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UNITED STATES REPORTS

VOLUME 236

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1914

CHARLES HENRY BUTLER

REPORTER

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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.
CHARLES EVANS HUGHES, ASSOCIATE JUSTICE.
WILLIS VAN DEVANTER, ASSOCIATE JUSTICE.
JOSEPH RUCKER LAMAR, ASSOCIATE JUSTICE.
MAHLON PITNEY, ASSOCIATE JUSTICE.
JAMES CLARK McREYNOLDS, ASSOCIATE JUSTICE.[2]

JAMES C. McREYNOLDS, ATTORNEY GENERAL.[3]
THOMAS WATT GREGORY, ATTORNEY GENERAL.[4]
JOHN WILLIAM DAVIS, SOLICITOR GENERAL.
JAMES D. MAHER, CLERK.
JOHN MONTGOMERY WRIGHT, MARSHAL.[5]
FRANK KEY GREEN, MARSHAL.[6]

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

[2] James Clark McReynolds of Tennessee was appointed by President Wilson to succeed Mr. Justice Horace H. Lurton, who died during vacation on July 12, 1914; he was confirmed by the Senate of the United States on August 29, 1914; he took the oath of office September 5, 1914; the Judicial Oath was administered, and he took his seat on the bench on the opening of October Term 1914. For Memorial of Justice Lurton, see Volume 238, United States Reports.

[3] Resigned September 2, 1914.

[4] On August 19, 1914, President Wilson nominated Thomas Watt Gregory of Texas as Attorney General to succeed James C. McReynolds, resigned. He was confirmed by the Senate August 29, 1914, and took the oath of office on September 3, 1914.

[5] Died January 3, 1915. 235 U. S. VI.

[6] Appointed Marshal to succeed John Montgomery Wright, deceased, January 5, 1915.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, OCTOBER 19, 1914.[1]

ORDER: There having been an Associate Justice of this court appointed since the adjournment of the last 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, JAMES C. MCREYNOLDS, Associate Justice.

For the Eighth Circuit, WILLIS VAN DEVANTER, Associate Justice.

For the Ninth Circuit, JOSEPH MCKENNA, Associate Justice.

[1] For previous allotment see 234 U. S., p. iv.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1914.

COPPAGE *v.* STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 48. Submitted October 30, 1914.—Decided January 25, 1915.

The Kansas statute declaring it a misdemeanor punishable by fine or imprisonment for an employer to require an employé to agree not to become or remain a member of any labor organization during the time of the employment, so far as it applies to such a case as the present, where an employé at will, a man of full age and understanding, was merely required to freely choose whether he would give up his position of employment or would agree to refrain from association with the union while so employed, the case being free from any element of coercion or undue influence; *held*, repugnant to the "due process" clause of the Fourteenth Amendment.

Adair v. *United States*, 208 U. S. 161, followed to the effect that it is the constitutional right of an employer to dispense with the services of an employé because of his membership in a labor union, just as it is the constitutional right of an employé to quit the service of an employer who employs non-union men.

Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment where there is no stipulation on the subject he has the right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment, or of its continuance if terminable at will.

Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property, chief among which is that of personal employment by which labor and other services are exchanged for money or other forms of property.

A State cannot, by designating as "coercion" conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty; for to permit this would deprive the Fourteenth Amendment of its effective force in this respect.

When a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the State; and upon these matters this court cannot in the proper performance of its duty yield its judgment to that of the state court.

A statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power.

It being self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

The Fourteenth Amendment recognizes "liberty" and "property" as co-existent human rights and debars the States from any unwarranted interference with either.

Since a State may not strike down the rights of liberty or property directly, it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of the exercise of those rights, and then invoking the police power in order to remove the inequalities, without other object in view.

The Fourteenth Amendment debars the States from striking down personal liberty or property rights or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated "public welfare" and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.

Without intimating anything inconsistent with the right of individuals to join labor unions, or questioning the legitimacy of such organizations so long as they conform to the laws of the land as others are required to do, *held*, that the individual has no inherent right to join a labor union and still remain in the employ of one who is unwilling to employ a union man any more than the same individual has a right to join the union without the consent of that organization.

There may not be one rule of liberty for the labor organization or its members and a different and more restrictive rule for employers.

The employé's liberty of making contracts does not include a liberty to procure employment from an unwilling employer or without a fair understanding. Nor may the employer be foreclosed by legislation from exercising the same freedom of choice that is accorded to the employé.

To ask a man to agree in advance to refrain from affiliation with the union while retaining a certain position of employment is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment on any other; and, having accepted employment on those terms, the employé is still free to join the union when the period of employment expires, or, if employed at will, then at any time upon simply quitting the employment; and if bound by his own agreement to refrain from joining during a stated period of employment he is in no different situation from that which is necessarily incident to term contracts in general.

Constitutional freedom of contract does not mean that a party is to be as free after making a contract as before; he is not free to break it without accountability.

Freedom of contract, from the very nature of the thing, can be enjoyed only by being exercised; and each particular exercise of it involves making an engagement which if fulfilled prevents for the time any inconsistent course of conduct.

87 Kansas, 752, reversed.

THE facts, which involve the constitutionality under the due process clause of the Fourteenth Amendment of the statute of Kansas of 1909, making it unlawful for employers to coerce, require or influence employés not to join or remain members of labor organizations, are stated in the opinion.

Mr. R. R. Vermilion and *Mr. W. F. Evans* for plaintiff in error:

The statute amounts to deprivation of liberty and property without due process of law, and also to a denial of due process of law.

The statute is not a proper exercise of the police power.

In support of these contentions see, *Adair* v. *United States*, 208 U. S. 161; *A., T. & S. F. Ry.* v. *Brown*, 80 Kansas, 312; *Coffeyville Brick Co.* v. *Perry*, 69 Kansas, 297; *Gillespie* v. *People*, 188 Illinois, 176; *Goldfield Mines Co.* v. *Goldfield Miners' Union*, 159 Fed. Rep. 514; *Lochner* v. *New York*, 198 U. S. 45; *People* v. *Marcus*, 185 N. Y. 257; *State* v. *Coppage*, 87 Kansas, 752; *State* v. *Daniels*, 136 N. W. Rep. 584; *State* v. *Julow*, 129 Missouri, 163; *State* v. *Kreutzberg*, 114 Wisconsin, 530; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 112; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 558; *G., C. & S. F. Ry.* v. *Ellis*, 165 U. S. 151; *State* v. *Haun*, 61 Kansas, 154.

Mr. John S. Dawson, Attorney General of the State of Kansas, and *Mr. J. I. Sheppard* for defendant in error:

The Kansas statute does not violate the Fourteenth Amendment but seeks further to guarantee and protect the privileges and immunities of citizens of the United States. In harmony with the Fourteenth Amendment, the State of Kansas has said, in effect, that employers must not attempt to abridge the privilege of their employés to affiliate themselves with labor unions or meddle with or deprive them of their liberty to affiliate with such unions. They must not attempt by coercion to deprive them of their property—their financial interest in the insurance provided for their wives and children by such labor union. The State of Kansas will not fold its hands and sit idly by while employers seek to oppress and coerce their employés and reduce them to a state of peonage. Nor will the State withhold from a poor switchman equal protection

of its laws. See §§ 5508–10, Rev. Stat., prohibiting conspiracies to oppress any citizen of the United States.

If all men are to be equal within the law, as provided for in the Fourteenth Amendment; if the laboring man is to be the equal of the corporate officer; if the wage earner is to be the equal of his employer; if the poor man is to be the equal of the rich man; if that amendment is not to be distorted into a rod of oppression, then the law under which this prosecution was based is in furtherance of that amendment and not in derogation thereof.

In *Arthur* v. *Oakes*, 11 C. C. A. 209, 24 L. R. A. 414, Judge Harlan in his opinion held that as a general rule it is the right of every man to work for whom and when he pleases, and when he is ready to quit the service of his company he may do so. But this right of contract to quit work is not unlimited, but has its recognized exceptions. One of the exceptions to this rule, that the employé may quit the service of his employer when he likes, is, that employés cannot combine and conspire to quit the service of an employer, when the object and manifest intention is to injure the business of the employer.

The law of *Arthur* v. *Oakes* is the law of every State today, so it will be seen that this right to dispose of one's labor and capital as one pleases, relied upon by the plaintiff in error, is not without its recognized exceptions.

If the law in *Arthur* v. *Oakes*, there applied in favor of the corporation, is to be here applied in favor of the labor organization and its members, then the Kansas statute is constitutional. The only way to declare the law in the present case invalid is to say that in the eyes of the law the corporation is superior to the labor union, the poor man's organization. This is not the equality spoken of in the Fourteenth Amendment. *Coffeyville Brick Co.* v. *Perry*, 69 Kansas, 297, is no longer recognized as Kansas law and it can be distinguished.

There are differences between chapter 120 of the Laws

of Kansas of 1897, held unconstitutional in the *Perry Case*, and chapter 222 of the Laws of Kansas of 1903, which is herein questioned, to justify this court in upholding it; while the law of 1897 was rightly held unconstitutional in the *Perry Case*, the law here under review may be upheld as valid because the two laws are substantially different.

Similar cases, such as *Doremus* v. *Hennessey*, 176 Illinois, 608; *State* v. *Julow*, 129 Missouri, 163; *Gillespie* v. *People*, 188 Illinois, 176; *Zillmer* v. *Kreutzberg*, 114 Wisconsin, 530; *People* v. *Marcus*, 185 N. Y. 257; *Adair* v. *United States*, 208 U. S. 175; *Mines Company* v. *Miners' Union*, 159 Fed. Rep. 514, can be distinguished.

MR. JUSTICE PITNEY delivered the opinion of the court.

In a local court in one of the counties of Kansas, plaintiff in error was found guilty and adjudged to pay a fine, with imprisonment as the alternative, upon an information charging him with a violation of an act of the legislature of that State, approved March 13, 1903, being Chap. 222 of the session laws of that year, found also as §§ 4674 and 4675, Gen. Stat. Kansas 1909. The act reads as follows:

"AN ACT to provide a penalty for coercing or influencing or making demands upon or requirements of employés, servants, laborers, and persons seeking employment.

"*Be it Enacted, etc.:*

"SECTION 1. That it shall be unlawful for any individual or member of any firm, or any agent, officer or employé of any company or corporation, to coerce, require, demand or influence any person or persons to enter into any agreement, either written or verbal, not to join or become or remain a member of any labor organization or association, as a condition of such person or persons securing employment, or continuing in the employment of such individual, firm, or corporation.

"SEC. 2. Any individual or member of any firm or any

agent, officer or employé of any company or corporation violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than fifty dollars or imprisoned in the county jail not less than thirty days."

The judgment was affirmed by the Supreme Court of the State, two justices dissenting (87 Kansas, 752), and the case is brought here upon the ground that the statute, as construed and applied in this case, is in conflict with that provision of the Fourteenth Amendment of the Constitution of the United States which declares that no State shall deprive any person of liberty or property without due process of law.

The facts, as recited in the opinion of the Supreme Court, are as follows: About July 1, 1911, one Hedges was employed as a switchman by the St. Louis & San Francisco Railway Company, and was a member of a labor organization called the Switchmen's Union of North America. Plaintiff in error was employed by the railway company as superintendent, and as such he requested Hedges to sign an agreement, which he presented to him in writing, at the same time informing him that if he did not sign it he could not remain in the employ of the company. The following is a copy of the paper thus presented:

Fort Scott, Kansas, ——— —, 1911.

Mr. T. B. Coppage, Superintendent Frisco Lines, Fort Scott:

We, the undersigned, have agreed to abide by your request, that is, to withdraw from the Switchmen's Union, while in the service of the Frisco Company.

(Signed) ———————————

Hedges refused to sign this, and refused to withdraw from the labor organization. Thereupon plaintiff in error, as such superintendent, discharged him from the service of the company.

At the outset, a few words should be said respecting the construction of the act. It uses the term "coerce," and some stress is laid upon this in the opinion of the Kansas Supreme Court. But, on this record, we have nothing to do with any question of actual or implied coercion or duress, such as might overcome the will of the employé by means unlawful without the act. In the case before us, the state court treated the term "coerce" as applying to the mere insistence by the employer, or its agent, upon its right to prescribe terms upon which alone it would consent to a continuance of the relationship of employer and employé. In this sense we must understand the statute to have been construed by the court, for in this sense it was enforced in the present case; there being no finding, nor any evidence to support a finding, that plaintiff in error was guilty in any other sense. The entire evidence is included in the bill of exceptions returned with the writ of error, and we have examined it to the extent necessary in order to determine the Federal right that is asserted (*Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611, and cases cited). There is neither finding nor evidence that the contract of employment was other than a general or indefinite hiring, such as is presumed to be terminable at the will of either party. The evidence shows that it would have been to the advantage of Hedges, from a pecuniary point of view and otherwise, to have been permitted to retain his membership in the union, and at the same time to remain in the employ of the railway company. In particular, it shows (although no reference is made to this in the opinion of the court) that as a member of the union he was entitled to benefits in the nature of insurance to the amount of fifteen hundred dollars, which he would have been obliged to forego if he had ceased to be a member. But, aside from this matter of pecuniary interest, there is nothing to show that Hedges was subjected to the least pressure or influence, or that he was not

a free agent, in all respects competent, and at liberty to choose what was best from the standpoint of his own interests. Of course, if plaintiff in error, acting as the representative of the railway company, was otherwise within his legal rights in insisting that Hedges should elect whether to remain in the employ of the company or to retain his membership in the union, that insistence is not rendered unlawful by the fact that the choice involved a pecuniary sacrifice to Hedges. *Silliman* v. *United States*, 101 U. S. 465, 470, 471; *Hackley* v. *Headley*, 45 Michigan, 569, 576; *Emery* v. *Lowell*, 127 Massachusetts, 138, 141; *Custin* v. *City of Viroqua*, 67 Wisconsin, 314, 320. And if the right that plaintiff in error exercised is founded upon a constitutional basis it cannot be impaired by merely applying to its exercise the term "coercion." We have to deal, therefore, with a statute that, as construed and applied, makes it a criminal offense punishable with fine or imprisonment for an employer or his agent to merely prescribe, as a condition upon which one may secure certain employment or remain in such employment (the employment being terminable at will), that the employé shall enter into an agreement not to become or remain a member of any labor organization while so employed; the employé being subject to no incapacity or disability, but on the contrary free to exercise a voluntary choice.

In *Adair* v. *United States*, 208 U. S. 161, this court had to deal with a question not distinguishable in principle from the one now presented. Congress, in § 10 of an act of June 1, 1898, entitled "An Act concerning carriers engaged in interstate commerce and their employés" (c. 370, 30 Stat. 424, 428), had enacted "That any employer subject to the provisions of this Act and any officer, agent, or receiver of such employer who shall require any employé, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member

of any labor corporation, association, or organization; or shall threaten any employé with loss of employment, or shall unjustly discriminate against any employé because of his membership in such a labor corporation, association, or organization . . . is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof . . . shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars." Adair was convicted upon an indictment charging that he, as agent of a common carrier subject to the provisions of the Act, unjustly discriminated against a certain employé by discharging him from the employ of the carrier because of his membership in a labor organization. The court held that portion of the Act upon which the conviction rested to be an invasion of the personal liberty as well as of the right of property guaranteed by the Fifth Amendment, which declares that no person shall be deprived of liberty or property without due process of law. Speaking by Mr. Justice Harlan, the court said (208 U. S., p. 174): "While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such

employé. It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage [the employé in that case] because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

Unless it is to be overruled, this decision is controlling upon the present controversy; for if Congress is prevented from arbitrary interference with the liberty of contract because of the "due process" provision of the Fifth Amendment, it is too clear for argument that the States are prevented from the like interference by virtue of the corresponding clause of the Fourteenth Amendment; and hence if it be unconstitutional for Congress to deprive an employer of liberty or property for threatening an employé with loss of employment or discriminating against him because of his membership in a labor organization, it is unconstitutional for a State to similarly punish an employer for requiring his employé, as a condition of securing or retaining employment, to agree not to become or remain a member of such an organization while so employed.

