913.

Police legislation cannot be judged by abstract or theoretical comparisons, but it must be presumed to have been induced by actual experience. Even if disputable or crude it may not violate the Fourteenth Amendment.

One who is not discriminated against cannot attack a police statute of the State because it does not go farther; and if what it enjoins of

one it enjoins of all others in the same class, that person cannot complain on account of matters of which neither he nor any of his class are enjoined.

The Constitution of the United States does not require that all state laws shall be perfect, nor that the entire field of proper legislation shall be covered by a single enactment. *Rosenthal* v. *New York*, 226 U. S. 260.

There may be different degrees of danger in construction of buildings and a classification based upon such degree as the legislature of the State determines may be proper, and so that the classification does not violate the equal protection provision of the Fourteenth Amendment. *Mutual Loan Co.* v. *Martel*, 222 U. S. 225.

The statute of Illinois providing for protecting elevating and hoisting machinery in buildings under construction is not unconstitutional as denying equal protection of the law; nor is the classification as to different methods of protecting different classes of buildings, both as to location in cities and villages and as to nature of use of buildings, based on too fine and minute distinctions. It is within the power of the legislature to determine such distinctions if all in the same situation are treated alike.

Even if some provisions of a statute are unconstitutional, if they do not affect plaintiff in error this court is not concerned with them and cannot declare the whole statute unconstitutional as inseparable.

249 Illinois, 210, affirmed.

THE facts, which involve the constitutionality, under the equal protection clause of the Fourteenth Amendment, of provisions of an Illinois statute in regard to the protection of hoists and elevators in buildings under construction, are stated in the opinion.

Mr. Morse Ives for plaintiff in error:

Section 7 of the act violates the equal protection clause of the Fourteenth Amendment because the classification it seeks to make is according to minute rather than general distinctions. *Mondou* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1.

It does not bring within its purview all those who are in substantially the same situation or circumstances. *C.*,

M. & St. P. Ry. Co. v. *Westby*, 178 Fed. Rep. 619, 624, and cases there collected; *Lipman* v. *People*, 175 Illinois, 101, 107.

In fact, as construed by the Supreme Court of Illinois, the act does not protect any man at the place where he works, but does protect some men at places where they do not work.

According to that court's construction, the test is the use of a particular hoistway in a particular manner, for elevating materials to be used for a particular purpose. The lifting of the same materials, elevated in the same quantities in another hoistway, either in a different manner and for the same purpose or in the same manner but for a different purpose is not condemned.

This classification is entirely unnatural and wholly arbitrary, and therefore invalid. *Nicoll* v. *Ames*, 173 U. S. 509, 521; *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150, 165; *State* v. *C., B. & Q. R. R. Co.* (Mo.), 125 S. W. Rep. 28, 30, 31; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 541, 564, and cases cited *supra*.

But even if § 7 be held to be constitutional, other sections of the act are unconstitutional and the whole legislative scheme must fall, and § 7 cannot stand by itself. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565; *Matthews* v. *People*, 202 Illinois, 389, 406; *Chicago* v. *Burke*, 226 Illinois, 191, 203.

Mr. James C. McShane, for defendant in error, submitted:

The statute in question is remedial in its nature and should not be strictly construed. *Johnson* v. *So. Pac. R. Co.*, 196 U. S. 1.

While the act is designed for the protection and safety of persons, in and about the construction, repairing, alteration, or removal of buildings, bridges, viaducts, and other structures, still it is not necessary that the act should

cover the entire field of dangers to which such persons are exposed. The question here is one of power of the legislature to enact legislation of this class, and this court should not be concerned with mere matters of policy or wisdom of such legislation. *Rosenthal* v. *New York*, 226 U. S. 260; *C., B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549 (569).

Employers' liability laws, relating to railroads, and even as covering all employés of railroads, whether engaged in hazardous occupations or not, have been held constitutional by this court, and the classifications therein made, proper. *Louisville & N. Ry. Co.* v. *Melton*, 218 U. S. 36; *Mobile &c. R. Co.* v. *Turnipseed*, 219 U. S. 35, 44; *Aluminum Co.* v. *Ramsey*, 222 U. S. 251, 256; *Mo. Pac. Ry. Co.* v. *Castle*, 224 U. S. 541, 546; *Mondou* v. *N. Y., N. H. & H. R. Co.*, 223 U. S. 1.

Even if § 7 be held to apply only to hoists and elevators within a building, or even if subject to other criticisms made by counsel for plaintiff in error, such discriminations have a reasonable basis and are, therefore, not contrary to the Fourteenth Amendment. *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 65; *American Sugar Co.* v. *Louisiana*, 179 U. S. 89; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157; *Cargill Co.* v. *Minnesota*, 180 U. S. 452.

The provisions of § 6, even if held to be limited to such buildings within cities as are mentioned in this section, are not, on that account, unreasonable. *Chicago* v. *Sturgis*, 222 U. S. 313.

But if this section of the act should be held unconstitutional, if so limited to buildings in cities, then, in order to save the constitutionality of the section, it would be proper to construe the section as not so limited.

Sections 2 and 3 of the act are not unconstitutional because they except from its provisions "a private house used exclusively as a private residence." *Arms* v. *Ayer*, 192 Illinois, 601.

Even if some of the sections of the act, other than § 7, should be held unconstitutional, yet if § 7 is constitutional, it is separable from the others, and the others are so separated from the act as a whole, that § 7, and the act, as a whole, are valid. *C., B. & Q. R. R. Co.* v. *Jones*, 149 Illinois, 387.

Mr. Justice McKenna delivered the opinion of the court.

This writ of error is directed to review a judgment of the Supreme Court of the State of Illinois, affirming a judgment in an action brought by Gertrude V. Claffy, against plaintiff in error for the violation of § 7, of a statute of the State entitled "An act providing for the protection and safety of persons in and about the construction, repairing, alteration or removal of buildings, bridges, viaducts and other structures, and to provide for the enforcement thereof." Laws of 1907, p. 312.

Section 7 reads as follows:

"If elevating machines or hoisting apparatus are used within a building in the course of construction for the purpose of lifting materials to be used in such construction, the contractors or owners shall cause the shafts or openings in each floor to be inclosed or fenced in on all sides by a substantial barrier or railing at least eight feet in height. . . ."

Section 9 gives a right of action for a wilful violation of or failure to comply with any provisions of the act to the person injured or, in case of loss of life, to his widow, lineal heirs, adopted children or persons dependent upon him, for damages so sustained.

Gertrude V. Claffy, widow of Charles F. Claffy, brought suit against plaintiff in error and one Henry Erickson for causing the death of her husband through violation of the act. The defendants filed separate demurrers to the

declaration, which were overruled. An additional count was filed by the plaintiff in the action which set out with detail the cause of action. The defendants answered and, upon a trial to a jury, a verdict of $10,000 was returned against defendants. A new trial was granted as to Erickson, and $2500 of the amount found remitted and a judgment entered against plaintiff in error here for the sum of $7500. It was sustained by the Supreme Court of the State. Subsequently, Gertrude V. Claffy having died, her administratrix, defendant in error here, was substituted as appellee in the Supreme Court.

The facts are these: Plaintiff in error was the owner of a large building in the course of construction in Chicago, and Erickson was the contractor for its erection. The deceased was employed by the plumbing contractor, and, in the course of his employment, was working in the building.

In the building there was an elevator or hoist, operated through a shaft or opening, for the purpose of lifting materials to be used in the construction of the building. It was not inclosed or fenced in as required by § 7 of the act. Deceased was at work upon a pipe immediately alongside of the shaft and accidentally fell into and down through it a distance of six stories.

The contention of plaintiff in error is here, as it was in the state courts, that §§ 7 and 9 of the act violate the Fourteenth Amendment to the Constitution of the United States in that they deny to him the equal protection of the laws. He specifies as grounds of his contention that the classification of the statute is based upon minute rather than general distinctions, that it does not bring within its purview all of those who are in substantially the same situation and circumstances in that it distinguishes between openings required for hoisting or lowering materials to be used in construction and stairways and elevator shafts. Section 7, counsel says, "requires that but one of these classes be barricaded, namely, those openings used

for hoisting materials to be used in construction." And, asserting the purpose of the act to be to protect those lawfully on the premises against danger from falling materials, he adds, "that in a case like this use cannot be made the test. Danger is the thing," and hence concludes that the classification of the statute, not having relation to its purpose, is arbitrary.

That danger is the test may be conceded, but there may be degrees of it, and a difference in degree may justify classification. *Mutual Loan Co.* v. *Martel*, 222 U. S. 225, 236. Who is to judge of the danger, whether absolutely considered or comparatively considered? Is it a matter of belief or proof? If of belief, we should be very reluctant to oppose ours to that of the legislature of the State, informed no doubt by experience of conditions and fortified by presumptions of legality and confirmed, besides, by the opinion of the Supreme Court of the State. *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358, 365; *Adams* v. *City of Milwaukee*, *ante*, p. 572. If of proof, there is none in the record. There are assertions by counsel, and considering alone the openings necessary for hoisting machinery and the openings for stairs and other openings, an employé or materials can be imagined as falling through one of them with the same ease as he or the materials can through the others. But other things must be taken into account. The setting of the openings must be considered, the varying relations of the employés to them, and other circumstances. The legislation cannot be judged by abstract or theoretical comparisons. It must be presumed that it was induced by actual experience, and New York, it is said, has been induced by a like experience to enact like legislation. If it be granted that the legislative judgment be disputable or crude, it is notwithstanding not subject to judicial review. We have said many times that the crudities or even the injustice of state laws are not redressed by the Fourteenth Amendment.

The law may not be the best that can be drawn nor accurately adapted to all of the conditions to which it was addressed. It may be that it would have been more complete if it had gone farther and recognized and provided against the danger that all uninclosed openings in a building might cause, and should not have distinguished between hoists inside of a building and those outside; but we do not see how plaintiff in error is concerned with the omissions. It is not discriminated against. All in its situation are treated alike. What the statute enjoins it enjoins not only of plaintiff in error but of all similarly situated. What it does not enjoin plaintiff in error cannot complain of. "The Constitution does not require that all state laws shall be perfect, nor that the entire field of proper legislation shall be covered by a single enactment." *Rosenthal* v. *New York*, 226 U. S. 260, 271.

Counsel attacks other sections of the statute "to show," as he says, that "the whole scheme of the statute is based upon those 'minute distinctions' condemned in the *Mondou* and *Ellis Cases* (223 U. S. 1; 165 U. S. 150) and, secondly, to demonstrate, if we can, that, as we urged in the state court, so much of the act is unconstitutional that all must fall." The state court did not yield to the contention nor its asserted consequences. Nor can we yield to it. Its foundation is based on the distinction made between buildings in cities and buildings in villages (§ 6); the distinction between houses exclusively for private residences and other constructions as to the strength of the supports for joists (§§ 2 and 3); the distinction between the protection required for men working upon swinging and stationary scaffolds used in the construction, alteration, repairing, removing, cleaning or painting of buildings and that given to advertising agents. (Sections 1 and 5.) Sections 2 and 3 must fall, it is contended, because of the exception of private residences; § 6, because of its limitations to cities; §§ 1 and 5, because they discriminate be-

tween the indicated classes. It is enough to say of these contentions—(1) of the asserted discrimination in §§ 1 and 5, plaintiff in error cannot complain and, so far as it is made a criticism of the statute, we are not concerned with it; (2) of the distinction made by the other sections, they are within the power of classification which the legislature possesses.

Judgment affirmed.

BROOKS *v.* CENTRAL SAINTE JEANNE.

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

No. 283. Submitted May 2, 1913.—Decided May 26, 1913.

Whether one is in general service of another or not, if he is rendering the latter a service even as a volunteer and comes under his orders, he becomes his servant, and fellow-servant of the other employés.

The servant is not only such while actually at work on the service for which he is specially employed, but also during its progress while absent from the location for the purpose of, and in connection with, such work.

One going in the master's conveyance on the master's business, *held*, in this case, to be a fellow-servant of the driver of the conveyance.

In view of the adoption by Porto Rico in substantially the same form, of the English Employers' Liability Act which presupposes the existence of the common-law rule as to fellow-servants, and the provisions of that act in regard to exceptions in specific instances, and in the absence of any authorities to the contrary, *held* that the law in Porto Rico in regard to the fellow-servant defense does not differ from the common law.

A single expression in the testimony that the driver of an automobile was accustomed to drink while driving the machine, there being other testimony importing usual sobriety, does not justify a finding of negligence on the part of the employer for employing a servant who was incompetent as an excessive drinker.

5 Porto Rico Fed. Rep. 281, affirmed.

THE facts, which involve the application in a case for personal injuries in Porto Rico of the defense of negligence of a fellow-servant, and the determination of whether the employé of the defendant whose negligence caused the injury was a fellow-servant of the plaintiff, are stated in the opinion.

Mr. N. B. K. Pettingill and *Mr. George H. Lamar* for plaintiff in error:

The fellow-servant rule is not applicable. Plaintiff was not an employé of the defendant for any purpose. During the enterprise resulting from an invitation to assist in the erection of the plant, plaintiff was not acting as an employé of defendant, but entered upon the enterprise in the capacity of a friendly helper by invitation, and was riding upon the automobile truck at the time of the accident as a gratuitous passenger by like invitation. *Railroad Co.* v. *Fort*, 17 Wall. 553; *No. Pac. R. Co.* v. *Hambly*, 154 U. S. 349, 357.

When an employé is not engaged in his work, his rights are not to be determined by the principles applicable to the relation of master and servant. *Fletcher* v. *B. & R. Co.*, 168 U. S. 135, 138.

Plaintiff's rights were the same as if he had had no business connection of any kind with defendant company, but had been a stranger riding as a passenger by invitation issued under due authority.

A gratuitous passenger may recover from owner for negligence of driver. *Thorogood* v. *Bryan*, 8 C. B. 114; *Little* v. *Hackett*, 116 U. S. 366, 371; *N. Y., L. E. & W. R. R. Co.* v. *Steinbrenner*, 47 N. J. Law, 161, 171; *Crampton* v. *Ivie Bros.*, 126 N. Car. 894; *Frerker* v. *Nicholson*, 41 Colorado, 12; *Clark* v. *Wright*. 79 Fed. Rep. 744, 747.

This was the settled law of this country as to the relation and responsibility between driver and passenger, whether for hire or gratuitous carriage, of whatever kind

of vehicle, before the arrival of the automobile. There is nothing in the structure or management of that vehicle which makes the above rule inapplicable. On the contrary, its greater speed and required skill and attention in management has resulted in making more apparent the reason and necessity for applying that rule. *Wilson* v. *Puget Sound Elec. Ry. Co.*, 52 Washington, 522; *Chadbourne* v. *Springfield St. Ry.*, 199 Massachusetts, 574, 576; *Johnson* v. *Coey*, 237 Illinois, 88; *Gresh* v. *Wanamaker*, 221 Pa. St. 28; *Routledge* v. *Rambler Automobile Co.*, 95 S. W. Rep. 749.

The ordinary rule for negligence cases is applicable here. And the principle is identical under the local statute. *Lake Shore Ry. Co.* v. *Prentice*, 147 U. S. 101.

The statutes of Porto Rico, Civil Code "Obligations Arising from Fault or Negligence," §§ 1803, 1804, 1805, announce principles in substantial harmony with the American law. For the application of those principles along identical lines, both in Spain and Porto Rico, see *Redinger* v. *Crespo*, Sup. Ct. of P. R., March 8, 1912; 12 Manresa's Comm. 608, 609, 611, 612. Decisions Supreme Court of Spain of October 21, 1882; Juris. Civ., vol. 50, p. 207. June 27, 1894; Juris. Civ., vol. 75, p. 848. December 12, 1894; Juris. Civ., vol. 76, p. 483; October 12, 1897; Juris. Civ., vol. 82, p. 417. Supreme Court of Porto Rico; *Rodrigues* v. *Fernandez Bros.*, 13 P. R. Rep. 349. *Vargas* v. *Monroig*, 15 P. R. Rep. 27.

There was negligence of defendant in retaining the driver with knowledge of his habit of drinking intoxicating liquor. 12 Manresa's Comm. 608–612.

It is the duty of the employer to select and retain servants who are fitted and competent for the service. The servant does not undertake to incur the risks arising from the want of sufficient and skillful co-laborers. *Nor. Pac. R. R. Co.* v. *Herbert*, 116 U. S. 247; *Wabash Ry. Co.* v. *McDaniels*, 107 U. S. 454; *Nor. Pac. R. R. Co.* v. *Mares*,

123 U. S. 710; *Balt. & O. R. R. Co.* v. *Henthorne*, 73 Fed. Rep. 634, 637; *Fletcher* v. *B. & P. R. Co.*, 168 U. S. 135.