It is true that, while the statute that was dealt with in the *Adair Case* contained a clause substantially identical with the Kansas act now under consideration—a clause making it a misdemeanor for an employer to require an employé or applicant for employment, as a condition of such employment, to agree not to become or remain a member of a labor organization,—the conviction was

based upon another clause, which related to discharging an employé because of his membership in such an organization; and the decision, naturally, was confined to the case actually presented for decision. In the present case, the Kansas Supreme Court sought to distinguish the *Adair* decision upon this ground. The distinction, if any there be, has not previously been recognized as substantial, so far as we have been able to find. The opinion in the *Adair Case*, while carefully restricting the decision to the precise matter involved, cited (208 U. S. on page 175), as the first in order of a number of decisions supporting the conclusion of the court, a case (*People* v. *Marcus*, 185 N. Y. 257), in which the statute denounced as unconstitutional was in substance the counterpart of the one with which we are now dealing.

But, irrespective of whether it has received judicial recognition, is there any real distinction? The constitutional right of the employer to discharge an employé because of his membership in a labor union being granted, can the employer be compelled to resort to this extreme measure? May he not offer to the employé an option, such as was offered in the instant case, to remain in the employment if he will retire from the union; to sever the former relationship only if he prefers the latter? Granted the equal freedom of both parties to the contract of employment, has not each party the right to stipulate upon what terms only he will consent to the inception, or to the continuance, of that relationship? And may he not insist upon an express agreement, instead of leaving the terms of the employment to be implied? Can the legislature in effect require either party at the beginning to act covertly; concealing essential terms of the employment—terms to which, perhaps, the other would not willingly consent—and revealing them only when it is proposed to insist upon them as a ground for terminating the relationship? Supposing an employer is unwilling to have in his

employ one holding membership in a labor union, and has reason to suppose that the man may prefer membership in the union to the given employment without it—we ask, can the legislature oblige the employer in such case to refrain from dealing frankly at the outset? And is not the employer entitled to insist upon equal frankness in return? Approaching the matter from a somewhat different standpoint, is the employé's right to be free to join a labor union any more sacred, or more securely founded upon the Constitution, than his right to work for whom he will, or to be idle if he will? And does not the ordinary contract of employment include an insistence by the employer that the employé shall agree, as a condition of the employment, that he will not be idle and will not work for whom he pleases but will serve his present employer, and him only, so long as the relation between them shall continue? Can the right of making contracts be enjoyed at all, except by parties coming together in an agreement that requires each party to forego, during the time and for the purpose covered by the agreement, any inconsistent exercise of his constitutional rights?

These queries answer themselves. The answers, as we think, lead to a single conclusion: Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment, or of its continuance if it be terminable at will. It follows that this case cannot be distinguished from *Adair* v. *United States*.

The decision in that case was reached as the result of elaborate argument and full consideration. The opinion states (208 U. S. 171): "This question is admittedly one of importance, and has been examined with care and deliberation. And the court has reached a conclusion

which, in its judgment, is consistent with both the words and spirit of the Constitution and is sustained as well by sound reason." We are now asked, in effect, to overrule it; and in view of the importance of the issue we have re-examined the question from the standpoint of both reason and authority. As a result, we are constrained to re-affirm the doctrine there applied. Neither the doctrine nor this application of it is novel; we will endeavor to re-state some of the grounds upon which it rests. The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the State. But, notwithstanding the strong general presumption in favor of the validity of state laws, we do not think the statute in question, as construed and applied in this case, can be sustained as a legitimate exercise of that power. To avoid possible misunderstanding, we should here emphasize, what has been said before, that so far as its title or enacting clause expresses a purpose to deal with coercion, compulsion, duress, or other undue influence, we have no present concern with it, because nothing of that sort is involved in this case. As has

been many times stated, this court deals not with moot cases or abstract questions, but with the concrete case before it. (*California* v. *San Pablo &c. Railroad*, 149 U. S. 308, 314; *Richardson* v. *McChesney*, 218 U. S. 487, 492; *Missouri, Kan. & Texas Ry.* v. *Cade*, 233 U. S. 642, 648.) We do not mean to say, therefore, that a State may not properly exert its police power to prevent coercion on the part of employers towards employés, or *vice versa*. But, in this case, the Kansas court of last resort has held that Coppage, the plaintiff in error, is a criminal punishable with fine or imprisonment under this statute simply and merely because, while acting as the representative of the Railroad Company and dealing with Hedges, an employé at will and a man of full age and understanding, subject to no restraint or disability, Coppage insisted that Hedges should freely choose whether he would leave the employ of the Company or would agree to refrain from association with the union while so employed. This construction is, for all purposes of our jurisdiction, conclusive evidence that the State of Kansas intends by this legislation to punish conduct such as that of Coppage, although entirely devoid of any element of coercion, compulsion, duress, or undue influence, just as certainly as it intends to punish coercion and the like. But, when a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the State; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the state court. *St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 362, and cases cited. Now, it seems to us clear that a statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a

purpose which would be a proper object for the exercise of that power. "Its true character cannot be changed by its collocation," as Mr. Justice Grier said in the *Passenger Cases*, 7 How. 283, 458. It is equally clear, we think, that to punish an employer or his agent for simply proposing certain terms of employment, under circumstances devoid of coercion, duress, or undue influence, has no reasonable relation to a declared purpose of repressing coercion, duress, and undue influence. Nor can a State, by designating as "coercion" conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty or of property rights; for to permit this would deprive the Fourteenth Amendment of its effective force in this regard. We of course do not intend to attribute to the legislature or the courts of Kansas any improper purpose or any want of candor; but only to emphasize the distinction between the form of the statute and its effect as applied to the present case.

Laying aside, therefore, as immaterial for present purposes, so much of the statute as indicates a purpose to repress coercive practices, what possible relation has the residue of the Act to the public health, safety, morals or general welfare? None is suggested, and we are unable to conceive of any. The Act, as the construction given to it by the state court shows, is intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations. But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power. They are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general

welfare. If they were, a different question would be presented.

As to the interest of the employed, it is said by the Kansas Supreme Court (87 Kansas, p. 759) to be a matter of common knowledge that "employés, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making contracts of purchase thereof." No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employé. Indeed a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a State shall not "deprive any person of life, liberty or property without due process of law," gives to each of these an equal sanction; it recognizes "liberty" and "property" as co-existent human rights, and debars the States from any unwarranted interference with either.

And since a State may not strike them down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those

inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty.

We need not refer to the numerous and familiar cases in which this court has held that the power may properly be exercised for preserving the public health, safety, morals, or general welfare, and that such police regulations may reasonably limit the enjoyment of personal liberty, including the right of making contracts. They are reviewed in *Holden* v. *Hardy*, 169 U. S. 366, 391; *Chicago, B. & Quincy R. R.* v. *McGuire*, 219 U. S. 549, 566; *Erie R. R.* v. *Williams*, 233 U. S. 685; and other recent decisions. An evident and controlling distinction is this: that in those cases it has been held permissible for the States to adopt regulations fairly deemed necessary to secure some object directly affecting the public welfare, even though the enjoyment of private rights of liberty and property be thereby incidentally hampered; while in that portion of the Kansas statute which is now under consideration—that is to say, aside from coercion, etc.—there is no object or purpose, expressed or implied, that is claimed to have reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving one who has property of some part of what is characterized as his "financial independence." In short, an interference with the normal exercise of personal liberty and property rights is the primary object of the statute, and not an incident to the advancement of the general welfare. But, in our opinion, the Fourteenth Amendment debars the States from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting

so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated "public welfare," and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.

It is said in the opinion of the state court that membership in a labor organization does not necessarily affect a man's duty to his employer; that the employer has no right, by virtue of the relation, "to dominate the life nor to interfere with the liberty of the employé in matters that do not lessen or deteriorate the service"; and that "the statute implies that labor unions are lawful and not inimical to the rights of employers." The same view is presented in the brief of counsel for the State, where it is said that membership in a labor organization is the "personal and private affair" of the employé. To this line of argument it is sufficient to say that it cannot be judicially declared that membership in such an organization has no relation to a member's duty to his employer; and therefore, if freedom of contract is to be preserved, the employer must be left at liberty to decide for himself whether such membership by his employé is consistent with the satisfactory performance of the duties of the employment.

Of course we do not intend to say, nor to intimate, anything inconsistent with the right of individuals to join labor unions, nor do we question the legitimacy of such organizations so long as they conform to the laws of the land as others are required to do. Conceding the full right of the individual to join the union, he has no inherent right to do this and still remain in the employ of one who is unwilling to employ a union man, any more than the same individual has a right to join the union without the consent of that organization. Can it be doubted that a

labor organization—a voluntary association of working men—has the inherent and constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with non-union men? Or that a union man has the constitutional right to decline proffered employment unless the employer will agree not to employ any non-union man? (In all cases we refer, of course, to agreements made voluntarily, and without coercion or duress as between the parties. And we have no reference to questions of monopoly, or interference with the rights of third parties or the general public. These involve other considerations, respecting which we intend to intimate no opinion. See *Curran* v. *Galen*, 152 N. Y. 33; 46 N. E. Rep. 297; *Jacobs* v. *Cohen*, 183 N. Y. 207, 213, 214; 76 N. E. Rep. 5; *Plant* v. *Woods*, 176 Massachusetts, 492; 57 N. E. Rep. 1011; *Berry* v. *Donovan*, 188 Massachusetts, 353; 74 N. E. Rep. 603; 3 A. & E. Ann. Cas. 738; *Brennan* v. *United Hatters*, 73 N. J. Law, 729, 738; 65 Atl. Rep. 165, 169; 9 A. & E. Ann. Cas. 698, 702.) And can there be one rule of liberty for the labor organization and its members, and a different and more restrictive rule for employers? We think not; and since the relation of employer and employé is a voluntary relation, as clearly as is that between the members of a labor organization, the employer has the same inherent right to prescribe the terms upon which he will consent to the relationship, and to have them fairly understood and expressed in advance.

When a man is called upon to agree not to become or remain a member of the union while working for a particular employer, he is in effect only asked to deal openly and frankly with his employer, so as not to retain the employment upon terms to which the latter is not willing to agree. And the liberty of making contracts does not include a liberty to procure employment from an unwilling employer, or without a fair understanding. Nor may the

employer be foreclosed by legislation from exercising the same freedom of choice that is the right of the employé.

To ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment, is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment on any other; for "It takes two to make a bargain." Having accepted employment on those terms, the man is still free to join the union when the period of employment expires; or, if employed at will, then at any time upon simply quitting the employment. And, if bound by his own agreement to refrain from joining during a stated period of employment, he is in no different situation from that which is necessarily incident to term contracts in general. For constitutional freedom of contract does not mean that a party is to be as free after making a contract as before; he is not free to break it without accountability. Freedom of contract, from the very nature of the thing, can be enjoyed only by being exercised; and each particular exercise of it involves making an engagement which, if fulfilled, prevents for the time any inconsistent course of conduct.

So much for the reason of the matter; let us turn again to the adjudicated cases.

The decision in the *Adair Case* is in accord with the almost unbroken current of authorities in the state courts. In many States enactments not distinguishable in principle from the one now in question have been passed, but, except in two instances (one, the decision of an inferior court in Ohio, since repudiated; the other, the decision now under review), we are unable to find that they have been judicially enforced. It is not too much to say that such laws have by common consent been treated as unconstitutional, for while many state courts of last resort have adjudged them void, we have found no decision by such a court

sustaining legislation of this character, excepting that which is now under review. The single previous instance in which any court has upheld such a statute is *Davis* v. *State of Ohio* (1893), 30 Cinc. Law Bull. 342; 11 Ohio Dec. Reprint, 894; where the Court of Common Pleas of Hamilton County sustained an act of April 14, 1892 (89 Ohio Laws, 269), which declared that any person who coerced or attempted to coerce employés by discharging or threatening to discharge them because of their connection with any lawful labor organization should be guilty of a misdemeanor and upon conviction fined or imprisoned. We are unable to find that this decision was ever directly reviewed; but in *State of Ohio* v. *Bateman* (1900), 10 Ohio Dec. 68; 7 Ohio N. P. 487, its authority was repudiated upon the ground that it had been in effect overruled by subsequent decisions of the state Supreme Court, and the same statute was held unconstitutional.

The right that plaintiff in error is now seeking to maintain was held by the Supreme Court of Kansas, in an earlier case, to be within the protection of the Fourteenth Amendment and therefore beyond legislative interference. In *Coffeyville Brick Co.* v. *Perry*, 69 Kansas, 297; 76 Pac. Rep. 848; 66 L. R. A. 185; 1 A. & E. Ann. Cas. 936; the court had under consideration Ch. 120 of the Laws of 1897 (Gen. Stat. 1901, §§ 2425, 2426), which declared it unlawful for any person, company, or corporation, or agent, officer, etc., to prevent employés from joining and belonging to any labor organization, and enacted that any such person, company, or corporation, etc., that coerced or attempted to coerce employés by discharging or threatening to discharge them because of their connection with such labor organization should be deemed guilty of a misdemeanor, and upon conviction subjected to a fine, and should also be liable to the person injured in punitive damages. It was attacked as violative of the Fourteenth Amendment, and also of the Bill of Rights of the state

constitution.[1] The court held it unconstitutional, saying (p. 299): "The right to follow any lawful vocation and to make contracts is as completely within the protection of the constitution as the right to hold property free from unwarranted seizure, or the liberty to go when and where one will. One of the ways of obtaining property is by contract. The right, therefore, to contract cannot be infringed by the legislature without violating the letter and spirit of the constitution. Every citizen is protected in his right to work where and for whom he will. He may select not only his employer but also his associates. He is at liberty to refuse to continue to serve one who has in his employ a person, or an association of persons, objectionable to him. In this respect the rights of the employer and employé are equal. Any act of the legislature that would undertake to impose on an employer the obligation of keeping in his service one whom, for any reason, he should not desire would be a denial of his constitutional right to make and terminate contracts and to acquire and hold property. Equally so would be an act the provisions of which should be intended to require one to remain in the service of one whom he should not desire to serve. . . . The business conducted by the defendant was its property, and in the exercise of this ownership it is protected by the constitution. It could abandon or discontinue its operation at pleasure. It had the right, beyond the possibility of legislative interference, to make any contract with reference thereto not in violation of law.

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[1] Constitution of the State of Kansas. . . . Bill of Rights.

Section 1. All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.

* * * * * * * *

Section 18. All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

In the operation of its property it may employ such persons as are desirable, and discharge, without reason, those who are undesirable. It is at liberty to contract for the services of persons in any manner that is satisfactory to both. No legislative restrictions can be imposed upon the lawful exercise of these rights."