Mr. Benjamin S. Minor, Mr. Hugh B. Rowland and *Mr. Colley W. Bell* for defendant in error:

The fellow-servant rule, as known to the common law of England and the United States, is and apparently always has been in force in Porto Rico, as will be seen from the statute law and from a reading of the decisions of the Porto Rico courts. *Dia* v. *Fajardo Development Co.*, 2 P. R. Fed. Rep. 152; *Colón* v. *Ponce & Guayama R. Co.*, 3 P. R. Fed. Rep. 367; *Natal* v. *Bartolomey*, 14 P. R. Rep. 474.

The plaintiff was a fellow-servant of the driver. *Nor. Pac. R. R. Co.* v. *Charless*, 162 U. S. 359, 363; *Nor. Pac. R. R. Co.* v. *Peterson*, 162 U. S. 346, 357; *Martin* v. *A., T. & S. F. R. R. Co.*, 166 U. S. 399, 403. See also *Randall* v. *Balto. & Ohio R. R. Co.*, 109 U. S. 478; *Quebec S. S. Co.* v. *Merchant*, 133 U. S. 375; *Balto. & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368; *Nor. Pac. R. R. Co.* v. *Hambly*, 154 U. S. 349; *Oakes* v. *Mase*, 165 U. S. 363; *Nor. Pac. R. R. Co.* v. *Poirier*, 167 U. S. 48; *New Eng. R. R. Co.* v. *Conroy*, 175 U. S. 323; *Nor. Pac. Ry. Co.* v. *Dixon*, 194 U. S. 338; *Texas & Pac. Ry. Co.* v. *Bourman*, 212 U. S. 536; *Beutler* v. *Grand Trunk Ry. Co.*, 224 U. S. 85.

Plaintiff had ample time and opportunity to observe, had he chosen to do so, the driver of the truck and to judge for himself as to his competency, carefulness and capability. *Schlemmer* v. *Buff., Roch. & Pitts. R. Co.*, 220 U. S. 590, 596. *Railroad Company* v. *Fort*, 17 Wall. 553, 558, distinguished.

A servant who is transferred from one part of the work to another assumes the risks incident to the new employment. *Reed* v. *Stockmeyer*, 74 Fed. Rep. 186; *O'Connor* v. *T. & S. F. Ry. Co.*, 137 Fed. Rep. 503.

Plaintiff being a fellow-servant of the driver of the

truck, the defendant cannot be held responsible unless plaintiff shows that the defendant was negligent in some particular. The burden of proof is on the plaintiff, and there is nothing in the record which even intimates that the defendant was in any way negligent either in the hiring of the driver or in retaining him in its employ. *Tex. & Pac. Ry. Co.* v. *Barrett*, 166 U. S. 617; *Patton* v. *Tex. & Pac. Ry. Co.*, 179 U. S. 658, 663; *Claudio* v. *Cortinez*, 9 P. R. Rep. 97.

There was contributory negligence on the part of the plaintiff. *Reed* v. *Stockmeyer*, 74 Fed. Rep. 186, 189; *Nor. Pac. R. R. Co.* v. *Freeman*, 174 U. S. 379, 383; *Claudio* v. *Cortinez*, 9 P. R. Rep. 97; *Patton* v. *Tex. & Pac. Ry. Co.*, 179 U. S. 658.

Mr. Justice Holmes delivered the opinion of the court.

This is an action for personal injuries suffered in Porto Rico. The declaration alleges that the plaintiff at the defendant's request made a trip on an automobile of the latter "for the purpose of aiding other employés of the defendant in moving a certain boiler which was the property of the defendant," and that in returning from the trip the automobile was so negligently operated by the defendant, its agents and employés, that it was driven into a ditch and the plaintiff was badly hurt. There was a trial by jury, in which, at the end of the plaintiff's evidence, the judge directed a verdict for the defendant and the plaintiff excepted. The evidence showed that the machine was driven by a servant of the defendant, so that it appeared in proof that the plaintiff was suing for an injury caused by a fellow-servant, as is to be inferred from the face of the declaration itself.

Notwithstanding the admission that the plaintiff was an employé of the defendant, imported by the words 'for the purpose of aiding other employés,' it is argued that

the plaintiff was not a fellow-servant, and therefore, although the contention hardly is open, the substance of the testimony may be stated. The plaintiff's general employers had sold a sugar mill to the Central, delivered in New Orleans. At the request of the Central they had sent over the plaintiff to put up a chimney, a battery of six boilers and a bagasse track. While at the work he seems to have been paid by the defendant and was under the direction of its chief engineer. The chimney had been nearly finished and the next work was to set up the boilers, but they had not arrived. The man in charge of the transportation directed the plaintiff to go and help to get a boiler, which, after asking the chief engineer for leave, he did. When they got to the boiler there were not enough machines to haul it, so that they had to return to the Central. On the way the driver seems to have been more or less drunk, and negligently, it must be assumed, upset the machine.

Whether the plaintiff was in the general employ of the defendant, as he seems to have been, or not, the service that he consented to render was the defendant's work. In rendering that, at least, he came under its orders and became its servant. Assuming in his favor that he was a volunteer, that fact did not enlarge his rights. *Degg* v. *Midland Ry. Co.*, 1 H. & N. 773; *Potter* v. *Faulkner*, 1 Best & Sm. 800; *Barstow* v. *Old Colony R. R. Co.*, 143 Massachusetts, 535, 536; *Wischam* v. *Richards*, 136 Pa. St. 109. Other cases will be found in 2 Labatt, Master & Servant, § 631. He was the defendant's servant not only while actually at work on the boiler but during the trip taken for the purpose of doing the work. *Northern Pacific R. R. Co.* v. *Peterson*, 162 U. S. 346, 358. *Martin* v. *Atchison, Topeka & Santa Fe R. R. Co.*, 166 U. S. 399, 403. *Texas & Pacific Ry. Co.* v. *Bourman*, 212 U. S. 536, 538, 539. And he was fellow-servant with the driver of the machine. *Martin* v. *Atchison, Topeka & Santa Fe R. R. Co., supra;*

Northern Pacific Ry. Co. v. *Dixon*, 194 U. S. 338. *Texas & Pacific Ry. Co.* v. *Bourman*, 212 U. S. 536, 541. *Beutler* v. *Grand Trunk Junction Ry. Co.*, 224 U. S. 85. If the law of Porto Rico does not differ in this respect from the common law, the direction to the jury was right.

Whether the common law rule prevails is not made clear by any authority cited. But by the act of March 1, 1902, (Rev. Stats. & Codes, 1902, p. 150), the English Employers' Liability Act was copied more or less exactly, as it has been in some of the States. That statute presupposes the common law rule as to fellow-servants, *Ryalls* v. *Mechanics' Mills*, 150 Massachusetts, 190, 191, and the Porto Rican copy would be hard to account for except upon the same presupposition. If a master were liable for injuries caused by the negligence of a fellow-servant there would be no need of enacting that he should be liable for such injuries in specific cases, as the statute does, and no sense in the provision of § 10 that the act shall not apply to injuries caused to domestic servants, or farm laborers, by fellow-employés. Therefore, while we might hesitate if we were deducing the rule from the considerations on which it originally was placed, *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U. S. 1, 11, 12, as indeed one might hesitate about the more general liability to which it is an exception, we must assume that it exists, even laying on one side the suggestion that the statute offers the only remedy for cases within it. We should add that this suit is not brought under the act.

It was argued, evidently as an afterthought for which no foundation was laid in the pleadings, that the defendant might have been liable on the ground that it employed an incompetent servant. This suggestion is based on a single expression concerning the driver, that it was his custom to drink while driving the machine. This neither stated nor meant, so far as we can judge, that it was the custom of the driver to drink to excess or so as to unfit

him for his work. The only other reference to the matter was by another of the plaintiff's witnesses, that the driver was "not in the mood or attitude which he usually had when we worked together in the shops," importing usual sobriety. It would have been permitting a mere guess, to allow the jury to find for the plaintiff on this ground.

Judgment affirmed.

FRANCIS, PETITIONER, *v.* McNEAL, TRUSTEE IN BANKRUPTCY OF THE PROVIDENT INVESTMENT BUREAU.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 290. Argued May 5, 6, 1913.—Decided May 26, 1913.

Whether or not the copartnership is an entity distinct from the members, partnership debts are debts of the members of the firm.

The individual liability of partners for debts of the firm is primary and direct; it is not collateral like that of a surety.

The business of a bankruptcy act is so far as may be to preserve, not to upset, existing relations based on fundamental rules of law.

The Bankruptcy Act recognizes the firm as an entity for certain purposes, but does not alter the preëxisting rule that the partnership can be in bankruptcy and the partners not.

In this case an order directing that the separate estate of a member of a firm which had been adjudicated bankrupt be turned over to the trustee for administration is affirmed.

186 Fed. Rep. 481; 108 C. C. A. 459, affirmed.

THE facts, which involve the construction of the Bankruptcy Act of 1898 in regard to the administration by the trustee of a bankrupt copartnership of the individual estates of the partners, are stated in the opinion.

Mr. Charles L. Frailey, with whom *Mr. Henry J. Scott* was on the brief, for petitioner:

The trustee of a partnership which has been declared a bankrupt cannot administer the individual estate of a partner who has not himself been adjudged bankrupt.

A partnership for the purpose of adjudication and administration in bankruptcy under the act of July 1, 1898, is an entity separate and distinct from the members which compose the partnership.

Under the act of 1898 a partnership is a "person." It can commit any act of bankruptcy defined by the act (*In re Meyer*, 98 Fed. Rep. 976, 979), including, of course, that stated in § 3a. It can be discharged without reference to its members, under §§ 14a and b. Insolvency is defined, and the definition refers to the assets and liabilities of a "person." It is, therefore, a concrete thing under the act of 1898, subject as a distinct entity to the provisions of the statute. *Fidelity Co.* v. *Gaskell*, 195 Fed. Rep. 865; *Mills* v. *Fisher*, 159 Fed. Rep. 897; *In re Bertenshaw*, 157 Fed. Rep. 363; *Tumlin* v. *Bryan*, 165 Fed. Rep. 166; *In re Stein*, 127 Fed. Rep. 547, 549; *In re Mercur*, 122 Fed. Rep. 384, 388; *In re Sanderlin*, 109 Fed. Rep. 857; *In re Solomon*, 163 Fed. Rep. 140; *In re Everybody's Grocery*, 173 Fed. Rep. 492; *In re Meyer*, 98 Fed. Rep. 976, 979; *Strause* v. *Hooper*, 105 Fed. Rep. 590; *In re Farley*, 115 Fed. Rep. 359, 361; *In re Barden*, 101 Fed. Rep. 553, 555; *In re Hale*, 107 Fed. Rep. 432.

Before a partnership can be adjudged a bankrupt for an act of bankruptcy involving insolvency, it is not necessary that the individual partners must be insolvent also. *In re Bertenshaw*, 157 Fed. Rep. 363. See also *In re Sanderlin*, 109 Fed. Rep. 857; *In re Solomon*, 163 Fed. Rep. 140; *In re Everybody's Grocery Co.*, 173 Fed. Rep. 492. The leading case in opposition to this contention, *Vaccaro* v. *Security Bank of Memphis*, 103 Fed. Rep. 436, recognizes that the partnership is a complete legal entity and yet the property of the individual members of the partnership must be considered upon the question of the

firm's solvency, because each member of the partnership is liable *in solido* for the debts of the firm. But the individual property of each member is not the property of the partnership, and does not belong to it.

If the proposition announced in *Vaccaro* v. *Security Bank of Memphis*, 103 Fed. Rep. 436, is correct in a bankruptcy case involving insolvency the entity doctrine must be abandoned, and an adjudication of a partnership for an act of bankruptcy involving insolvency cannot take place unless all the partners are also adjudicated bankrupts upon that ground. If this is so, then the partnership is an entity for some purposes and not for others, although no such distinction whatever is made in the Bankruptcy Act itself.

See also on this subject *Tumlin* v. *Bryan*, 165 Fed. Rep. 166; *Re Forbes*, 128 Fed. Rep. 137; *In re Meyer*, 98 Fed. Rep. 384; *Re Mercur*, 122 Fed. Rep. 384.

Section 5h is applicable where the partnership has been adjudicated a bankrupt as well as where it has not.

If there be an unadjudicated partner, he may administer the estates of those who have been adjudicated; and if the firm—the separate entity—has also been adjudicated, certainly that fact cannot take from the unadjudicated partner his right to settle the partnership business as provided by this subdivision.

Indeed, it is more reasonable to suppose that subdivision h applies only where the partnership has been adjudicated. *Mills* v. *Fisher*, 159 Fed. Rep. 897; *Re Mercur*, 122 Fed. Rep. 384, 388.

Subdivision h enunciates a well-recognized equitable principle in the law of administration of partnerships. And it is reasonable to suppose that it was inserted for the purpose of covering the case, among others, where the partnership, as an entity contemplated by the statute and almost unanimously held by the Federal courts to be such, has been adjudicated a bankrupt in a matter in-

volving insolvency, independently of its members together with one or more of the partners but not all thereof and there is an unadjudicated partner. To hold otherwise would lead to the conclusion that this subdivision "is in effect a provision that the partnership shall not be made bankrupt except by an adjudication of all its partners, *Re Forbes*, 128 Fed. Rep. 137, *supra*, a conclusion impossible under the entity doctrine.

The trustee of a partnership adjudicated a bankrupt because of the commission by it of any of the acts of bankruptcy defined in the act of 1898, cannot draw to himself for administration or administer in bankruptcy the estate of an unadjudicated partner. *Re Stein*, 127 Fed. Rep. 547; *Strause* v. *Hooper*, 105 Fed. Rep. 590; *In re Bertenshaw*, 157 Fed. Rep. 363.

The only cases *contra* are *Re Duke*, 199 Fed. Rep. 199; *Re Stokes*, 106 Fed. Rep. 312; and the *obiter* in *Re Meyer*, 98 Fed. Rep. 977, and *In re Wing Yick*, 13 A. B. R. 757.

Mr. George Wharton Pepper, with whom *Mr. Edgar J. Pershing* was on the brief, for respondent.

Mr. Justice Holmes delivered the opinion of the court.

This is a proceeding to review an order of the Bankruptcy Court to the effect that the separate estate of Stanley Francis should be turned over for administration to the respondent, McNeal, trustee in bankruptcy of a firm of which Francis was a member. The order was made on the petition of the trustee, and was affirmed upon a petition for revision by the Circuit Court of Appeals. 186 Fed. Rep. 481. 108 C. C. A. 459.

The facts are short. Creditors filed a petition against Latimer, Francis and Marrin, alleging that they were

partners trading as the Provident Investment Bureau, and that they were bankrupt individually and as a firm. McNeal was appointed receiver of the partnership and individual estates, but Francis denied that he was a partner and sought to have the receiver discharged. Thereupon, on March 13, 1906, it was agreed between the counsel for the receiver and for Francis that McNeal should be discharged as receiver of the individual estate of Francis; that the question whether Francis was a partner should be referred to one of the regular referees; that until the determination of that question, his counsel, Scott, should collect the rents and retain possession of his estate; and that thereafter Scott should account and turn over the funds to such person as the court might direct. On April 17 an order was made embodying the agreement and naming a referee. The referee found that Francis was a partner, and that now stands admitted for the purposes of the present decision. The firm was adjudicated bankrupt in June, 1909. McNeal was appointed trustee in July and forthwith filed the petition upon which the order in question was made. The order declared that the separate estate of Francis was subject to administration in bankruptcy and ordered the real estate turned over to McNeal, with leave to sell. The firm, even with the separate estates of the partners, will not be able to pay its debts in full.

Since Cory on Accounts was made more famous by Lindley on Partnership the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever

priorities there may be in the marshalling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the Bankruptcy Act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment could be got and the partnership debt satisfied on execution out of the individual estates.

The question is whether the Bankruptcy Act has established principles inconsistent with these fundamental rules, although the business of such an act is so far as may be to preserve, not to upset, existing relations. It is true that by § 1, the word 'person' as used in the act includes partnerships; that by the same section, a person shall be deemed insolvent when his property, exclusive &c., shall not be sufficient to pay his debts; that by § 5a, a partnership may be adjudged a bankrupt, and that by § 14a, any person may file an application for discharge. No doubt these clauses taken together recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets and that of individual debts upon the individual estate. Section 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula—a guillotine for cutting off all the consequences admitted to attach to partnerships elsewhere than in the bankruptcy courts. On the contrary we should infer from § 5, clauses c through g, that the assumption of the Bankruptcy Act was that the partnership and individual estates both were to be administered, and that the only exception was that in h, "in the event of one or more, but not all of the members of a partnership being adjudged bankrupt."