In *Railway Co.* v. *Brown*, 80 Kansas, 312; 102 Pac. Rep. 459, the same court passed upon Chapter 144 of the Laws of 1897 (Gen. Stat. 1901, §§ 2421–2424), which required the employer upon the request of a discharged employé to furnish in writing the true cause or reason for such discharge. The railway company did not meet this requirement, its "service letter," as it was called, stating only that Brown was discharged "for cause," which the court naturally held was not a statement of the cause. The law was held unconstitutional, upon the ground (80 Kansas, 315) that an employer may discharge his employé for any reason, or for no reason, just as an employé may quit the employment for any reason, or for no reason; that such action on the part of employer or employé, where no obligation is violated, is an essential element of liberty in action; and that one cannot be compelled to give a reason or cause for an action for which he may have no specific reason or cause, except, perhaps, a mere whim or prejudice.

In the present case the court did not repudiate or overrule these previous decisions, but on the contrary cited them as establishing the right of the employer to discharge his employé at any time, for any reason, or for no reason, being responsible in damages for violating a contract as to the time of employment, and as establishing, conversely, the right of the employé to quit the employment at any time, for any reason, or without any reason, being likewise responsible in damages for a violation of his contract with the employer. The court held the act of 1903 that is now in question to be distinguishable from the

act of 1897, upon grounds sufficiently indicated and answered by what we have already said.

In five other States the courts of last resort have had similar acts under consideration, and in each instance have held them unconstitutional. In *State* v. *Julow* (1895), 129 Missouri, 163; 31 S. W. Rep. 781; 29 L. R. A. 257; 50 Am. St. Rep. 443; the Supreme Court of Missouri dealt with an act (Missouri Laws 1893, p. 187), that forbade employers, on pain of fine or imprisonment, to enter into any agreement with an employé requiring him to withdraw from a labor union or other lawful organization, or to refrain from joining such an organization, or to "by any means attempt to compel or coerce any employé into withdrawal from any lawful organization or society." In *Gillespie* v. *The People* (1900), 188 Illinois, 176; 58 N. E. Rep. 1007; 52 L. R. A. 283; 80 Am. St. Rep. 176; the Supreme Court of Illinois held unconstitutional an act (Hurd's Stat. 1899, p. 844) declaring it criminal for any individual or member of any firm, etc., to prevent or attempt to prevent employés from forming, joining, and belonging to any lawful labor organization, and that any such person "that coerces or attempts to coerce employés by discharging or threatening to discharge them because of their connection with such lawful labor organization" should be guilty of a misdemeanor. In *State, ex rel. Zillmer* v. *Kreutzberg* (1902), 114 Wisconsin, 530; 90 N. W. Rep. 1098; 58 L. R. A. 748; 91 Am. St. Rep. 934; the court had under consideration a statute (Wisconsin Laws 1899, ch. 332), which, like the Kansas act now in question, prohibited the employer or his agent from coercing the employé to enter into an agreement not to become a member of a labor organization, as a condition of securing employment or continuing in the employment, and also rendered it unlawful to discharge an employé because of his being a member of any labor organization. The decision related to the latter prohibition, but this was denounced

upon able and learned reasoning that has a much wider reach. In *People* v. *Marcus* (1906), 185 N. Y. 257; 77 N. E. Rep. 1073; 7 L. R. A., N. S. 282; 113 Am. St. Rep. 902; 7 A. & E. Ann. Cas. 118; the statute dealt with (N. Y. Laws, 1887, ch. 688), as we have already said, was in substance identical with the Kansas act. These decisions antedated *Adair* v. *United States*. They proceed upon broad and fundamental reasoning, the same in substance that was adopted by this court in the *Adair Case*, and they are cited with approval in the opinion (208 U. S. 175). A like result was reached in *State, ex rel. Smith* v. *Daniels* (1912), 118 Minnesota, 155; 136 N. W. Rep. 584; with respect to an act that, like the Kansas statute, forbade an employer to require an employé or person seeking employment, as a condition of such employment, to make an agreement that the employé would not become or remain a member of a labor organization. This was held invalid upon the authority of the *Adair Case*. And see *Goldfield Mines Co.* v. *Goldfield Miners' Union*, 159 Fed. Rep. 500, 513.

Upon both principle and authority, therefore, we are constrained to hold that the Kansas act of March 13, 1903, as construed and applied so as to punish with fine or imprisonment an employer or his agent for merely prescribing, as a condition upon which one may secure employment under or remain in the service of such employer, that the employé shall enter into an agreement not to become or remain a member of any labor organization while so employed, is repugnant to the "due process" clause of the Fourteenth Amendment, and therefore void.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE HOLMES, dissenting.

I think the judgment should be affirmed. In present conditions a workman not unnaturally may believe that

only by belonging to a union can he secure a contract that shall be fair to him. *Holden* v. *Hardy*, 169 U. S. 366, 397. *Chicago, Burlington & Quincy R. R.* v. *McGuire*, 219 U. S. 549, 570. If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins. Whether in the long run it is wise for the workingmen to enact legislation of this sort is not my concern, but I am strongly of opinion that there is nothing in the Constitution of the United States to prevent it, and that *Adair* v. *United States*, 208 U. S. 161, and *Lochner* v. *New York*, 198 U. S. 45, should be overruled. I have stated my grounds in those cases and think it unnecessary to add others that I think exist. See further *Vegelahn* v. *Guntner*, 167 Massachusetts, 92, 104, 108. *Plant* v. *Woods*, 176 Massachusetts, 492, 505. I still entertain the opinions expressed by me in Massachusetts.

MR. JUSTICE DAY with whom MR. JUSTICE HUGHES concurs, dissenting:

The character of the question here involved sufficiently justifies, in my opinion, a statement of the grounds which impel me to dissent from the opinion and judgment in this case. The importance of the decision is further emphasized by the fact that it results not only in invalidating the legislation of Kansas, now before the court, but necessarily decrees the same fate to like legislation of other States of the Union.[1] This far-reaching result is attained because the statute is declared to be an infraction

[1] Statutes like the Kansas statute have been passed in California, Colorado, Connecticut, Indiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Porto Rico, and Wisconsin. Bulletin of the Bureau of Labor Statistics No. 148, Volumes 1 and 2; Labor Laws of the United States.

of the constitutional protection afforded under the Fourteenth Amendment to the Federal Constitution, which declares that no person shall be deprived of life, liberty or property without due process of law. The right of contract, it is said, is part of the liberty of the citizen, and to abridge it, as is done in this case, is declared to be beyond the legislative authority of the State.

That the right of contract is a part of individual freedom within the protection of this amendment, and may not be arbitrarily interfered with, is conceded. While this is true, nothing is better settled by the repeated decisions of this court than that the right of contract is not absolute and unyielding, but is subject to limitation and restraint in the interest of the public health, safety and welfare, and such limitations may be declared in legislation of the State. It would unduly extend what I purpose to say in this case to refer to all the cases in which this doctrine has been declared. One of them is: *Frisbie* v. *United States*, 157 U. S. 160, 165. In that case, it was declared, and in varying form has been repeated many times since:

"While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally

speaking, every citizen has a right freely to contract for the price of his labor, services, or property."

See also *Holden* v. *Hardy*, 169 U. S. 366, 391; *Atkin* v. *Kansas*, 191 U. S. 207; *Muller* v. *Oregon*, 208 U. S. 412, 421; *McLean* v. *Arkansas*, 211 U. S. 539; *Chicago, Burlington & Quincy R. R.* v. *McGuire*, 219 U. S. 549; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 202; *Erie Railroad* v. *Williams*, 233 U. S. 685, 699. The *Erie Railroad Case* is a very recent deliverance of this court upon the subject, wherein it was declared:

"But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance. *C., B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549, 565; *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389."

It is therefore the thoroughly established doctrine of this court that liberty of contract may be circumscribed in the interest of the State and the welfare of its people. Whether a given exercise of such authority transcends the limits of legislative authority must be determined in each case as it arises. The preservation of the police power of the States, under the authority of which that

great mass of legislation has been enacted which has for its purpose the promotion of the health, safety and welfare of the public, is of the utmost importance. This power was not surrendered by the States when the Federal Constitution was adopted, nor taken from them when the Fourteenth Amendment was ratified and became a part of the fundamental law of the Union. *Barbier* v. *Connolly*, 113 U. S. 27.

Of the necessity of such legislation, the local legislature is itself the judge, and its enactments are only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be merely arbitrary and capricious, and hence out of place in a government of laws and not of men, and irreconcilable with the conception of due process of law. McGehee on "Due Process of Law," page 306, and cases from this court therein cited.

By this it is not meant that the legislative power is beyond judicial review. Such enactments as are arbitrary or unreasonable and thus exceed the exercise of legislative authority in good faith, may be declared invalid when brought in review by proper judicial proceedings. This is necessary to the assertion and maintenance of the supremacy of the Constitution.

Conceding then that the right of contract is a subject of judicial protection, within the authority given by the Constitution of the United States, the question here is, was the power of the State so arbitrarily exercised as to render its action unconstitutional and therefore void? It is said that this question is authoritatively determined in this court, in the case of *Adair* v. *United States*, 208 U. S. 161. In that case, a statute passed by the Congress of the United States, under supposed sanction of the power to regulate interstate commerce, was before this court, and it was there decided that the right of contract protected by the Fifth Amendment to the Constitution,

providing that no person shall be deprived of life, liberty or property without due process of law, avoided a statute which undertook to make it a crime to discharge an employé simply because of his membership in a labor organization. The feature of the statute which is here involved, making it an offense to require any employé, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become a member of any labor corporation, association or organization,—a provision exactly similar to that of the Kansas statute now under consideration,—was not before the court upon the charge made or the facts shown, and this provision was neither considered nor decided upon in reaching the conclusion that an employer could not be made a criminal because he discharged an employé simply because of his membership in a labor organization. In the course of the opinion this fact was more than once stated, and the question before the court declared to be (208 U. S., p. 171):

"May Congress make it a criminal offense against the United States—as by the tenth section of the act of 1898 it does—for an agent or officer of an interstate carrier, having full authority in the premises from the carrier, to discharge an employé from service simply because of his membership in a labor organization?"

Such was the question before the court, and that there might be no mistake about it, at the close of the opinion, the part of the act upon which the defendant in that case was convicted was declared to be separable from the other parts of the act, and that feature of the statute the only subject of decision. Mr. Justice Harlan, concluding the opinion of the court said (p. 180):

"We add that since the part of the act of 1898 upon which the first count of the indictment is based, and upon which alone the defendant was convicted, *is severable from its other parts*, and as what has been said is sufficient to

dispose of the present case, *we are not called upon to consider other and independent provisions of the act*, such, for instance, as the provisions relating to arbitration. *This decision is therefore restricted to the question of the validity of the particular provision in the act of Congress making it a crime against the United States for an agent or officer of an interstate carrier to discharge an employé from its service because of his being a member of a labor organization.*" (Italics mine.)

In view of the feature of the statute involved, the charge made, and this express reservation in the opinion of the court as to other features of the statute, I am unable to agree that that case involved or decided the one now at bar.

There is nothing in the statute now under consideration which prevents an employer from discharging one in his service at his will. The question now presented is, May an employer, as a condition of present or future employment, require an employé to agree that he will not exercise the privilege of becoming a member of a labor union, should he see fit to do so? In my opinion, the cases are entirely different, and the decision of the questions controlled by different principles. The right to join labor unions is undisputed, and has been the subject of frequent affirmation in judicial opinions. Acting within their legal rights, such associations are as legitimate as any organization of citizens formed to promote their common interest. They are organized under the laws of many States, by virtue of express statutes passed for that purpose, and, being legal, and acting within their constitutional rights, the right to join them, as against coercive action to the contrary may be the legitimate subject of protection in the exercise of the police authority of the States. This statute, passed in the exercise of that particular authority called the police power, the limitations of which no court has yet undertaken precisely to define, has for its avowed

purpose the protection of the exercise of a legal right, by preventing an employer from depriving the employé of it as a condition of obtaining employment. I see no reason why a State may not, if it chooses, protect this right, as well as other legal rights.

But it is said that the contrary must necessarily result, if not from the precise matter decided in the *Adair Case*, then from the principles therein laid down, and that it is the logical result of that decision that the employer may, as a condition of employment, require an obligation to forego the exercise of any privileges because of the exercise of which an employé might be discharged from service. I do not concede that this result follows from anything decided in the *Adair Case*. That case dealt solely with the right of an employer to terminate relations of employment with an employé, and involved the constitutional protection of his right so to do, but did not deal with the conditions which he might exact or impose upon another as a condition of employment.

The act under consideration is said to have the effect to deprive employers of a part of their liberty of contract, for the benefit of labor organizations. It is urged that the statute has no object or purpose, express or implied, that has reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving him who has property of some part of his "financial independence."

But this argument admits that financial independence is not independence of law or of the authority of the legislature to declare the policy of the State as to matters which have a reasonable relation to the welfare, peace and security of the community.

This court has many times decided that the motives of legislators in the enactment of laws are not the subject of judicial inquiry. Legislators, state and Federal, are entitled to the presumption that their action has been in

good faith and because of conditions which they deem proper and sufficient to warrant the action taken. Speaking for this court in *Ex parte McCardle*, 7 Wall. 506, 514, Chief Justice Chase summed up the doctrine in a sentence when he said: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution." In Cooley's Constitutional Limitations, 7th Ed., 257, that eminent author says: "They [the courts] must assume that legislative discretion has been properly exercised. If evidence was required, it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding." "The rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile." *Soon Hing* v. *Crowley*, 113 U. S. 703, 710. "We must assume that the legislature acts according to its judgment for the best interests of the State. A wrong intent cannot be imputed to it." *Florida Central &c. R. R.* v. *Reynolds*, 183 U. S. 471, 480.

The act must be taken as an attempt of the legislature to enact a statute which it deemed necessary to the good

order and security of society. It imposes a penalty for "coercing or influencing or making demands upon or requirements of employés, servants, laborers, and persons seeking employment." It was in the light of this avowed purpose that the act was interpreted by the Supreme Court of Kansas, the ultimate authority upon the meaning of the terms of the law. Of course, if the act is necessarily arbitrary and therefore unconstitutional, mere declarations of good intent cannot save it, but it must be presumed to have been passed by the legislative branch of the state government in good faith, and for the purpose of reaching the desired end. The legislature may have believed, acting upon conditions known to it, that the public welfare would be promoted by the enactment of a statute which should prevent the compulsory exaction of written agreements to forego the acknowledged legal right here involved, as a condition of employment in one's trade or occupation.

It would be impossible to maintain that because one is free to accept or refuse a given employment, or because one may at will employ or refuse to employ another, it follows that the parties have a constitutional right to insert in an agreement of employment any stipulation they choose. They cannot put in terms that are against public policy either as it is deemed by the courts to exist at common law or as it may be declared by the legislature as the arbiter within the limits of reason of the public policy of the State. It is no answer to say that the greater includes the less and that because the employer is free to employ, or the employé to refuse employment, they may agree as they please. This matter is easily tested by assuming a contract of employment for a year and the insertion of a condition upon which the right of employment should continue. The choice of such conditions is not to be regarded as wholly unrestricted because the parties may agree or not as they choose. And if the State may pro-

hibit a particular stipulation in an agreement because it is deemed to be opposed in its operation to the security and well being of the community, it may prohibit it in any agreement whether the employment is for a term or at will. It may prohibit the attempt in any way to bind one to the objectionable undertaking.