In that case naturally the partnership property may be administered by the partners not adjudged bankrupt and

does not come into bankruptcy at all except by consent. But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes no further than that.

On the other hand it would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate after paying private debts is part of those assets so far as needed. Section 5f. Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy. If such a case is within § 5h, it is enough that Francis never has objected to the firm property being administered by the trustee.

If it be said that the logical result of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, in an able opinion, *In re Forbes*, 128 Fed. Rep. 137, it is a sufficient answer that no such objection has been taken, but on the contrary, Francis has consented and agreed to hand over his property according to the order of the court. So far

as *Vaccaro* v. *Security Bank of Memphis*, 103 Fed. Rep. 436, 442, is inconsistent with the opinion of the majority in *In re Bertenshaw*, 157 Fed. Rep. 363, we regard it as sustained by the stronger reasons and as correct.

Decree affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* HESTERLY, ADMINISTRATOR.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 297. Argued May 6, 1913.—Decided May 26, 1913.

When the state court has overruled an objection that the Federal right was not clearly presented, the objection is not open in this court.

Quære, whether plaintiff can sue upon a statute of one jurisdiction when the action can be maintained only on that of another.

In a suit for personal injuries resulting in the death of plaintiff's intestate, plaintiff sued an interstate carrier on two counts, one for pecuniary loss to next of kin and the other for injury and pain sustained by the intestate before death. There was a recovery on both counts which the Supreme Court of the State sustained on the ground that the Employers' Liability Act was only supplementary and the judgment could be upheld under the state law. *Held* error and that:

In a suit for personal injuries against an interstate railway carrier, plaintiff, not defendant, has the election how the suit shall be brought.

The Federal Employers' Liability Act supersedes state laws in the matters with which it deals, including liability of carriers while engaged in commerce between the States for defects of cars.

In case of death of an injured employé, the only action under the Federal Employers' Liability Act of 1908 is one for the benefit of the next of kin; there can be no recovery for the pain suffered before death.

The Employers' Liability Act as amended in 1910 saves the rights of the injured employé but allows only one recovery; the act as amended

not having a retroactive effect does not apply where the death occurred prior to the amendment.
98 Arkansas, 240, reversed.

THE facts, which involve the construction of the Employers' Liability Act of 1908 and the extent to which it superseded state statutes, are stated in the opinion.

Mr. W. E. Hemingway, with whom *Mr. Martin L. Clardy* and *Mr. Thos. B. Pryor* were on the brief, for plaintiff in error.

Mr. Joseph M. Hill, *Mr. James Brizzolara* and *Mr. Henry L. Fitzhugh*, for defendant in error, submitted.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries resulting in the death of the plaintiff's intestate. There are two counts, the first for the pecuniary loss to the next of kin, laid at $5,000, the other for the injury and pain suffered by the intestate, laid at $25,000. The death was caused by a defect in a car on which the intestate was a brakeman, the car being part of a train running from Van Buren, Arkansas, to Coffeyville, Kansas. The jury found a verdict for the plaintiff for $2,000 on the first count and for $10,000 on the second. The Supreme Court of the State sustained the judgment on condition of a remittitur of $5,000; this was entered and judgment was rendered for $7,000. At the trial the defendant asked for a ruling that the plaintiff could not recover damages for pain under the second count, which was denied subject to exception. The Supreme Court treated the request as intended to raise the question whether the Employers' Liability Act of Congress of April 22, 1908, c. 149, 35 Stat. 65, displaced the state law, as undoubtedly it was; stated that the suit was

not based upon that act, and held that the act of Congress was only supplementary, and that the judgment could be upheld under the state law. 98 Arkansas, 240.

The plaintiff contends that the claim of right under the law of the United States and against that under the law of the State was not presented with clearness enough to save it. But as the Supreme Court held the question sufficiently raised and decided it, that objection is not open here. *San José Land & Water Co.* v. *San José Ranch Co.*, 189 U. S. 177, 180; *Eau Claire Nat. Bank* v. *Jackman*, 204 U. S. 522, 533.

The same answer may be given to the suggestion that the defendant is estopped by having pleaded contributory negligence and thus having relied upon the state law. Moreover, the plaintiff, not the defendant, had the election how the suit should be brought, and as he relied upon the state law, the defendant had no choice, if it was to defend upon the facts. Whether the defendant could have defeated the first count also on the ground that the plaintiff was suing upon a statute of one jurisdiction, whereas the action could be maintained only on that of another, need not be decided, since the defendant asks reversal of only so much of the judgment as rests on the second count. Hence it is unnecessary to consider whether the principle of *Union Pacific Ry. Co.* v. *Wyler*, 158 U. S. 285, or that of *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570, 577, should be applied. See further *Troxell* v. *Delaware, Lackawanna & Western R. R. Co.*, 227 U. S. 434, 442. *Northern Pacific Ry. Co.* v. *Slaght*, 205 U. S. 122, 131. *United States* v. *Dalcour*, 203 U. S. 408, 423.

Coming to the merits it now is decided that the act of Congress supersedes state laws in the matter with which it deals. *Mondou* v. *New York, New Haven & Hartford R. R. Co.*, 223 U. S. 1, 53–55. *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570, 576. *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, 67. The act deals with

the liability of carriers, while engaged in commerce between the States, for defects in cars. Section 1. In the case of death the only action is one for the benefit of the next of kin. Section 1. *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, 67, 68. *American R. R. Co.* v. *Didricksen*, 227 U. S. 145, 149. *Gulf, Colorado & Santa Fé Ry. Co.* v. *McGinnis*, 228 U. S. 173, 175. Therefore the ruling of the state court was wrong. The amendment of April 5, 1910, c. 143, § 2, 36 Stat. 291, in like manner allows but one recovery, although it provides for survival of the right of the injured person. The amendment, however, does not apply to this case, as the death occurred in August, 1909.

Judgment reversed.

SANFORD *v.* AINSA, ADMINISTRATOR.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 504. Argued May 5, 1913.—Decided May 26, 1913.

This court rarely disturbs local decisions of the territorial courts on question of local practice.

The Supreme Court of the Territory, having held that under § 10 of Act 44 of 1899 of Arizona transferring cases from the District Court of one county to the corresponding court of another county newly organized, the former court retained jurisdiction until the conditions of the transfer were fulfilled, this court follows that decision.

13 Arizona, 287, affirmed.

THE facts are stated in the opinion.

Mr. William C. Prentiss, with whom *Mr. Fred McKee* was on the brief, for appellants.

Mrs. Sarah H. Sorin and *Mr. Selim M. Franklin*, for appellee, submitted.

MR. JUSTICE HOLMES delivered the opinion of the court.

This was a suit to recover possession of land conveyed by the father of the appellants to them, pending a prior suit prosecuted by the appellee to quiet title in a tract of which this land was part. *Richardson* v. *Ainsa*, 218 U. S. 289. The plaintiff (appellee) got a judgment for possession and damages and the defendant took the case to the Supreme Court of the Territory.

The errors assigned before that court seem to have been first, the refusal of the court below to strike out a paragraph of the complaint that set up the decree in the former suit, the defendant contending that it appeared on its face to have been entered by a court having no jurisdiction; second, the overruling of a general demurrer; and besides these two, the overruling of a motion for judgment in defendant's favor, and of another motion for a new trial and in arrest of judgment, and the admission of incompetent evidence. The court declined to review the assignments other than the first two, both because they were too general and because the abstract of record before the court did not contain the evidence, and therefore it would have been necessary to examine the original transcript of the reporter's notes, contrary to the rules and practice of the court. Accordingly when the appellant moved for findings of fact in the nature of a special verdict the motion was denied, and the first contention of the appellants is that the case should be sent back for findings of fact. *Nielsen* v. *Steinfeld*, 224 U. S. 534.

We assume that the findings of fact desired were findings sufficient to open the last mentioned assignments of error for reconsideration here. But the only findings that the Supreme Court of the Territory could have made in

order to submit its rulings to revision would have been to the effect of what we have stated. It was not called on to reverse its decision that by correct local practice the merits were not before it in order to present the merits to this court. Therefore unless its decision on the question of practice was wrong its refusal to make the findings desired was right. But we rarely disturb local decisions on questions of local practice and we see no reason to do so in this instance. Therefore so far as all the assignments of error after the first two are concerned the judgment must be affirmed. *Armijo* v. *Armijo*, 181 U. S. 558, 561.