Would anyone contend that the State might not prohibit the imposition of conditions which should require an agreement to forego the right on the part of the employé to resort to the courts of the country for redress in the case of disagreement with his employer? While the employé might be discharged in case he brought suit against an employer if the latter so willed, it by no means follows that he could be required, as a condition of employment, to forego a right so obviously fundamental as the one supposed. It is therefore misleading to say that the right of discharge necessarily embraces the right to impose conditions of employment which shall include the surrender of rights which it is the policy of the State to maintain.

Take another illustration: The right to exclude a foreign corporation from carrying on a purely domestic business in the State has been distinctly recognized by decisions of this court; yet it has been held, and is now settled law, that it is beyond the authority of the State to require a corporation doing business of this character to file in the office of the Secretary of State a written agreement that it will not remove a suit, otherwise removable, to a Federal court of the United States. *Insurance Co.* v. *Morse*, 20 Wall. 445. In that case, the right to exclude was held not to include the right to impose any condition under which the corporation might do business in the State. In that connection this court said:

"A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in *Cancemi's Case*, be tried in any other manner than by a jury of twelve men, although he consent in open

court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented." *Insurance Co.* v. *Morse*, 20 Wall. 445, 451.

It may be that an employer may be of the opinion that membership of his employés in the National Guard, by enlistment in the militia of the State, may be detrimental to his business. Can it be successfully contended that the State may not, in the public interest, prohibit an agreement to forego such enlistment as against public policy? Would it be beyond a legitimate exercise of the police power to provide that an employé should not be required to agree, as a condition of employment, to forego affiliation with a particular political party, or the support of a particular candidate for office? It seems to me that these questions answer themselves. There is a real and not a fanciful distinction between the exercise of the right to discharge at will and the imposition of a requirement that the employé, as a condition of employment, shall make a particular agreement to forego a legal right. The *agreement* may be, or may be declared to be, against public policy, although the right of discharge remains. When a man is discharged, the employer exercises his right to declare such action necessary because of the exigencies of his business, or as the result of his judgment for other reasons sufficient to himself. When he makes a stipulation of the character here involved essential to future employment, he is not exercising a right to discharge, and may not wish to discharge the employé when, at a

subsequent time, the prohibited act is done. What is in fact accomplished, is that the one engaging to work, who may wish to preserve an independent right of action, as a condition of employment, is coerced to the signing of such an agreement against his will, perhaps impelled by the necessities of his situation. The State, within constitutional limitations, is the judge of its own policy and may execute it in the exercise of the legislative authority. This statute reaches not only the employed but as well one seeking employment. The latter may never wish to join a labor union. By signing such agreements as are here involved he is deprived of the right of free choice as to his future conduct, and must choose between employment and the right to act in the future as the exigencies of his situation may demand. It is such contracts, having such effect, that this statute and similar ones seek to prohibit and punish as against the policy of the State.

It is constantly emphasized that the case presented is not one of coercion. But in view of the relative positions of employer and employed, who is to deny that the stipulation here insisted upon and forbidden by the law is essentially coercive? No form of words can strip it of its true character. Whatever our individual opinions may be as to the wisdom of such legislation, we cannot put our judgment in place of that of the legislature and refuse to acknowledge the existence of the conditions with which it was dealing. Opinions may differ as to the remedy, but we cannot understand upon what ground it can be said that a subject so intimately related to the welfare of society is removed from the legislative power. Wherein is the right of the employer to insert this stipulation in the agreement any more sacred than his right to agree with another employer in the same trade to keep up prices? He may think it quite as essential to his "financial independence" and so in truth it may be if he alone is to be considered. But it is too late to deny that the legis-

lative power reaches such a case. It would be difficult to select any subject more intimately related to good order and the security of the community than that under consideration—whether one takes the view that labor organizations are advantageous or the reverse. It is certainly as much a matter for legislative consideration and action as contracts in restraint of trade.

It is urged that a labor organization—a voluntary association of working-men—has the constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with non-union men. And it is asserted that there cannot be one rule of liberty for the labor organization and its members and a different and more restrictive rule for employers.

It of course is true, for example, that a Church may deny membership to those who unite with other denominations, but it by no means follows that the State may not constitutionally prohibit a railroad company from compelling a working-man to agree that he will, or will not, join a particular church. An analogous case,—viewed from the employer's standpoint, would be: Can the State, in the exercise of its legislative power, reach concerted effort of employés intended to coerce the employer as a condition of hiring labor that he shall engage in writing to give up his privilege of association with other employers in legal organizations, corporate or otherwise, having for their object a united effort to promote by legal means that which employers believe to be for the best interest of their business?

I entirely agree that there should be the same rule for employers and employed, and the same liberty of action for each. In my judgment, the law may prohibit coercive attempts, such as are here involved, to deprive either of the free right of exercising privileges which are theirs within the law. So far as I know, no law has undertaken

to abridge the right of employers of labor in the exercise of free choice as to what organizations they will form for the promotion of their common interests, or denying to them free right of action in such matters.

But it is said that in this case all that was done in effect was to discharge an employé for a cause deemed sufficient to the employer—a right inherent in the personal liberty of the employer protected by the Constitution. This argument loses sight of the real purpose and effect of this and kindred statutes. The penalty imposed is not for the discharge but for the attempt to coerce an unwilling employé to agree to forego the exercise of the legal right involved as a condition of employment. It is the requirement of such agreements which the State declares to be against public policy.

I think that the act now under consideration, and kindred ones, are intended to promote the same liberty of action for the employé as the employer confessedly enjoys. The law should be as zealous to protect the constitutional liberty of the employé as it is to guard that of the employer. A principal object of this statute is to protect the liberty of the citizen to make such lawful affiliations as he may desire with organizations of his choice. It should not be necessary to the protection of the liberty of one citizen that the same right in another citizen be abridged or destroyed.

If one prohibitive condition of the sort here involved may be attached, so may others, until employment can only be had as the result of written stipulations, which shall deprive the employé of the exercise of legal rights which are within the authority of the State to protect. While this court should, within the limitations of the constitutional guaranty, protect the free right of contract, it is not less important that the State be given the right to exert its legislative authority, if it deems best to do so, for the protection of rights which inhere in the privileges of the citizen of every free country.

The Supreme Court of Kansas in sustaining this statute, said that "employés as a rule are not financially able to be as independent in making contracts for the sale of their labor as are employers in making a contract of purchase thereof," and in reply to this it is suggested that the law cannot remedy inequalities of fortune, and that so long as the right of property exists, it may happen that parties negotiating may not be equally unhampered by circumstances.

This view of the Kansas court, as to the legitimacy of such considerations, is in entire harmony, as I understand it, with the former decisions of this court in considering the right of state legislatures to enact laws which shall prevent the undue or oppressive exercise of authority in making contracts with employés. In *Holden* v. *Hardy*, 169 U. S. 366, this court considering legislation limiting the number of hours during which laborers might be employed in a particular employment, said:

"The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority. . . . But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to

the contract shall be protected against himself. 'The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer.'" (Page 397.)

This language was quoted with approval in *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 570, in which a statute of Iowa was sustained, prohibiting contracts limiting liability for injuries made in advance of the injuries received, and providing that the subsequent acceptance of benefits under such contracts should not constitute satisfaction for injuries received after the contract. Certainly it can be no substantial objection to the exercise of the police power that the legislature has taken into consideration the necessities, the comparative ability, and the relative situation of the contracting parties. While all stand equal before the law, and are alike entitled to its protection, it ought not to be a reasonable objection that one motive which impelled an enactment was to protect those who might otherwise be unable to protect themselves.

I therefore think that the statute of Kansas, sustained by the Supreme Court of the State, did not go beyond a legitimate exercise of the police power, when it sought, not to require one man to employ another against his will, but to put limitations upon the sacrifice of rights which one man may exact from another as a condition of employment. Entertaining these views, I am constrained to dissent from the judgment in this case.

I am permitted to say that MR. JUSTICE HUGHES concurs in this dissent.

KINNEY *v.* PLYMOUTH ROCK SQUAB COMPANY.

APPLICATION FOR LEAVE TO DOCKET AND PROSECUTE WITHOUT PREPAYMENT OF FEES.

No. .—Decided January 18, 1915.

Under the act of July 20, 1892, c. 209, 27 Stat. 252, as amended by the act of June 25, 1910, c. 435, 36 Stat. 866, the allowance of the right to sue *in forma pauperis* by defendants and by either party in appellate proceedings depends upon the exercise of the same discretion as to the meritorious character of the cause to the same extent provided under the statute before amendment as to plaintiffs bringing suit in the court of first instance.

Although the affidavit as to poverty may be sufficient, the allowance of the right to prosecute a writ of error from this court *in forma pauperis* is subject to the exercise of judicial discretion to determine the good faith of the applicant and the meritorious character of the cause.

In the first case coming to the attention of the court, under a statute prescribing procedure, an omission, probably inadvertent, may be overlooked without making a precedent for future cases.

Although the petition required by the statute providing for the right to prosecute a writ of error from this court *in forma pauperis* has been omitted, the transcript which it is proposed to docket if the petition is allowed discloses no ground sufficiently meritorious for the allowance of the right, and the petition is denied.

Frivolous and fruitless litigation should cease.

THE facts, which involve the construction and application of the Federal statute relative to conducting cases *in forma pauperis*, are stated in the opinion.

Mr. Robert D. Kinney pro se.

No appearance or brief filed for Plymouth Rock Squab Co.

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

Prosecuting a writ of error in this case allowed by a circuit judge, the plaintiff in error asks to be permitted to docket the cause and conduct the proceedings *in forma*

pauperis. The matter is governed by the act of July 20, 1892, c. 209, 27 Stat. 252, as amended by the act of June 25, 1910, c. 435, 36 Stat. 866. We summarize their provisions, reproducing, however, in full the first section as amended by the act of 1910, as that was the only portion of the original act changed by the amendment, printing in italics the provisions added and putting in brackets with a line of erasure the words omitted in the amendment.

"SEC. 1. That any citizen of the United States entitled to commence *or defend* any suit or action, *civil or criminal*, in any court of the United States, may, *upon the order of the court*, commence and prosecute *or defend* to conclusion any [~~such~~] suit or action, *or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith*, without being required to prepay fees or costs *or for the printing of the record in the appellate court* or give security therefor, before or after bringing suit or action, *or upon suing out a writ of error or appealing*, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action *or of such writ of error or appeal*, [~~which he is about to commence~~] or to give security for the same, and that he believes *that* he is entitled to the redress he seeks by such suit or action *or writ of error or appeal*, and setting forth briefly the nature of his alleged cause of action, *or appeal*."

The second section provides for permission to proceed as a poor person after commencement of suit. The third governs the conduct of court officers in cases coming under the statute. The fourth authorizes the appointment by the court of an attorney to represent poor persons "if it deems the cause worthy of a trial" and empowers the court at any stage after permitting proceedings as a poor person to dismiss the suit "if it be made to appear that the allega-

tion of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious." The fifth and last section points out the manner of entering judgment concerning costs in cases under the statute.

Prior to the amendment of 1910 on the face of the statute three things were certain: (a) that the statute imposed no imperative duty to grant a request to proceed as a poor person but merely conferred authority to do so when the fact of poverty was established and the case was found not to be frivolous, that is, was considered to be sufficiently meritorious to justify the allowance of the request; (b) that there was no power to grant such a request when made by a defendant; and (c) that there was also no authority to allow a party to proceed as a poor person in appellate proceedings in this court or the circuit courts of appeals. *Bradford* v. *Southern Railway*, 195 U. S. 243. Clarifying the first section as amended by these considerations, it becomes clear that the sole change operated by the amendment was to bring defendants within the statute and to extend its provisions so as to embrace, first, proceedings on application for the allowance of a writ of error or appeal to this court and the Circuit Court of Appeals, and second, the appellate proceedings in such courts. This being true, it is clear that as to the new subjects, the allowance of the right in those cases was made to depend upon the exercise of the same discretion as to the meritorious character of the cause to the same extent provided under the statute before amendment. That is to say, there is no ground for a contention that at one and the same time the statute brought certain proceedings within its scope and yet exempted them from its operation. Indeed this conclusion is not alone sustained by the implication resulting from the fact that the safeguards provided for the exercise of the authority found in the statute as originally enacted were not changed by the amendment, but further plainly results from the express provisions of the amended section

manifesting the purpose to subject the granting of the right in both the new instances provided for, to the exercise of the judicial discretion to determine the poverty and good faith of the applicant and the meritorious character of the cause in which the relief was asked.

Under the assumption that the affidavit as to poverty is sufficient we come to the merits, in other respects, of the application. There is a failure, however, to comply with the requirement that a statement be made briefly setting forth the cause of action relied upon since the petition only refers to an assignment of errors which it is said will be found in the written transcript which it is proposed to docket when the request the petitioner makes is allowed. As this is the first case coming to our attention under the amended statute and the omission was probably inadvertent, without making a precedent for future cases we consider the case for the purpose of determining whether it is of such a character as to justify the allowance of the relief prayed.

On October 14, 1909, Robert D. Kinney, the petitioner, caused a writ of attachment to issue against the defendant to recover damages in the amount of $18,309.84. This writ was made returnable before the Circuit Court of the United States for the District of Massachusetts on the first Monday of December following, that is to say, on December 6, 1909. On October 26, service was made of the writ together with a declaration concerning the claim for damages. Before the return day (December 6, 1909), Kinney left with the clerk the writ and the declaration along with an order directing the clerk to enter the action and his appearance therein. The return day stated in the writ having expired, and the defendant not having entered its appearance, Kinney on December 20, 1909, instructed the clerk to enter a default against the defendant and some days thereafter, that is, on December 27, 1909, he sent to the clerk a written motion for entry of judgment with

directions to assess the plaintiff's damages at $19,026.98 as per an enclosed statement. The clerk declined to comply on the ground that the writ was made returnable on a day other than the first day of some statutory term of the court as required by the rules. When the first day of the next term arrived, that is, February 23, 1910, the clerk caused the case to be entered and on the following day the defendant appeared and some time after filed a demurrer and answer.

Without taking further steps in the cause, Kinney commenced an action in the Eastern District of Pennsylvania against the surety on the bond of the clerk to recover damages alleged to have been suffered by a violation of duty committed by the clerk in failing to enter the writ of attachment and to note the default under the circumstances which we have stated. After issue joined the case was decided against Kinney on two grounds: first, that the action of the clerk complained of was rightful, and second, that even if it was assumed to be wrongful, there was no proof of damage suffered as there was nothing to show that the corporation against whom the attachment was issued had any funds in its hands belonging to the defendant. (182 Fed. Rep. 1005.) In the Circuit Court of Appeals for the Third Circuit, on April 12, 1911, this judgment was affirmed, the court resting its conclusion solely on the ground that the action of the clerk in refusing to enter the judgment as requested was rightful and therefore no cause of action in favor of Kinney arose therefrom. (186 Fed. Rep. 477.) And in this court to which the case was brought on error, the judgment of the Court of Appeals was on motion affirmed, December 18, 1911. (222 U. S. 283.) On February 15 following, in the attachment suit in the District Court of Massachusetts, Kinney asked that the default as originally asked by him be entered *nunc pro tunc*. The motion was set down for hearing for a day in March, and, the petitioner not appearing, on hearing de-

fendant it was dismissed. In the meanwhile pending action on this petition, on February 28 a new attachment proceeding was sought to be begun by Kinney based upon the theory of the existence of a judgment against the defendant in the original proceeding and a writ of attachment which was made returnable on a day other than the first day of the following term was presented to the clerk with the request that he affix the seal of the court to it, which he declined to do on the ground of an improper return day. And the District Court refusing to command the clerk to comply with the request, mandamus proceedings were commenced in the Circuit Court of Appeals for the First Circuit to compel the clerk to comply. The court refused the mandamus upon the ground that because of the wrong return day the clerk had rightfully refused, supporting its conclusions by the same line of reasoning which caused the District Court in the Eastern District of Pennsylvania and the Circuit Court of Appeals for the Third Circuit in the cases to which we have previously referred to decide that the original action of the clerk in refusing to file because of a wrong return day was right. (202 Fed. Rep. 137.) Thereupon the suit before us was commenced in March, 1913, in the District Court of Massachusetts to recover on a judgment against the defendant upon the assumption that such a judgment had been rendered in the original suit; and after issue joined there was a judgment in favor of the defendant company on the ground that there was no such judgment in said suit, the court again directly upholding the rightfulness of the action of the clerk in having originally refused to enter the cause because of the wrong return day. This judgment was affirmed by the Circuit Court of Appeals in a careful opinion sustaining the same view (214 Fed. Rep. 766), and it is this judgment that is intended to be brought under review in the proceedings which it is prayed may be conducted *in forma pauperis*. And the assignments of error

but challenge, for reasons which it is unnecessary to recapitulate, the lawfulness of the action of the clerk in originally refusing to comply with the request to file the attachment proceedings and enter the default judgment and assess the damages before the first day of the term following the issue of the writ, and therefore but assail all the various opinions and judgments to which we have referred in stating the history of the case.