We see no ground for the demurrer unless it was intended to raise the same question as the motion to strike out the averments touching the previous suit. The basis of this motion was that the jurisdiction of the court where that suit was pending was ended before judgment by § 10 of Act 44, 20th Leg. Assembly, 1899. By that section all actions 'now pending' in the District Court of Pima County, where the property in controversy is situated in the new County of Santa Cruz, "shall be transferred to the proper courts of said County of Santa Cruz for trial," and it is made the duty of the clerks of Pima County to transmit all papers, provided that it shall not be the clerk's duty to do so until his fees and compensation allowed by the act shall have been paid or tendered to him, and until all costs due to the clerk and sheriff have been paid. The court of Santa Cruz is to acquire jurisdiction upon receipt by its clerk of the papers in the actions transferred. It was held by the Supreme Court—and we should follow the decision even if it were less obviously correct, *Gray* v. *Taylor*, 227 U. S. 51, 57—that the jurisdiction of the Pima Court remained until the conditions of transfer were fulfilled, and that no facts were alleged in the complaint showing that to be the case. No ground appears for disturbing the judgment below.

Judgment affirmed.

DONNELLY *v.* UNITED STATES.

ON PETITION FOR REHEARING.

No. 97. Petition for rehearing presented May 31, 1913.—Decided June 9, 1913.

This court will permit a petition for rehearing to be filed in order to determine whether it ought to be entertained and even if the point raised as to expressions in the original opinion have a basis, if the decision did not depend on that point the petition will be denied.

The court recalls that part of the opinion heretofore delivered in this case, *ante*, pp. 262, 263, which holds that "By the acts of legislation mentioned, as construed by the highest court of the State—(a) the act of 1850, adopting the common law and thereby transferring to all riparian proprietors (or confirming in them) the ownership of the non-navigable streams and their beds; and (b) the acts of February 24 and of March 11, 1891, declaring in effect that the Klamath River is a non-navigable stream—California has vested in the United States, as riparian owner, the title to the bed of the Klamath, if in fact it be a navigable river," and leaves that matter undecided.

As the conviction of the plaintiff in error can be sustained without reference to the question of navigability of the Klamath River, a petition for rehearing based on assertions of errors in that respect in the opinion heretofore filed, *ante*, p. 243, is denied.

THE facts are stated in the opinion.

Mr. John F. Quinn, with whom *Mr. W. F. Clyborne* was on the brief, for plaintiff in error.

Mr. Assistant Attorney General Denison for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

A petition for rehearing is presented, which we permit to be filed in order to determine whether it ought to be entertained.

The petition raises several points, only one of which is deemed worthy of mention; and that is the insistence that the court, in basing its decision herein (228 U. S. 243, 262, etc.) upon the California acts of February 24, 1891, c. 14 (Laws, 1891, p. 10) and of March 11, 1891, c. 92 (Laws, 1891, p. 96) (Political Code, § 2349), and the decision of the Supreme Court of that State in *Cardwell* v. *County of Sacramento*, 79 California, 347, 349, to the effect that the enumeration of the navigable rivers of the State as made by the legislature is exclusive and that no other rivers are navigable under the laws of California, overlooked the effect of the decisions of the Supreme Court of California in other cases (*People* v. *Elk River M. & L. Co.*, 107 California, 221, 224; *Forestier* v. *Johnson*, 44 Cal. Dec. 471, No. 2350, October 1, 1912; and *People* v. *Kerber*, 152 California, 731), and that our decision respecting the navigability of the Klamath River and state ownership of the bed thereof is so serious in its ulterior consequences that it ought not to be adhered to without further argument.

The judgment affirming the conviction of the plaintiff in error can be sustained, however, without regard to the question thus raised. It is conceded that whether the Klamath is navigable at the place where the homicide occurred is a question of fact. Of course the tide ebbs and flows at the river's mouth, but the *locus in quo* is approximately twenty-five miles from the mouth, and quite beyond any possible influence of the tide. As the opinion points out, there was evidence tending to show that the stream is navigable in fact at certain seasons from Requa (near its mouth) up to and above the *locus in quo*. But the evidence was by no means conclusive. It showed an apparently irregular traffic, in times of high water only, employing Indian canoes, "dug-outs," and at certain times small steamboats and gasoline launches. In this state of the evidence, the trial court could not, nor can

we, take judicial notice of the stream as being navigable in fact; especially in the face of a declaration by the legislature of the State that it is not navigable. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 698.

Upon the argument, the Government cited and relied upon the acts of February 24 and March 11, 1891, and the decision in *Cardwell* v. *County of Sacramento*, as showing that the State had abandoned any claim it might have had to the bed of the stream, and surrendered such rights to the riparian proprietors—in this case to the United States, for the benefit of the Indians. Counsel for plaintiff in error did not in his brief (nor, so far as we recall, in the oral argument) make any reply to this contention, nor challenge the authority of *Cardwell* v. *County of Sacramento*, or the effect of that decision upon the matter in controversy. Being unable to find that the case had been overruled or questioned, we accepted it as authoritative upon the question of state policy, with the result of concluding upon the whole matter that whether the river were or were not navigable in fact, its bed was to be deemed as included within the extension of the Hoopa Valley Reservation.

But the record shows that upon the trial, the plaintiff in error did not request or suggest that the question of the navigability of the river at the *locus in quo* should be considered as a question of fact, and disposed of accordingly. At the close of the evidence for the Government, counsel moved for a dismissal of the action upon the ground that it had not been shown that the alleged offense happened within the limits of the Reservation. And at the close of all the evidence the trial court was requested to instruct the jury that the river was not within the limits of the Reservation, and that if the alleged crime was committed upon the river, the evidence had failed to establish the jurisdiction of the court to try the defendant. This insistence was repeated in different forms, but in each in-

stance the court was in effect requested to rule as matter of law that the Klamath River was not within the Reservation. This contention was as properly attributable to the theory that the territorial limits as described in the executive order of President Harrison, dated October 16, 1891, did not in terms include it, as to the theory that the river was not navigable. It was upon the former theory that plaintiff in error principally relied in this court. If the suggestion of excluding the river from the Reservation on the ground that it was navigable was intended to be made the subject of exception at the trial, this point should have been clearly raised; and it was not. Moreover, even assuming that the requests were intended to point to the question of navigability, they at best called upon the court to decide that question as a question of law, and not to determine it, or to have the jury determine it, as a question of fact.

The state of the record, therefore, did not entitle the plaintiff in error to call upon this court to decide the merits of the question of the navigability of the river and its effect upon the jurisdiction of the Circuit Court over the homicide. In discussing the merits we assumed (in favor of plaintiff in error) that the question was raised by the record. But since it is now suggested that in so doing we have passed upon a question that was not adequately argued, and which in its consequences involves important interests, other than those of the plaintiff in error, we prefer to and do recall so much of the opinion as holds that—"By the acts of legislation mentioned, as construed by the highest court of the State—(a) the act of 1850, adopting the common law and thereby transferring to all riparian proprietors (or confirming in them) the ownership of the non-navigable streams and their beds; and (b) the acts of February 24 and of March 11, 1891, declaring in effect that the Klamath River is a non-navigable stream—California has vested in the United States, as riparian owner,

the title to the bed of the Klamath, if in fact it be a navigable river." That matter, therefore, we leave undecided.

But since, as already shown, the conviction of the plaintiff in error may properly stand without regard to that question, we deem that no useful purpose would be served by further oral argument.

Rehearing denied.

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4. *Deportation; power of Philippine Government.*

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2. *Court of Appeals; review by; time for taking appeal; rule governing; effect of death of party.*

Rule 10 providing that there shall be no review by the Court of Appeals of any order, judgment or decree of the Supreme Court of the District unless the appeal be taken within twenty days after the same is made, is the only rule governing such appeals, and there is no provision extending the time for taking or perfecting an appeal in the event of death of a party. *Ib.*

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EMPLOYERS' LIABILITY ACT.

1. *Act of 1906; effect as law.*

An unconstitutional statute is not a law, and is as inoperative as though it never had been passed; it can neither confer a right or immunity nor operate to succeed any existing valid law; and so held as to Employers' Liability Act of 1906. *Chicago, I. & L. Ry. Co.* v. *Hackett*, 559.