Under these circumstances we think it is manifest that no ground is shown for the allowance of the prayer of the petition. The case proceeds upon the erroneous assumption that a judgment was rendered in a cause which is yet pending and undisposed of; in other words, the case assumes as a basis for relief the existence of that which does not exist. It seeks collaterally to attack that which was only susceptible of being assailed directly. It disregards the conclusive effect of the judgments as to the want of merit in the claim rendered in the courts of the first and third circuits and by implication disregards the legal consequences necessarily arising from the former action of this court. Indeed, irrespective of these considerations, to the end that frivolous and fruitless litigation may cease, we say that we are clearly of the opinion that the absolute want of merit in the case is demonstrated by the views expounded in the opinions of the courts of the first and third circuits to which we have referred concerning the rightfulness of the action of the clerk in refusing to file the papers and enter the judgment for damages under the circumstances disclosed.

The prayer of the petition is denied.

YOST *v.* DALLAS COUNTY.

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

No. 604. Argued January 6, 1915.—Decided January 18, 1915.

The obligation of bonds issued by a county pursuant to legislative authority is an obligation under, and not paramount to, the authority of the State.

While the District Court has jurisdiction, where diverse citizenship exists, of a suit upon bonds issued by a county pursuant to legislative authority, the extent of the obligation is determined by the statutes of the State and not by the Constitution of the United States.

A plaintiff by bringing suit in the Federal court upon the contract obligation of a county acquires no greater rights than are given by local statutes.

The right given in bonds issued by a county pursuant to legislative authority to have a tax levied, collected and applied to their payment, is to have such tax levied and collected in the manner provided by statute, and courts cannot substitute their own appointee in place of one contemplated by the act.

Even where the state court by mandamus has directed the officers of a county to levy and collect a tax as required by the state statute and apply it to the payment of a judgment for defaulted bonds, and they have failed to do so, the Federal court has not jurisdiction to appoint a commission to levy, collect and apply the tax.

Until the highest court of Missouri otherwise construes Rev. Stat., § 11417, Missouri, giving the Circuit Court power to enforce by mandamus or otherwise an order of the county court to have a tax assessed, this court will not construe the words "or otherwise" as authorizing the court to collect the tax itself, but as only allowing the resort to other means besides mandamus to compel the county court to do so.

THE facts, which involve the jurisdiction of the District Court, are stated in the opinion.

Mr. Harry J. Cantwell for Yost:

Federal courts are bound to proceed to judgment and

to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. *Chicot Co.* v. *Sherwood*, 148 U. S. 529, 534.

The means to be employed by the United States courts, in the enforcement of their lawful jurisdiction, are limited only by the determination of whether such means are necessary, and agreeable to the principles and usages of law. Section 262, Jud. Code; *Hills* v. *Hoover*, 220 U. S. 335; *Holland* v. *Challen*, 110 U. S. 24; *Davis* v. *Gray*, 16 Wall. 203; *Chicot Co.* v. *Sherwood*, 148 U. S. 534.

Counties and other municipal corporations, when acting for the particular advantage of the particular corporation, and not from considerations connected with the government of the State at large, are to be regarded as private corporations. *Murray* v. *Charleston*, 96 U. S. 445; *State* v. *Gates*, 190 Missouri, 540, 558; *State* v. *County Court*, 128 Missouri, 427; *Lincoln Co.* v. *Luning*, 133 U. S. 529, 531.

There is no distinction between counties and cities or towns as regards their liability for obligations created in their business capacity, or in the method of enforcement of the obligations. *Laramie County* v. *Albany County*, 92 U. S. 307, 311; *Mount Pleasant* v. *Beckwith*, 100 U. S. 524; *Lincoln Co.* v. *Luning*, 133 U. S. 531.

On mandamus being disobeyed the court may appoint a receiver to do the act or acts required to be done by the writ. Section 3012, Rev. Stat. Missouri, 1909.

The special tax imposed by the legislature of the State of Missouri upon the property in Dallas County is a special charge, analogous to internal improvement charges. It bears no relation to ordinary taxes for the maintenance of local government. The creation of the debt by the authority of the legislature, the provisions of the legislative act definitely fixing the property upon which it should be charged, and requiring the enforcement of the charge for the payment of the debt, created a charge

against definite specific property. *Farrar* v. *St. Louis*, 80 Missouri, 379; *Construction Co.* v. *Shovel Co.*, 211 Missouri, 532; *Ray Co.* v. *Bentley*, 49 Missouri, 236; *Dickason* v. *County Court*, 128 Missouri, 427, 438.

The charge here is a fixed, definite and certain charge imposed by law. *King* v. *United States*, 99 U. S. 233; *Savings Bank* v. *United States*, 19 Wall. 227, 240; *Meriwether* v. *Muhlenburg Ct.*, 120 U. S. 357; *Thompson* v. *United States*, 103 U. S. 484; *Supervisors* v. *Rogers*, 7 Wall. 175.

There being no act of discretion to be performed by the agents of the defendant, the acts necessary to enforce the charge against definite property being acts commanded by the sovereign power of the State, no good reason can be given why the same remedy should not be applied to these agents of the county as would be applied if the county were a private corporation.

The sovereign power of the State of Missouri has specially conferred upon the judiciary the duty of compelling the specific performance of every act necessary to payment of the judgment in this case. Rev. Stat. Mo. 1855, p. 427; Vol. I, Rev. Stat. Mo. 1855, p. 438; Wagner's Mo. Stat. 1870, p. 306, see App.

The judiciary has express power to dispense with official action of any particular individual officer in the performance of any and every act which might be necessary to the accomplishment of payment of these bonds. Section 8, c. 47, Rev. Stat. 1855, p. 533; § 21, Art. VI, Const., 1865; § 23, Art. VI, Const., 1875; §§ 1 and 16, c. 135, Rev. Stat. Mo. 1855, pp. 1329, 1338; § 37, c. 47, *id.;* § 7, c. 12, Gen. Stat. Mo. 1865, p. 99; § 37, c. 47, Rev. Stat. 1855; § 18, c. 133, Gen. Stat. 1865, and see also *Givens* v. *Daviess Co.*, 107 Missouri, 608.

The whole question of levying taxes and of raising revenues is, in Missouri, under the control of the judiciary. Sections 11416, 11417, Rev. Stat. Mo. 1909.

The United States courts may exercise the same powers as the state court as such powers are agreeable to the usages and principles of law. *Davis* v. *Gray*, 16 Wall. 203; *Holland* v. *Challen*, 110 U. S. 24; *Louisiana* v. *Jumel*, 107 U. S. 728; *Supervisors* v. *Rogers*, 7 Wall. 175.

This being a case in which equity has original jurisdiction, any of the usual equitable remedies may be applied, and Equity Rule No. 8 is applicable. *Walla Walla* v. *Water Co.*, 172 U. S. 12; *Davis* v. *Corbin*, 112 U. S. 40; *Gibson* v. *Shufeldt*, 122 U. S. 38; *Oelrich* v. *Spain*, 15 Wall. 211; *Hills* v. *Hoover*, 220 U. S. 335; *May* v. *May*, 167 U. S. 310; *Boyce* v. *Grundy*, 3 Pet. 210; *Clark* v. *Wooster*, 119 U. S. 326; Street's Fed. Prac., § 52; *Pendleton* v. *Perkins*, 49 Missouri, 565.

Equity courts, in a case wherein the court has, under the Federal Constitution, jurisdiction because of diverse citizenship, to protect the rights of a suitor, when usual grounds for equitable relief are set up, have jurisdiction even though there may thereby be involved control of matters of revenue and taxation. *Newmeyer* v. *Mo. & Miss. R. R.*, 52 Missouri, 81; *Rolston* v. *Mo. Fund Commissioners*, 120 U. S. 411; *Crampton* v. *Zabriskee*, 101 U. S. 609; Dillon on Mun. Corp., §§ 1488, 9; *Davis* v. *Corbin*, 112 U. S. 40; *Gibson* v. *Shufeldt*, 122 U. S. 38; 1 Story's Eq. Jurisp., § 519, p. 539; *Blackbourne* v. *Webster* (1731), 2 Piere Wms. 632; *Attorney-General* v. *Heelis*, 2 Sim. & St. Cas. in Chan., p. 67; *Izard* v. *Brown*, 1 Swanston's Chan. Rep. 265; *Stanley Co.* v. *Coler*, 190 U. S. 437; *New Orleans* v. *Warner*, 175 U. S. 120.

Mandamus is but one of the means of securing the specific performance of an act which the suitor has the right to have performed. It is not an end; it is but one of the means of securing specific performance. *Antoni* v. *Greenhow*, 107 U. S. 781; *Davenport* v. *Dodge County*, 105 U. S. 237, 243; *Louisiana* v. *United States*, 103 U. S. 292; *State* v. *County Court*, 128 Missouri, 427, 438; *Greene*

County v. *Daniel*, 102 U. S. 194; *Caster Co.* v. *Sinton*, 120 U. S. 517; *Hawley* v. *Fairbanks*, 108 U. S. 543.

See *Supervisors* v. *Rogers*, 7 Wall. 175; *Stansell* v. *Levee Board*, 13 Fed. Rep. 846, where the court below exercised exactly the same powers as are here sought to be invoked.

In the case at bar, it is not the State of Missouri, but the mere agents of a municipal corporation, who attempt to defeat the jurisdiction of the court, to paralyze the judicial arm of the United States by violating the laws of the State.

The State is not interfered with by the proceedings sought herein. The powers of the State, as well as the powers of the United States, are denied and defied by the agents of this corporation, now in contempt of both. *Virginia Coupon Cases*, 114 U. S. 295, 298.

Mr. John S. Haymes, with whom *Mr. J. W. Miller* was on the brief, for Dallas County.

Mr. Justice Holmes delivered the opinion of the court.

This case comes here upon a Certificate from the Circuit Court of Appeals. It is a suit in equity and the bill was dismissed by the District Court. The facts alleged are in short as follows. A statute of Missouri incorporated the Laclede and Fort Scott Railroad and authorized counties to invest in its stock and bonds and to issue county bonds in order to pay for the same. The appellee did so, afterwards defaulted upon its bonds and the appellant recovered judgment upon them in the same District Court for over a million dollars. Under the laws in force when the bonds were issued it was the duty of the county officers to levy and collect annually a tax of thirty per cent. of the amount of the bonds issued but this duty never has been performed and the county officers evade service of writs of mandamus or if served refuse to obey the writs.

There is no other mode of obtaining satisfaction and the duties of levying and assessing the tax are only those of apportioning the tax among the taxable inhabitants on the basis of the last previous assessment which has been made, and of collecting it. The prayer is for the appointment of a commissioner to levy, collect and pay over the tax according to the Missouri law. The questions certified are:

"1. Has a District Court of the United States, sitting as a court of equity, jurisdiction of such a cause?

"2. When a judgment has been recovered on the law side of a District Court of the United States of competent jurisdiction, against a county of the State of Missouri, on its bonds issued by authority of law, and the laws of that State in force at the time the bonds were issued authorized such county to levy and collect taxes to pay such bonds, and the county has no funds in its treasury, which can be applied to the payment of the judgment, and its property is, under the laws of the State, exempt from seizure and sale under execution; when the officers charged by the laws of the State with the duty to levy and collect taxes to pay such judgment refuse so to do, when the court in which such judgment was rendered has a number of times issued writs of mandamus commanding such officials to levy the taxes which they were authorized and which it was their duty to levy to pay such judgment, but these officials have, when possible, evaded service of these writs, and when served have wilfully and defiantly refused to obey the writs of mandamus, and the fact has been conclusively demonstrated by the proceedings at law that the plaintiff is utterly remediless at law by mandamus or otherwise for the failure of the county to pay, and the refusal of the officers of the county to discharge their duty to levy and collect taxes and therewith to pay his judgment; and when the last previous assessment was made which, by the statute in force at the time the contract

was made, was authorized and made the basis of the levy of the amount to which the plaintiff is now entitled under his judgment and writs of mandamus so that no act of discretion is required to levy and collect it, but only the clerical or ministerial acts of apportioning the amount among the assessed values of the taxables specified in the last previous assessment, placing it on the tax books and collecting it of the persons and property liable therefor, has the Federal Court of the District in which the judgment was rendered, and the futile writs of mandamus issued and, when possible, served, the jurisdiction and authority in equity to appoint a commissioner, receiver or other officer to make the apportionment and to collect the amounts which the owner of the judgment is entitled to have collected from the parties and properties liable therefor."

The fundamental consideration for answering these questions is that the obligation upon which the judgment was recovered was an obligation under, not paramount to, the authority of the State. It is true that the District Court of the United States had jurisdiction of the suit upon the contract, but the extent of the obligation imposed was determined by the statutes of Missouri, not by the Constitution of the United States or any extraneous source, the Constitution only requiring that the obligation of the Contract should not be impaired by subsequent state law. The plaintiff by bringing suit in the United States court acquired no greater rights than were given to him by the local statutes. The right so given was to have a tax levied and collected, it is true, but a tax ordained by and depending on the sovereignty of the State and therefore limited in whatever way the State saw fit to limit it when, so to speak, it contracted to give the remedy. It is established that 'taxes of the nature now in question can only be levied and collected in the manner provided' by the statute, and therefore that it is impossible

for the courts to substitute their own appointee in place of the one contemplated by the act. *Seibert* v. *Lewis*, 122 U. S. 284, 298. The *Missouri Case* referred to in that decision states a rule that we believe always to have been recognized in that State and others, as well as reinforced by other decisions of this court. *Kansas City* v. *Hannibal & St. Joseph R. R.*, 81 Missouri, 285, 293. *St. L. & San Frans. Ry.* v. *Apperson*, 97 Missouri, 300, 306. *Rees* v. *Watertown*, 19 Wall. 107. 117. *Heine* v. *Levee Commissioners*, 19 Wall. 655, 658. *Barkley* v. *Levee Commissioners*, 93 U. S. 258, 265. *Meriwether* v. *Garrett*, 102 U. S. 472, 501. *Thompson* v. *Allen County*, 115 U. S. 550; *S. C.*, below, 4 Ky. Law Rep. 98, 101. The rule has other applications; e. g. *Smith* v. *Reeves*, 178 U. S. 436, 445. *United States* v. *Kaufman*, 96 U. S. 567, 569.

It is unnecessary to repeat the strong and already often repeated language of this court that will be found at the pages of the reports referred to. Some of it may go farther than was necessary or than we should be prepared to go in a different case, but to the extent of the principles that we have laid down we apprehend that it is not open to debate. It hardly could be except upon the question of construction: how far the liability to the tax was bound up with the mode of collection provided. But as the tax depended for its creation upon a sovereign act of the State and was confided for its enforcement to officers of the State it is decided that it cannot be enforced by others. The fact that it falls upon people who are not parties to the contract or the suit is an additional consideration in favor of the result; which no one would doubt if the judgment had been recovered and the present proceeding brought in another State. Of course it does not follow from the fact that a court has authority to issue a writ of mandamus to compel officers to perform their duty that it can perform that duty in their place. Authority is given by Missouri Rev. Stat. 1909, § 11417, to the Circuit Court

to enforce 'by mandamus or otherwise' an order to the county court to have the tax assessed, etc. But the words 'or otherwise' do not authorize the Circuit Court to collect the tax, but only allow the resort to other means beside mandamus to compel the county court to do so. At least until the Supreme Court of Missouri says otherwise we should read them in that sense.

We answer both questions: No.

MR. JUSTICE MCKENNA and MR. JUSTICE PITNEY dissent.

REYNOLDS *v.* FEWELL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 102. Argued December 7, 8, 1914.—Decided January 18, 1915.

The courts of Oklahoma have held that under § 7 of the Original Creek Agreement of 1901 a non-citizen husband, while by reason of non-membership in the tribe was not to be counted in determining the distributive shares for the purpose of allotment to, or in the right of, enrolled members of the tribe, was entitled under tribal laws to take an heir's part of the lands which had been allotted to his deceased citizen wife. *De Graffenreid* v. *Iowa Land & Trust Co.*, 20 Oklahoma, 687.

The laws of the Creeks were uncertain and ambiguous, and although the construction of a tribal law by the Supreme Court of Oklahoma is not a construction of a law of the State, and this court has an undoubted right of review, it will not overturn, in a case at most only debatable, a rule of construction that for years has governed transfers of property.

The Supplemental Creek Agreement of 1902, providing that the descent and distribution of allotments should be in accordance with § 49, Mansfield's Digest, Laws of Arkansas, was not an interpreta-

tion of the provisions for descent and distribution in the Original Creek Agreement of 1901, but an express repeal thereof and the establishment of another rule as to the future; but without affecting the meaning of the provision in the Original Agreement as to the cases governed by it.

34 Oklahoma, 112, affirmed.

THE facts, which involve the construction of the Original Creek Agreement and the laws of descent applicable to allotments made thereunder, are stated in the opinion.

Mr. William R. Lawrence and *Mr. F. W. Clements* for plaintiff in error.

Mr. Joseph C. Stone, with whom *Mr. Henry B. Martin* was on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

The defendant in error brought this action to recover certain lands which had been allotted under the Original Creek Agreement (act of March 1, 1901, c. 676; 31 Stat. 861; 32 Stat. 1971). The allotments described in the complaint had been made on behalf of two deceased Creeks, Minnie Solander and her infant daughter, Hettie L. Solander, that is, the respective allotments ran to the 'heirs' of each. The defendant in error claimed under a lease, executed on September 7, 1905, by George A. Solander, the surviving husband of Minnie Solander and father of the other decedent. At the time of the death of his wife and daughter, as for some years previously, George A. Solander 'resided in the Creek Nation,' but he was not a citizen of that Nation. The plaintiff in error claimed under a conveyance from Phoebe B. Trusler, an enrolled Creek, who as the sister of Minnie Solander was the nearest relative of Indian blood. The question was whether George A. Solander was entitled to take as 'heir,' despite

the fact that he was not a Creek citizen. It was answered by the state court in the affirmative. 34 Oklahoma, 112; 124 Pac. Rep. 623.

While the complaint embraced a portion of the lands allotted on behalf of Minnie Solander, as well as lands allotted on behalf of Hettie L. Solander, it appears from the record that the judgment related exclusively to the latter. According to the agreed statement of facts, Hettie L. Solander was born on February 22, 1899, and died on November 17, 1899, before receiving her allotment and leaving her father and aunt surviving. She was entitled to be enrolled, and was enrolled, as a member of the tribe, and the allotment on her behalf was made to her 'heirs,' without further description, on December 4, 1901, under the second paragraph of § 28 of the act of 1901, *supra*, and the tribal deed was thereafter executed accordingly. Section 28 is as follows:

"No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

"All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

"All children born to citizens so entitled to enrollment,

up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

"The rolls so made by said commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

We are thus referred to the 'laws of descent and distribution of the Creek nation' to ascertain the persons entitled to the property. This explicit and determinative reference disposes of the contention that George A. Solander, although he might be an 'heir' under the Creek laws, nevertheless could not take the lands in controversy because being a non-citizen he was not entitled to the allotment of a distributive share of the tribal lands in his own right. It is sought to find support for this contention in the concluding paragraph of § 28, above quoted, which provides that the approved rolls shall be the final rolls of citizenship, upon which 'allotment of all lands . . . shall be made, and to no other persons.' But this paragraph should be read in the light of § 3 of the act of 1901, *supra*, under which all lands were to be allotted 'among the citizens of the tribe' so as 'to give each an equal share of the whole in value, as nearly as may be.' The persons who were to receive these equal portions were those duly ascertained and enrolled, and the rolls approved by the Secretary of the Interior were to be final with respect to membership in the tribe and the corresponding determination of the distributive shares of the tribal lands. Thus, the provision of the last paragraph of § 28 had manifest regard to those who were to receive allotments if living,

and to those on whose behalf allotments were to be made if they had died. In the latter case, the allotment of the distributive share which would have gone to the enrolled citizen, if living, was to go to his 'heirs.' One who took as such 'heir' would be none the less entitled because he might have in addition an allotment in his own right as a member of the tribe; that would not be a disturbance of the principle of equality in distribution which was so emphatically laid down. Nor, on the other hand, would one be excluded from taking, if he were a described 'heir,' by reason of the fact that he could not himself have received a distributive share as an enrolled citizen. The right of such 'heir' to take would not be determined by reference to his status as a citizen or non-citizen, or by his right to a distributive share of the tribal lands as one enrolled, but by the status of the decedent and the fact that he was an 'heir' of the decedent within the statutory definition.

We have recently had occasion to review the course of legislation with respect to the distribution of the property of Creek intestates. *Washington* v. *Miller*, 235 U. S. 422; *Sizemore* v. *Brady*, 235 U. S. 441. The Creek nation, as a 'distinct political society' (*Cherokee Nation* v. *Georgia*, 5 Pet. 1, 16) had its own laws governing the devolution of the property of its citizens. When Congress put in force in the Indian Territory certain general laws of Arkansas, including Chapter 49 of Mansfield's Digest relating to descents and distributions, it provided that 'the judicial tribunals of the Indian nations' should retain exclusive jurisdiction in all cases in which members of the nation should be the only parties and that to such cases the laws of Arkansas should not apply. Act of May 2, 1890, c. 182, §§ 30, 31; 26 Stat. 81, 94, 95. In 1897, however, it was provided that the laws of the United States and of the State of Arkansas in force in the Indian Territory should 'apply to all persons therein, irrespective of race' (Act of June 7, 1897, c. 3; 30 Stat. 62, 83); and, in 1898, Congress

abolished the tribal courts and prohibited the enforcement of the tribal laws. Act of June 28, 1898, c. 517, §§ 26, 28; 30 Stat. 495, 504. The Original Creek Agreement of 1901, *supra*, operated again to make effective, for the purposes stated, the Creek tribal laws with respect to 'descent and distribution' of the property of Creek intestates (see §§ 7 and 28), and the provisions having this import remained in force until their repeal in the following year. Act of May 27, 1902, c. 888; 32 Stat. 245, 258, 742; Supplemental Agreement, Act of June 30, 1902, c. 1323, § 6; 32 Stat. 500, 501.

The Creek laws thus made controlling are set forth in the agreed statement as follows:

"SEC. 6. Be it further enacted, that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons; and in all cases where there are no children, the nearest relation shall inherit the property. Laws of Muscogee Nation, 1880, p. 132.

"SEC. 8. The lawful or acknowledged wife of a deceased husband shall be entitled to one half of the estate, if there are no other heirs and an heir's part, if there should be other heirs, in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner. Laws of Muscogee Nation, 1880, p. 60.

"SEC. 1. All non-citizens, not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship, shall have a right to live in this nation and enjoy all the privileges enjoyed by other citizens, except participation in the annuities and final participation in the lands. Laws of the Muscogee Nation, 1890, p. 60."

See Perryman's Compiled Creek Laws of 1890; § 6 p. 32; § 8, p. 76; § 1, p. 66; Bledsoe's Indian Land Laws, 2d ed., §§ 829–831.

It will be observed that §§ 6 and 8 make no distinction between citizens and non-citizens. Under § 8, it is 'the

lawful or acknowledged wife,' or 'husband,' that is entitled to take. If a non-citizen within this description was to have 'an heir's part,' there would seem to be no reason for construing § 6 so as to exclude a non-citizen father of a deceased citizen, when the father is the 'nearest relation.' And it is contended by the defendant in error that the provision of § 1, above quoted, only debarred the non-citizen husband, or non-citizen father, from taking a membership interest in the tribal property, that is, from being counted as one of the *units* in the final distribution of the tribal lands, and did not deprive him of the right to take the part of an heir or next of kin in whatever property had come to be owned individually by the deceased wife or child.

While the agreed statement asserts that the laws above quoted are the 'only' Creek statutes 'in relation to descent and distribution' at the time in question, the plaintiff in error insists that we should take judicial notice of numerous other provisions of the Creek laws which it is urged must control. Thus we are referred—taking those statutes which are most nearly in point—to §§ 299 and 300 of McKellop's Compilation (1893) of Creek Laws to the effect that 'no non-citizens shall, on account of marriage with a citizen of this Nation, acquire any right pertaining or belonging to a citizen of this Nation' and that 'no non-citizen shall have the right to reside in or to own any improvement in this Nation, except as provided for in the treaties between this Nation and the United States'; and also to § 108 (McKellop's Comp., 1900), apparently approved October 30, 1894, that 'no non-citizen shall be permitted to own houses or fences of any kind within the Nation, or any interest therein' and that 'any purchase, grant, lease or other conveyance of lands of the Muskogee Nation, or title or claim thereto given by any citizen or person claiming to be a citizen, contrary to § 2116 of the United States Intercourse Laws' shall be void.

It is not certain that any of these last-mentioned provisions was intended to apply to the succession of a husband or father in case of intestacy. On the other hand, the acquisition of property rights within the Nation by an intermarried person, although a non-citizen, was distinctly recognized by the Creek Act of April 6, 1894 (McKellop's Comp., 1900, §§ 76, 77), relating to the jurisdiction of the tribal courts. This act provided:

"SEC. 76. The courts of this Nation shall have and exercise jurisdiction over all controversies arising out of or pertaining to property rights acquired in this Nation, and situated in the same, by non-citizens who have intermarried with citizens of this Nation and by reason of such marriage secured rights and privileges in this Nation under which such property was acquired and accumulated by them. The jurisdiction of our courts shall extend to controversies over property and property rights acquired by intermarried non-citizens of our Nation who, by virtue of this intermarriage with citizens, acquired such property rights and privileges, and that irrespective of whether such controversies are between non-citizens and citizens of the Muskogee Nation or between any persons whomsoever, who claim in this Nation property rights under and through such intermarried non-citizens which are by them acquired in the manner aforesaid; and all persons hereafter intermarrying with citizens of this Nation shall thereby be deemed to consent that the courts of this Nation exercise jurisdiction over all property rights and privileges that they acquire in this Nation by virtue of their said marriage.

"SEC. 77. All property brought into this Nation by non-citizens in consequence of intermarriage of such non-citizens with citizens of this Nation shall likewise be under the jurisdiction of the courts of this Nation."

That the intermarried non-citizen could inherit under the tribal laws appears to have been the conclusion reached

in an unreported case (*Porter* v. *Brook*) in the United States court for the Western District of the Indian Territory, and this ruling was followed by the Supreme Court of the State of Oklahoma in the case of *De Graffenreid* v. *Iowa Land & Trust Co.*, 20 Oklahoma, 687. It was held that a non-citizen husband, while, by reason of the fact of his non-membership, he was not to be counted in determining the distributive shares for the purpose of allotment to, or in the right of, enrolled members of the tribe, was entitled under the tribal laws to take an heir's part of the lands which had been allotted to his deceased citizen wife. In that case the descent was controlled by the provision of § 7 of the Original Creek Agreement that the land allotted should descend to the heirs of the allottee 'according to the laws of descent and distribution of the Creek Nation,'—the same expression that is used in § 28.

This decision as to the right of intermarried non-citizens to inherit has been repeatedly followed and has become a rule of property which, recognizing the importance of the security of titles, we should not disturb unless it is clearly wrong. But so far from the case being one of manifest error, it is apparent from the review of their provisions that the most that can be said is that the Creek laws were uncertain and ambiguous and that their proper construction as an original question might be regarded as doubtful. It is true, of course, as urged by the plaintiff in error, that we are not dealing with a statute of a State the meaning of which is necessarily settled by the state court, but even where we have undoubted right of review we ought not to overturn, in a case at most debatable, a local rule of construction which for years has governed transfers of property. See *Nadal* v. *May*, 233 U. S. 447, 454.

It is insisted that the Supplemental Creek Agreement of 1902 (*supra*), in § 6, contains an interpretation by Congress of the words used in §§ 7 and 28 of the act of 1901. But we do not so read the later statute. Its evident

purpose was not to interpret the reference in the act of 1901 to the Creek laws of 'descent and distribution,' or to define the content and significance of such laws, but to supersede the former provision and to establish another rule. The previous provision with respect to descent and distribution according to the Creek laws was expressly repealed, and it was provided that 'the descent and distribution' should be in accordance with Chapter 49 of Mansfield's Digest of the statutes of Arkansas with the proviso that Creek heirs, if there were such, should take to the exclusion of others. This was a recognition of dissatisfaction with the provision of the Original Agreement which made the Creek laws controlling, but the meaning and application of that provision in the cases governed by it was in no way affected.

We are therefore of the opinion that George A. Solander was entitled to the land which was allotted on behalf of his infant daughter and, as in the case of an allotment of this sort the restriction upon alienation was not applicable, he had the right to make the conveyance under which the defendant in error claims. *Skelton* v. *Dill*, 235 U. S. 206.

The judgment of the state court is affirmed.

Judgment affirmed.

SHELLENBARGER *v.* FEWELL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 103. Argued December 7, 8, 1914.—Decided January 18, 1915.

Reynolds v. *Fewell*, *ante*, p. 58, followed to the effect that under § 7 of the Original Creek Agreement of 1901 a non-citizen husband is entitled under the tribal laws to take an heir's part of the lands which had been allotted to his deceased citizen wife, pursuant to the rule of property established by the highest court of Oklahoma in *De Graffenreid* v. *Iowa Land & Trust Co.*, 20 Oklahoma, 687.

Quære, whether persons entitled to take lands allotted under § 28 of the Original Creek Agreement on behalf of a deceased member of the tribe should be ascertained by reference to the time of the death of the decedent or by reference to the date of the allotment.