2. *Effect to supersede state statutes; quære.*

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In a suit for personal injuries resulting in the death of plaintiff's intestate, plaintiff sued an interstate carrier on two counts, one for pecuniary loss to next of kin and the other for injury and pain sustained by the intestate before death. There was a recovery on both counts which the Supreme Court of the State sustained on the ground that the Employers' Liability Act was only supplementary and the judgment could be upheld under the state law. *Held* error and that

In a suit for personal injuries against an interstate railway carrier plaintiff, not defendant, has the election how the suit shall be brought.

The Federal Employers' Liability Act supersedes state laws in the matters with which it deals, including liability of carriers while engaged in commerce between the States for defects of cars.

In case of death of an injured employé, the only action under the Federal Employers' Liability Act of 1908 is one for the benefit of the next of kin; there can be no recovery for the pain suffered before death. *St. Louis, I. M. & S. Ry. Co.* v. *Hesterley*, 702.

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2. *Power to convey; effect to create trust; rule in District of Columbia.*

In the District of Columbia a power of sale given to more than one person named in a will as executors, coupled with the active and continuing duty of managing the property, making disposition thereof and changing investments for the benefit of the family of testator, is not a mere naked power to sell, but one that creates a trust which survives and can be executed by the survivor. *Ib.*

3. *When deemed trustees.*

Where the duties imposed upon executors are active and render the possession of the estate convenient and reasonably necessary, they will be deemed trustees for the performance of those duties to the same extent as though declared so to be in the most explicit terms. *Ib.*

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Whether rules provided to be made by a police ordinance were properly promulgated and whether the officer promulgating them had authority so to do are not Federal questions. *Adams* v. *Milwaukee*, 572.

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See NEGLIGENCE, 2.

INSURANCE.

1. *Payment of premium; effect of partial payment.*

Where a life insurance policy plainly provides for payment of the stipulated premium within a specified period of grace after the due day and as plainly excludes any idea of partial payments distributed between the premium dates, the insured gains nothing by giving an agent a portion of the premium in the absence of authority given him by the company to accept it. *Slocum* v. *New York Life Ins. Co.*, 364.

2. *Payment of premium; effect of attempt to extend otherwise than provided.*

Where there is a method for extending payment of premiums which is known to the insured, who also knows that the agent has no power to extend on any other terms, the insured takes nothing by an attempt to extend in a different manner in which an element of substance in the prescribed method is omitted. *Ib.*

3. *Payment of premium; effect of retention of partial payment as waiver by insurer.*

The temporary retention by an insurance company of a partial payment of a premium subject to the direction of the insured, *held*, under the circumstances of this case, not to constitute a waiver of full and timely payment. *Ib.*

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See STATUTES, A 6;
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1. *Purposes of act; judicial review of conduct of carriers subject to action by Interstate Commerce Commission.*

The purpose of the Interstate Commerce Act is to establish a tribunal to determine the relation of communities, shippers and carriers, and their respective rights and obligations dependent upon the act, and the conduct of carriers is not subject to judicial review in criminal or civil cases based on alleged violations of the act until submitted to and passed on by the Commission. *United States* v. *Pacific & Arctic Co.*, 87.

2. *Findings of Commission; quœre as to effect.*

Quœre, what the effect is of a finding by the Interstate Commerce Commission in such a case. *Ib.*

3. *Carmack Amendment; validity under, of stipulation as to liability of connecting carriers.*

Under *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, and *Galveston, Harrisburg &c. Ry. Co.* v. *Wallace*, 223 U. S. 481, which sustained the Carmack Amendment, stipulations in a bill of lading for interstate shipment that no carrier shall be liable for damages not occurring on its portion of the through route, are void; and the initial carrier is liable whether the through route connections are designated by it or by the shipper. *Norfolk & Western Ry. Co.* v. *Dixie Tobacco Co.*, 593.

4. *Rates; discrimination in; validity of rates given in connection with construction work.*

In dealing with transportation of supplies and employés of contractors in connection with construction and improvement of its own road, a railroad company does not act as a common carrier; arrangements made in good faith with such contractors for free or reduced rates are not violations of the prohibitions of the Interstate Commerce Act against rebates. See *Matter of Railroad-Telegraph Contracts*, 12 I. C. C. Rep. 10. *Santa Fe, P. & P. Ry. Co.* v. *Grant Bros.*, 177.

5. *State interference by taxation; cessation of interstate commerce to permit taxation.*

Where the trade in an article can only be accommodated by storage at some point in transit from the point of shipment in one State to final destination in another, and there is a business purpose and advantage in the delay during which the article secures the protection of the State where it is stored, there is a cessation of inter-

court had no jurisdiction. The court overruled the plea and, defendant not having answered further, made a decree for plaintiff. In this court *held* that the appeal was on the question of jurisdiction alone, and as jurisdiction existed below and rested solely on the patent law, there being no diverse citizenship, the decree must be affirmed. *Ib.*

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D. OF BANKRUPTCY COURT.

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E. OF FEDERAL COURTS GENERALLY.

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Judges of Federal courts should avoid asking counsel if objections to the jurisdiction of the court are withdrawn, as the withdrawal of such objections to be effectual must be purely voluntary. *Rexford* v. *Brunswick-Balke-Collender Co.*, 339.

See CONSTITUTIONAL LAW, 29, 30; INDIANS, 5; PURE FOOD AND DRUG ACT, 11; REMOVAL OF CAUSES, 1.

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H. GENERALLY.

1. *Basis of; power over person; continuance.*

While ordinarily jurisdiction over a person is based on the power of the sovereign to seize and imprison him, it is one of the decencies of civilization that when the power exists and has been asserted at the beginning of a cause, the necessity of maintaining the physical power is dispensed with. *Michigan Trust Co.* v. *Ferry*, 346.

2. *Definition; how defeated.*

Jurisdiction is authority to decide either way, and, if it exists as an incident to a Federal statutory cause of action, it cannot be defeated by a plea denying the merits. *The Fair* v. *Kohler Die Co.*, 22.

See COMBINATIONS IN RESTRAINT OF TRADE, 1, 3; CONSTITUTIONAL LAW, 1; INDIANS, 1; MANDAMUS, 1; PRACTICE AND PROCEDURE, 17.

MAILS.

MANDAMUS.

See PUBLIC LANDS, 23.

MARRIAGE.

MUNICIPAL CORPORATIONS.

1. *Changes of grade; liability for consequential damages.*

In the absence of legislation requiring compensation to be made for damages to abutting owners by change of grade of street, the municipality, being an agent of the State and exercising a governmental power, is not liable for consequential injuries provided it keep within the street and use reasonable care and skill in doing the work. *Ettor* v. *Tacoma*, 148.

2. *Changes of grade; liability for consequential damages; local law of Washington.*

Under the statutes of the State of Washington as construed by the courts of that State this general rule was superseded by legislation which required municipalities to compensate for consequential damages. *Ib.*

3. *Changes of grade; liability for consequential damages; defenses.*

A municipality cannot defend a suit for consequential damages on the ground that as the agent of the State it is immune, when its only authority to act is that given by the State coupled with an obligation to make compensation. *Ib.*

4. *Public utilities; right of municipality to construct and of private parties to prevent construction of plants.*

If the constitution of the State authorizes municipalities to construct utility plants as well after, as before, such plants have been built by private parties, one constructing such a plant takes the risk of what may happen, and cannot invoke the Fourteenth Amendment to protect him against loss by the erection of a municipal plant. *Madera Water Works* v. *Madera*, 454.

See CONSTITUTIONAL LAW, 3;
INTERSTATE COMMERCE, 6;
LOCAL LAW (Cal.).

MUNICIPAL ORDINANCES.

See CONSTITUTIONAL LAW, 2, 14, 15.

MUNITIONS OF WAR.

1. *"Export"; meaning as used in Joint Resolution of March 14, 1912.*

As used in the joint resolution of March 14, 1912, 37 Stat. 630, prohibiting exportation of munitions of war to American countries where conditions of domestic violence exist, the word "export" refers to any shipment of the prohibited articles from the United States

22. *Reversals; when court will not reverse judgment.*

Where this court finds nothing giving rise to a clear conviction that error has resulted from the action of the court below it should not reverse the judgment. (*Chicago Junction Ry. Co.* v. *King*, 222 U. S. 215.) *Seaboard Air Line Ry.* v. *Moore*, 433.

23. *Who may attack constitutionality of statute.*

One who is not discriminated against cannot attack a police statute of the State because it does not go farther; and if what it enjoins of one it enjoins of all others in the same class, that person cannot complain on account of matters of which neither he nor any of his class are enjoined. *Chicago Dock Co.* v. *Fraley*, 680.

See CERTIORARI, 2;
CONSTITUTIONAL LAW, 23, 28;
COURTS, 5;
FEDERAL QUESTION, 3, 5, 6;
JURISDICTION, E;
LOCAL LAW (Arizona);
REMOVAL OF CAUSES, 2;
VARIANCE.

PREËMPTION RIGHTS.

See PUBLIC LANDS, 8.

PREFERENCES.

See BANKRUPTCY, 19, 20;
CORPORATIONS, 1.

PRESUMPTIONS.

See CONSTITUTIONAL LAW, 16;
DEEDS, 2;
MARRIAGE, 1;
PHILIPPINE ISLANDS, 3;
PRACTICE AND PROCEDURE, 17.

PRINCIPAL AND AGENT.

Act of agent; effect to bind principal.

One dealing with an agent knowing that his authority is limited and that his acts transcend the limits cannot hold the principal. *Slocum* v. *New York Life Ins. Co.*, 364.

See CLAIMS AGAINST THE UNITED STATES;
INSURANCE, 1, 2;
MUNICIPAL CORPORATIONS, 1, 3.

PRIVILEGED COMMUNICATIONS.

See CONSTITUTIONAL LAW, 24, 25, 26.

PRODUCTION OF BOOKS AND PAPERS.

See CONSTITUTIONAL LAW, 24, 25, 26.

2. *Power of Congress to determine means for barring articles from interstate commerce.*

Congress may itself determine the means appropriate to this purpose; and, so long as they do no violence to the other provisions of the Constitution, Congress is itself the judge of the means to be employed in exercising the powers conferred on it in this respect. *Ib.*

3. *Construction; purpose and power of Congress controlling.*

The Pure Food and Drugs Act must be construed in the light of the purpose and power of Congress to exclude poisonous and adulterated food from interstate commerce. (*Hipolite Egg Co.* v. *United States*, 220 U. S. 45.) *Ib.*

4. *Articles prohibited by § 2.*

Articles, the shipment or delivery of which in interstate commerce is prohibited by § 2 of the Food and Drugs Act, are those which are adulterated or misbranded within the meaning of the act in the light of those provisions of the act wherein adulteration and misbranding are defined. *Ib.*

5. *Package or its equivalent as used in § 7 defined.*

"Package" or its equivalent, as used in § 7 of the Food and Drugs Act, refers to the immediate container of the article which is intended for consumption by the public. To limit the requirements of the act to the outside box which is not seen by the purchasing public would render nugatory one of the principal provisions of the act. *Ib.*

6. *Original package doctrine; effect on power of Congress.*

The doctrine of original packages was not intended to limit the right of Congress, when it chose to assert it, as it has done in the Food and Drugs Act, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end. *Ib.*

7. *"Original and unbroken package" and "broken package"; quære as to meaning.*

Quære, and not necessary to decide in this case, what is the exact meaning of the terms "original unbroken package" and "broken package" as used in §§ 2, 3 and 10 of the Food and Drugs Act. *Ib.*

8. *State interference with provisions of; power of State in respect of impure food.*

While the enactment by Congress of the Food and Drugs Act does not prevent the State from making regulations, not in conflict therewith, to protect its people against fraud or imposition by impure

REBATES.

See INTERSTATE COMMERCE, 4.

RECORD.

See FEDERAL QUESTION, 5;
JURISDICTION, A 8, 12;
PRACTICE AND PROCEDURE 14.

REHEARINGS.

1. *When granted.*

Petition for rehearing granted, not because of doubt of correctness of the decree, but to prevent misconception concerning the reasons for dismissing the writ of error in this case, *ante*, p. 326. *Consolidated Turnpike Co.* v. *Norfolk & O. V. Ry. Co.*, 596.

2. *When petition permitted to be filed.*

This court will permit a petition for rehearing to be filed in order to determine whether it ought to be entertained and even if the point raised as to expressions in the original opinion have a basis, if the decision did not depend on that point the petition will be denied. *Donnelly* v. *United States*, 708.

3. *Denial where petition based on errors not material.*

As the conviction of the plaintiff in error can be sustained without reference to the question of navigability of the Klamath River, a petition for rehearing based on assertions of error in that respect in the opinion heretofore filed, *ante*, p. 243, is denied. *Ib.*

See FEDERAL QUESTION, 3, 4.

REMEDIES AND DEFENSES.

See BANKRUPTCY, 16;
ELECTION OF REMEDIES.

REMOVAL OF CAUSES.

1. *Jurisdiction; time of filing petition not an essential to.*

The time for filing a petition for removal is not essential to the jurisdiction of the Federal court, and may be the subject of waiver or estoppel. *Rexford* v. *Brunswick-Balke-Collender Co.*, 339.

2. *Procedure in state court on second petition after cause remanded by Federal court.*

Where the second petition to remove presents no different question from that presented by the first, it is proper for the state court to follow the decision of the Federal court remanding the record and deny the petition. *McLaughlin Bros.* v. *Hallowell*, 278.

See JURISDICTION, A 1, 2, 3, 14, 18;
PRACTICE AND PROCEDURE, 12.

STATUTES.

A. Construction of.

1. *Foreign statute; what amounts to proof of construction.*

The putting in evidence of opinions of the highest court of a State construing a statute of that State, does not amount to proving a settled construction of that statute. *Chicago, I. & L. Ry. Co.* v. *Hackett*, 559.

2. *Meaning of words used.*

In construing a statute a word used therein may be given the meaning it has in common speech, although it may have a narrower technical meaning. *United States* v. *Chavez*, 525.

3. *Of distinct and non-related provisions of general appropriation act.*

Wholly distinct and non-related provisions of a general appropriation act should not be brought together and construed as one when such construction defeats the obvious purpose of the act and policy of the Government declared in that and other acts. *United States* v. *Anderson*, 52.

4. *Proviso in Bankruptcy Act as to class of property; weight to be given.*

In construing a general reference to property in the Bankruptcy Act, weight must be given to a proviso dealing with a special class of property. *Burlingham* v. *Crouse*, 459.

5. *Provisos; office of; effect as additional legislation.*

A proviso may sometimes mean additional legislation and not be intended to have the usual and primary office of a proviso which is to limit generalities and exclude from the scope of the statute that which otherwise would be within its terms. *Ib.*

6. *Taxing statute; effect as declaration by Congress of new policy.*

A statute declaring that a specified article shall be taxed and how is not necessarily a declaration by Congress that such article was not taxed under prior statutes; its history may show, as in the case of the act of February 4, 1909, that it was not the declaration of a new policy but a more explicit expression of prior statutes. *Jordan* v. *Roche*, 436.

7. *Unconstitutional statute; effect as declaration of legislative purpose.*

The purpose of Congress cannot be indicated by a statute which is unconstitutional. *Chicago, I. & L. Ry. Co.* v. *Hackett*, 559.

8. *Unconstitutionality in part; effect on constitutionality as entirety.*

Even if some provisions of a statute are unconstitutional, if they do not

STOCK AND STOCKHOLDERS.

STREETS AND HIGHWAYS.

SUBROGATION.

TAXES AND TAXATION.

1. *Corporation tax; on what imposed.*

The corporation tax is imposed upon the doing of corporate business and with respect to the carrying on thereof and not upon the franchises or property of the corporation irrespective of their use in business. (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 145.) *McCoach* v. *Minehill & S. H. R. R. Co.*, 295.

2. *Corporation tax; lessor railroad exempt; what constitutes doing business.*

A railway corporation which has leased its railroad to another company operating it exclusively but which maintains its corporate existence and collects and distributes to its stockholders the rental from the lessee and also dividends from investments is not doing business within the meaning of the Corporation Tax Act. *Park Realty Company Case sub Flint* v. *Stone Tracy Co.*, 220 U. S. 171, distinguished, and *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, followed. *Ib.*

3. *Corporation tax; liability to; quære.*

Quære whether such a corporation would be subject to the tax if it exercised the power of eminent domain or other corporate powers for the benefit of the lessee. *Ib.*