34 Oklahoma, 79, affirmed.

THE facts, which involve the construction of the Original Creek Agreement and the laws of descent applicable to allotments made thereunder, are stated in the opinion.

Mr. William R. Lawrence and *Mr. F. W. Clements* for plaintiff in error.

Mr. Joseph C. Stone, with whom *Mr. Henry B. Martin* was on the brief, for defendant in error.

By leave of court *Mr. Grant Foreman* and *Mr. James D. Simms* filed a brief as *amici curiæ*, in support of plaintiff in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

Minnie Solander, a Creek, died intestate on October 8, 1899, leaving her husband, George Solander (who resided

in the Creek Nation but was not a citizen thereof), her child, Hettie L. Solander, and her sister, Phoebe Trusler, surviving. Hettie L. Solander died intestate on December 19, 1899,[1] without husband or issue; her father and aunt (above mentioned) survived her. Minnie Solander was duly enrolled as a member of the Creek tribe and, after the death of herself and her daughter, an allotment was made to her 'heirs' of certain land, the title to which is here in controversy. Her husband, George Solander, on April 27, 1906, executed a conveyance of this land to William M. Fewell, who brought the present action in ejectment against the plaintiff in error, John H. Shellenbarger; the latter claimed the property under a deed from Phoebe Trusler, the nearest relative of Indian blood.

The Supreme Court of the State of Oklahoma held that the husband, although a non-citizen, had title to the lands allotted on behalf of his wife and that they passed under his conveyance. 34 Oklahoma, 79; 124 Pac. Rep. 617. And this writ of error has been sued out.

The record in this case does not show the date of the allotment made on behalf of Minnie Solander [2] but the state court concluded 'from the admissions in the agreed statement of facts and the briefs of both parties' that the allotment had been selected, and the certificate issued, under the Original Creek Agreement of March 1, 1901, c. 676, 31 Stat. 861. This has also been assumed in the argument here. The case is, therefore, controlled by § 28 of the act of 1901, *supra*, which provides that the lands to which the deceased member of the tribe would have been entitled, if living, should 'descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted . . . accordingly.' Under

[1] The date of her death is given in the agreed statement in No. 102, *Reynolds* v. *Fewell*, *ante*, p. 58, as November 17, 1899.

[2] The date of this allotment is stated in the record in No. 102, *Reynolds* v. *Fewell*, *ante*, p. 58, as December 3, 1901.

these laws, according to the settled rule of construction, George Solander was entitled to the property and had the right to convey. *Reynolds* v. *Fewell, ante*, p. 58.

The question whether the persons entitled to take lands allotted under § 28 on behalf of a deceased member of the tribe, should be ascertained by reference to the time of the death of the decedent, or by reference to the date of the allotment, has been discussed in the briefs but is not material here, inasmuch as in either event George Solander took all the lands in question; it is not necessary to inquire whether an undivided interest should be treated as one passing in the first instance to his daughter and on her death to him.

Judgment affirmed.

LESSER *v.* GRAY.

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

No. 110. Submitted December 9, 1914.—Decided January 18, 1915.

Where plaintiff in error seasonably sets up and claims that, because the bankruptcy court adjudicated his debt to be not provable the proceedings in bankruptcy and defendant's discharge are not a bar, a Federal issue is raised, and as in this case that question is not frivolous, this court has jurisdiction under § 237, Judicial Code.

A disallowed debt and a non-provable debt are not identical; and a claim that has been presented and disallowed as not having foundation is not a non-provable debt and the discharge is a bar.

In this case, *held* that the contract on which the claim sued for was based was either terminated by defendant's bankruptcy or non-compliance therewith constituted a breach, and in either case defendant was released by his discharge.

As plaintiff, suing on a claim disallowed in the bankruptcy proceeding, made no effort to review the action of the bankruptcy court in the

direct way prescribed by the Bankruptcy Act, the result in this case cannot be obtained indirectly by suit in the state court based on the contention that the debt was non-provable.

8 Ga. App. 605, affirmed.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, and the effect of a discharge in bankruptcy, are stated in the opinion.

Mr. Henry A. Alexander, Mr. C. Henry Cohen and *Mr. Rodney S. Cohen* for plaintiff in error.

Mr. Alex. C. King and *Mr. Charles T. Hopkins* for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Lesser brought suit in the City Court of Atlanta against Gray and another, once members of Inman & Co., for damages alleged to have resulted from breach of contract by the firm. A demurrer was sustained and final judgment rendered for defendant; this was affirmed by the Court of Appeals of Georgia (8 Ga. App. 605); and the matter is here upon writ of error.

A motion to dismiss must be denied. Plaintiff in error seasonably set up and claimed that, because the bankruptcy court adjudicated his debt to be not provable (*Re Inman & Co.*, 175 Fed. Rep. 312), the proceedings in bankruptcy and discharge of defendant constituted no bar to a recovery thereon in the state court. A Federal issue is raised and we cannot say that it is too frivolous to give jurisdiction. *Rector* v. *City Deposit Bank,* 200 U. S. 405, 411.

The following summary adequately indicates the essentials of the original petition:

Inman & Co., a copartnership composed of Gray and

others, in July, 1907, agreed to purchase from Lesser 500 bales of patches—cotton bagging—to be delivered during the twelve months commencing September 1, 1907. About one-third was delivered and paid for prior to May 4, 1908, at which time an involuntary petition in bankruptcy was filed against the firm and its members. Shortly thereafter all were adjudicated bankrupts. Trustees were appointed, and in July, 1908, Gray obtained his discharge. Prior to the bankruptcy proceedings there was no breach or disavowal of the contract and thereafter no demand for further deliveries nor offer to make any.

In Feburary, 1909, Lesser presented a claim against the estate for his alleged loss. The trustees objected on several grounds. Among others these were specified: "That said claim is not a provable claim in bankruptcy under the provisions of the Bankrupt Act; that said claim on its face shows that at the time of the filing of the petition in said cause, and at the date of adjudication, the merchandise, the subject-matter of the claim, had not been delivered to the bankrupts as provided under the contract of sale therein set forth, but that all of said merchandise that had been delivered, to wit, the amount of 174 bales had been paid for. . . . Said proof shows that at the date of the adjudication, as well as the filing of the petition, no breach of said contract had occurred. . . . Your trustees show that the contract set forth is not such a contract as is avoided by an adjudication in bankruptcy, and, therefore, that the same is not a provable debt."

The referee disallowed the claim, and the United States District Court approved his action for reasons stated in a written opinion incorporated in the petition.

"Petitioner shows that the defendants have failed under said contract to accept and pay for 326 bales of patches at the contract price, and petitioner having retained said goods, defendants are indebted to him for the difference between the contract price and the market price at the

time and place of delivery under said contract; . . . that his said claim having been disallowed and adjudicated not provable in bankruptcy, the said discharges of the defendants are no bar to the prosecution of this suit, and the plea of bankruptcy is not available to the defendants;" and he prays for judgment.

In support of the demurrer defendant Gray maintains: (1) The plaintiff sustained no legal injury. Before any breach of the contract an involuntary petition in bankruptcy, afterwards sustained, was commenced against the partnership and its members; the partnership was dissolved, the contract rendered impossible of performance and annulled by the law; and whatever loss resulted was *damnum absque injuria.* (2) If there ever was a valid claim defendant's discharge in bankruptcy acquitted it. (3) The matter was submitted to a competent court of bankruptcy with exclusive jurisdiction, which disallowed the demand; no appeal was taken; and the question became *res judicata.*

The plaintiff in error insists: That he suffered legal damage because the contract of purchase was not fully complied with. "Under the classification of the act, claims are either provable or not provable;" when of the former class they are dischargeable, when of the latter they are not dischargeable. His "claim had been adjudged by the bankruptcy court, to which it had been presented for proof, to be not provable," and therefore the discharge constitutes no bar to his right to recover against the defendant.

Section 2 of the Bankruptcy Law (July 1, 1898, c. 541, 30 Stat. 544) invests courts of bankruptcy with jurisdiction to "(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; . . . (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determina-

tion of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; . . . (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; . . . (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act." A "'discharge' shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act." (§ 1.) "A discharge in bankruptcy shall release a bankrupt from all of his provable debts." (§ 17.) Debts of the bankrupt may be proved and allowed against his estate which are founded upon an open account, or upon a contract express or implied; and unliquidated claims may be liquidated in such manner as the court shall direct, and may thereafter be proved and allowed. (§ 63.)

A bankruptcy court in which an estate is being administered has full power to inquire into the validity of any alleged debt or obligation of the bankrupt upon which a demand or claim against the estate is based. This is essential to the performance of the duties imposed upon it. When an alleged debt or obligation is ascertained to be invalid—without lawful existence—the claim based thereon is necessarily disallowed. A disallowed claim and a non-provable debt are not identical things; and a failure accurately to observe the distinction has led to confusion in argument.

The United States District Court, being of opinion that an implied condition in Lesser's contract terminated it when the involuntary bankruptcy proceeding was begun, held that the bankrupt incurred no obligation to pay damage by reason of the firm's failure fully to comply there-

with. Accordingly the judgment in respect of the claim presented by plaintiff against the estate was that it be disallowed because without foundation—not that he had a non-provable debt.

The petition in the cause now under review was properly dismissed. If, as both the bankruptcy and state courts concluded, the contract was terminated by the involuntary bankruptcy proceeding no legal injury resulted. If, on the other hand, that view of the law was erroneous, then there was a breach and defendant Gray became liable for any resulting damage; but he was released therefrom by his discharge. In this state of the record we will not enter upon a consideration of the specific reason assigned by the state court for sustaining the demurrer. No effort was made by plaintiff in error to secure a review of the action of the bankruptcy court in the direct way prescribed by the statute and that result may not be obtained indirectly through the present proceeding. The judgment of the court below is

Affirmed.

LIEUTENANT COLONEL STEARNS *v.* BRIGADIER GENERAL WOOD.

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

No. 647. Argued December 18, 1914.—Decided January 18, 1915.

The province of courts is to decide real controversies and not to discuss abstract propositions; and this court cannot be called upon to construe orders, acts of Congress and provisions of the Constitution for the information of persons whose rights are not directly affected or threatened, notwithstanding their laudable feeling of deep interest in the general subject.

An officer of the National Guard whose personal rights are not directly violated or interfered with and whose present rank remains unchanged thereby cannot, in this court, question the validity and constitutionality of the General Order contained in Circular No. 8 issued by the Secretary of War pursuant to § 3 of the Military Law, act of January 21, 1903, c. 196, 32 Stat. 775, as amended by act of May 27, 1908, c. 204, 35 Stat. 399, relative to the organization, armament and discipline of the organized militia, and orders of the Adjutant General of Ohio with respect to the mobilization of the National Guard of that State and commanding that upon any declaration of war all furloughs be revoked and the officers and soldiers shall assemble and proceed wherever directed by the President of the United States, whether within or without the United States.

THE facts, which involve the jurisdiction of this court on a direct appeal from the District Court, are stated in the opinion.

Mr. Hubert J. Turney, with whom *Mr. Nathan William MacChesnay* and *Mr. Don R. Sipe* were on the brief, for appellee.

Mr. Harvey R. Keeler and *Mr. Fred C. Geiger* for appellant, submitted.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

This is a direct appeal from the District Court which held that the original bill states no cause of action. It must be dismissed unless the case involves the construction or application of the Constitution of the United States, or the constitutionality of a Federal statute is fairly drawn in question.

The only serious attempt to show that appellant has a direct personal interest in the subject presented is found in the section of the bill which alleges that he is now serving as a Major in the Inspector General's Department of the

Ohio National Guard and is aggrieved because defendant Wood, the Adjutant General of the State, is about to put into full force and effect a general order issued by command of the Secretary of War and known as Circular No. 8, which, without right or authority, directs that the maximum rank of senior officers in complainant's department shall be a Lieutenant Colonel, and if this is done he will be prevented from attaining and serving in the higher rank permitted by the existing laws of Ohio.

Section 3 of the Military Law (act of January 21, 1903, c. 196, 32 Stat. 775, as amended by the act of May 27, 1908, c. 204, 35 Stat. 399), provides that on and after January 21, 1910, the organization, armament and discipline of the organized militia in the several States, Territories, and the District of Columbia, shall be the same as that which is now or may hereafter be prescribed for the regular army of the United States, subject in time of peace to such general exceptions as may be authorized by the Secretary of War. Exercising his discretion the Secretary of War directed the issuance of Circular No. 8, to become effective January 1, 1914. It is comprehensive in terms and prescribes general regulations concerning the members, officers and organization of the state militia. The validity of the order is denied.

The bill further avers that the Adjutant General of Ohio has issued an order with respect to the mobilization of the National Guard of that State wherein he commands that upon any declaration of war all furloughs shall be revoked and all the officers and soldiers shall assemble and proceed wherever directed by the President whether within or without the United States. The validity of this is also denied.

The brief in behalf of appellant states that "this action is a test case brought by an officer of the National Guard against the Adjutant General of Ohio, who are nominal complainant and respondent, and involves the construc-

tion of certain constitutional provisions, as follows:" Art. I, § 8, Par. 16; the Second Amendment; the Tenth Amendment; Art. I, § 8, Par. 15; the Preamble to the Constitution; the provision making the President commander in chief of the militia when called into the Federal service; the power granted to Congress to raise and support armies. "The action also seeks a construction with respect to the right of the President and Congress over the National Guard of the several States, and the status and legal relation of the officers thereof to the War Department; and raises the further question whether the National Guard or organized militia may be used without the territorial limits of the United States, as such."

The general orders referred to in the bill do not directly violate or threaten interference with the personal rights of appellant—a Major in the National Guard whose present rank remains undisturbed. He is not therefore in position to question their validity; and certainly he may not demand that we construe orders, acts of Congress, and the Constitution for the information of himself and others, notwithstanding their laudable feeling of deep interest in the general subject. The province of courts is to decide real controversies, not to discuss abstract propositions. *Little* v. *Bowers*, 134 U. S. 547, 557; *California* v. *San Pablo Railroad*, 149 U. S. 308, 314; *Richardson* v. *McChesney*, 218 U. S. 487, 492; *Missouri, Kansas & Texas Ry.* v. *Cade*, 233 U. S. 642, 648.

We cannot consider the points suggested and the appeal is

Dismissed.

BURDICK v. UNITED STATES.

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

No. 471. Argued December 16, 1914.—Decided January 25, 1915.

Acceptance, as well as delivery, of a pardon is essential to its validity; if rejected by the person to whom it is tendered the court has no power to force it on him. *United States* v. *Wilson*, 7 Pet. 150.

Quære whether the President of the United States may exercise the pardoning power before conviction.

A witness may refuse to testify on the ground that his testimony may have an incriminating effect, notwithstanding the President offers, and he refuses, a pardon for any offense connected with the matters in regard to which he is asked to testify.

There are substantial differences between legislative immunity and a pardon; the latter carries an imputation of guilt and acceptance of a confession of it, while the former is non-committal and tantamount to silence of the witness.

There is a distinction between amnesty and pardon; the former overlooks the offense and is usually addressed to crimes against the sovereignty of the State and political offenses, the latter remits punishment and condones infractions of the peace of the State.

211 Fed. Rep. 492, reversed.

THE facts, which involve the effect of a pardon of the President of the United States tendered to one who has not been convicted of a crime nor admitted the commission thereof, and also the necessity of acceptance of a pardon in order to make it effective, are stated in the opinion.

Mr. Henry A. Wise, with whom *Mr. Henry W. Sackett* was on the brief, for plaintiff in error:

The proceeding before the grand jury was a "criminal case" within the meaning of the Fifth Amendment. *Counselman* v. *Hitchcock*, 142 U. S. 547.

Plaintiff in error was privileged under the Fifth Amend-

ment to decline to answer the questions upon the ground that his answers thereto might tend to criminate him. 1 Burr's Trial, 244, Coombs; *Counselman* v. *Hitchcock*, 142 U. S. 564; *Sanderson's Case*, 3 Cranch, 638.

The refusal of a witness to answer questions upon the ground that his answers may tend to criminate him does not constitute either an admission or proof of his guilt of any offense. 30 Am. & Eng. Ency., p. 1170; *Rose* v. *Blakemore*, 21 E. C. L. Ryan & Moody, 382, 774; *Phelin* v. *Kinderline*, 20 Pa. St. 354; *State* v. *Bailey*, 54 Iowa, 414; *Dorendinger* v. *Tschechtelin*, 12 Daly (N. Y.), 34; Greenleaf on Evidence, 16th ed., § 469d; Wigmore on Evidence, § 2272; Act of March 16, 1878, 20 Stat. 30; *Wilson* v. *United States*, 149 U. S. 60; *Fitzpatrick* v. *United States*, 178 U. S. 304, 315; *Boyle* v. *Smithman*, 146 Pa. St. 255; *Beach* v. *United States*, 46 Fed. Rep. 754.

The President was without power to issue any pardon to plaintiff in error; and consequently the warrant tendered is null, void and of no effect. Art. II, § 2, Const. U. S.; *Martin* v. *Hunter*, 1 Wheat. 304; Cooley's Const. Lim., p. 11; *Ex parte Wells*, 18 How. 307; *Ex parte Garland*, 4 Wall. 333; 20 Ops. Atty. Gen'l 330; 24 Am. & Eng. Ency., pp. 575–6; 2 Hawkins P. C., Ch. 37, § 9, p. 543; *In re Nevitt*, 117 Fed. Rep. 448; 11 Ops. Atty. Gen'l 227; *Howard's Case*, Sir T. Raymond, 13; 83 Eng. Rep. (Full Reprint), 7; *United States* v. *Klein*, 13 Wall. 128; *Armstrong's Foundry*, 6 Wall. 766; *Carlisle* v. *United States*, 16 Wall. 147; *Lapeyre* v. *United States*, 17 Wall. 191; *Osborn* v. *United States*, 91 U. S. 474; *Wallach* v. *Van Riswick*, 92 U. S. 202; *United States* v. *Padelford*, 9 Wall. 531; *Armstrong* v. *United States*, 13 Wall. 155; *Pargoud* v. *United States*, 13 Wall. 157.

Plaintiff in error having refused to accept the tendered pardon, the same is of no effect. *Wilson* v. *United States*, 7 Pet. 150; *Commonwealth* v. *Lockwood*, 109 Massachusetts, 323; Cooley, Const. Law, 3d ed., p. 115.

The decision of the court below is equivalent to the conviction of plaintiff in error of an offense against the United States without trial by jury, and consequently in violation of his rights under the Constitution of the United States. See Fifth and Sixth Amendments, Const. U. S.; 24 Am. & Eng. Ency. 579; 11 Ops. Atty. Gen'l 227; *Dominick* v. *Bowdoin,* 44 Georgia, 357; *Manlove* v. *State,* 153 Indiana, 80; *Commonwealth* v. *Lockwood,* 109 Massachusetts, 323; *People* v. *Marsh,* 125 Michigan, 410; *United States* v. *Armour,* 142 Fed. Rep. 808.

The tendered pardon is not an equivalent of the constitutional privilege of plaintiffs in error. *Counselman* v. *Hitchcock,* 142 U. S. 564; *Brown* v. *Walker,* 161 U. S. 591; Cooley's Const. Lim., pp. 5, 365.

The interpretation of the language of the Constitution conferring the pardoning power upon the President, "and he shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment," (Art. II, § 2, subd. 1) contended for by the United States stretches the actual language of the Constitution in that it makes the word "offenses" connote conjectural or purely hypothetical offenses in addition to ascertained events. Assuming for the sake of argument that this construction is permissible, upon a mere examination of the language, then there is presented a case in which there is a choice between two permissible constructions and in such a case the court must choose the one which is most in harmony with the Constitution taken as a whole and with the spirit of our institutions. *Gibbons* v. *Ogden,* 9 Wheat. 1, 188; *Legal Tender Cases,* 12 Wall. 457, 531–532; *In re Griffin,* 17 Am. L. R. 358.

The construction of the words conferring the pardoning power that is contended for by the United States would tend to destroy some of the most essential safeguards of free government. It would pervert the grand jury, which in its origin was an institution which stood

as a barrier against persecution by the crown into an instrument of inquisition that might be used by the executive department for the purpose of throttling the free and wholesome criticism of the acts of public officials. It would tend to destroy to a dangerous degree the separation of powers between the executive and the judicial branches of the government and in practical effect would arm the executive with summary powers which ought to be possessed only by the judicial branch. It would inevitably create the possibility of putting into effect a system of censorship of news concerning the acts of public officials and tend to the creation of a secret and powerful bureaucracy. *Ex parte Bain,* 121 U. S. 1, 10–11; *Kilbourn* v. *Thompson,* 103 U. S. 168, 190; United States Constitution, Art. III, § 1; Art. II, § 1; Art. I, § 1; Fifth Amendment.

The Solicitor General for the United States:

The President has the power to pardon a person for an offense of which he has not been convicted. It was so in England. 3 Coke's Inst. 233, c. 105, Of Pardons; 14 Blackstone, c. 26, subd. IV, 4, and see c. 28; 6 Halsbury's Laws of England, p. 404.

In this country from the very first, Presidents have exercised not only the power to pardon in specific cases before conviction, but even to grant general amnesties. 20 Ops. Atty. Gen'l 339. And see *Ex parte Garland,* 4 Wall. 333; *Brown* v. *Walker,* 161 U. S. 591.

In the constitutions of some of the States the power of the governor to grant pardons is expressly limited by the words "after conviction," but in the States in which this limitation is not contained in the constitutions the governor may pardon before conviction. *Dominick* v. *Bowdoin,* 44 Georgia, 357; *Grubb* v. *Bullock,* 44 Georgia, 379; *Commonwealth* v. *Bush,* 2 Duv. (Ky.) 264; *State* v. *Woolery,* 29 Missouri, 300.

A pardon may be granted for an offense which has neither been admitted nor proved. It is true that a pardon cannot be granted as a license for future misdoing, but the pardons involved in the cases at bar do not relate to future offenses, but to offenses which the plaintiffs in error have committed or may have committed, or taken part in.

A person may be pardoned for an offense which has not been proved. An acknowledgment by the person pardoned that his answer will tend to incriminate him is basis enough for granting a pardon, without any other proof of the offense or of his connection with it. This is the basis of the immunity statutes.

A pardon may be granted for the purpose of affording to a witness immunity from prosecution. The exercise of the pardoning power of the President for this purpose does not amount to a usurpation of legislative functions even if it be true that it is within the powers of Congress to enact laws securing to witnesses immunity from prosecution in lieu of the constitutional prohibition against compelling incriminating testimony. See *Brown* v. *Walker*, 161 U. S. 591.

The exercise of this power by Congress, however, can have no effect in limiting the constitutional power of the President to grant pardons. The President's power of pardon "is not subject to legislation," and "Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders." *United States* v. *Klein*, 13 Wall. 128, 141. It cannot be interrupted, abridged, or limited by any legislative enactment. *The Laura*, 114 U. S. 411, 414; *Ex parte Garland*, 4 Wall. 333, 380.

The immunity afforded by the pardons is as broad as the protection afforded by the constitutional provision against compelling a person to be a witness against himself. *Counselman* v. *Hitchcock*, 142 U. S. 547, distinguished. And see *Brown* v. *Walker*, 161 U. S. 591; *Int.*

Com. Comm. v. *Baird*, 194 U. S. 25; *Hale* v. *Henkel*, 201 U. S. 43; *Nelson* v. *United States*, 201 U. S. 92.

No formal acceptance is necessary to give effect to the pardons. *United States* v. *Wilson*, 7 Pet. 150, has no application here, and see *In re Callicot*, 8 Blatchf. 89, 96.

Although a court takes no notice of a pardon unless it is pleaded or in some way claimed *coram judice* by the person pardoned, *United States* v. *Wilson*, 7 Pet. 150, and the plaintiffs in error might refuse the benefit of their pardons should they be prosecuted for the offenses which are covered by the pardons, that does not affect their validity.

The pardons have been executed, formally tendered to plaintiffs in error, have been filed with the clerk of the court for the jurisdiction in which the testimony is required, and remain at the disposal of plaintiffs in error. They have passed out of the control of the President and of the executive department of the Government with the intention that they shall pass to the plaintiffs in error, so that there has been as complete a delivery as it is possible to make, and if they are not irrevocable now they would become so at the very instant that the required testimony is given.

It is the object of the constitutional privilege to protect the witness from the danger of prosecution for a past offense which his evidence may disclose or to which his evidence may give a clue. But, since that danger has been completely removed by the pardons of which the plaintiffs may avail themselves at any time after the moment of testifying, the constitutional privilege cannot be invoked by them, for there is nothing to which it can apply—no danger against which its protecting shield is necessary.

Mr. Justice McKenna delivered the opinion of the court.

Error to review a judgment for contempt against Burdick upon presentment of the Federal grand jury for

refusing to answer certain questions put to him in an investigation then pending before the grand jury into alleged custom frauds in violation of §§ 37 and 39 of the Criminal Code of the United States.

Burdick first appeared before the grand jury and refused to answer questions as to the directions he gave and the sources of his information concerning certain articles in the New York Tribune regarding the frauds under investigation. He is the City Editor of that paper. He declined to answer, claiming upon his oath, that his answers might tend to criminate him. Thereupon he was remanded to appear at a later day and upon so appearing he was handed a pardon which he was told had been obtained for him upon the strength of his testimony before the other grand jury. The following is a copy of it:

"Woodrow Wilson, President of the United States of America, to all to whom these presents shall come, Greeting:

"Whereas George Burdick, an editor of the New York Tribune, has declined to testify before a Federal Grand Jury now in session in the Southern District of New York, in a proceeding entitled 'United States *v.* John Doe and Richard Roe,' as to the sources of the information which he had in the New York Tribune office, or in his possession, or under his control at the time he sent Henry D. Kingsbury, a reporter on the said New York Tribune, to write an article which appeared in the said New York Tribune in its issue of December thirty first, 1913, headed 'Glove Makers' Gems may be Customs Size,' on the ground that it would tend to incriminate him to answer the questions; and,

"Whereas, the United States Attorney for the Southern District of New York desires to use the said George Burdick as a witness before the said Grand Jury in the said proceeding for the purpose of determining whether any employé of the Treasury Department at the Custom

House, New York City, has been betraying information that came to such person in an official capacity; and,

"Whereas, it is believed that the said George Burdick will again refuse to testify in the said proceeding on the ground that his testimony might tend to incriminate himself;

"Now, Therefore, be it Known, that I, Woodrow Wilson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant unto the said George Burdick a full and unconditional pardon for all offenses against the United States which he, the said George Burdick, has committed or may have committed, or taken part in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article, and in connection with any other article, matter or thing, concerning which he may be interrogated in the said grand jury proceeding, thereby absolving him from the consequences of every such criminal act.

"In testimony whereof, I have hereunto signed my name and caused the seal of the Department of Justice to be affixed. Done at the City of Washington this fourteenth day of February, in the year of our Lord One Thousand Nine Hundred and Fourteen, and of the Independence of the United States the One Hundred and Thirty-eighth."

He declined to accept the pardon or answer questions as to the sources of his information, or whether he furnished certain reporters information, giving the reason, as before, that the answers might tend to criminate him. He was presented by the grand jury to the District Court for contempt and adjudged guilty thereof and to pay a fine of $500, with leave, however, to purge himself by testifying fully as to the sources of the information sought of him, "and in event of his refusal or failure to so answer, a

commitment may issue in addition until he shall so comply," the court deciding that the President has power to pardon for a crime of which the individual has not been convicted and which he does not admit and that acceptance is not necessary to toll the privilege against incrimination.

Burdick again appeared before the grand jury, again was questioned as before, again refused to accept the pardon and again refused to answer upon the same grounds as before. A final order of commitment was then made and entered and he was committed to the custody of the United States Marshal until he should purge himself of contempt or until the further order of the court. This writ of error was then allowed.

The question in the case is the effect of the unaccepted pardon. The Solicitor General in his discussion of the question, following the division of the District Court, contends (1) that the President has power to pardon an offense before admission or conviction of it, and (2) the acceptance of the pardon is not necessary to its complete exculpating effect. The conclusion is hence deduced that the pardon removed from Burdick all danger of accusation or conviction of crime and that, therefore, the answers to the questions put to him could not tend to or accomplish his incrimination.

Plaintiff in error counters the contention and conclusion with directly opposing ones and makes other contentions which attack the sufficiency of the pardon as immunity and the power of the President to grant a pardon for an offense not precedently established nor confessed nor defined.

The discussion of counsel is as broad as their contentions. Our consideration may be more limited. In our view of the case it is not material to decide whether the pardoning power may be exercised before conviction. We may, however, refer to some aspects of the contentions of plaintiff in error, although the case may be brought to

the narrow question, Is the acceptance of a pardon necessary? We are relieved from much discussion of it by *United States* v. *Wilson*, 7 Peters, 150. Indeed, all of the principles upon which its solution depends were there considered and the facts of the case gave them a peculiar and interesting application.

There were a number of indictments against Wilson and one Porter, some of which were for obstructing the mail and others for robbing the mail and putting the life of the carrier in jeopardy. They were convicted on one of the latter indictments, sentenced to death, and Porter was executed in pursuance of the sentence. President Jackson pardoned Wilson, the pardon reciting that it was for the crime for which he had been sentenced to suffer death, remitting such penalty with the express stipulation that the pardon should not extend to any judgment which might be had or obtained against him in any other case or cases then pending before the court for other offenses wherewith he might stand charged.

To another of the indictments Wilson withdrew his plea of not guilty and pleaded guilty. Upon being arraigned for sentence the court suggested the propriety of inquiring as to the effect of the pardon, "although alleged to relate to a conviction on another indictment." Wilson was asked if he wished to avail himself of the pardon, to which he answered in person that (7 Pet., p. 154) "he had nothing to say, and that he did not wish in any manner to avail himself, in order to avoid sentence in this particular case, of the pardon referred to."

The judges were opposed in opinion and certified to this court for decision two propositions which were argued by the district attorney of the United States, with one only of which we are concerned. It was as follows (p. 154): "2. That the prisoner can, under this conviction, derive no advantage from the pardon, without bringing the same judicially before the court by plea, motion or otherwise."

There was no appearance for Wilson. Attorney General Taney (afterwards Chief Justice of this court) argued the case on behalf of the United States. The burden of his argument was that a pardon, to be effective, must be accepted. The proposition was necessary to be established as his contention was that a plea of the pardon was necessary to arrest the sentence upon Wilson. And he said, speaking of the pardon (p. 156), "It is a grant to him [Wilson]; it is his property; and he may accept it or not as he pleases," and, further, "It is insisted that unless he pleads it, or in some way claims its benefit, thereby denoting his acceptance of the proffered grace, the court cannot notice it, nor allow it to prevent them from passing sentence. The whole current of authority establishes this principle." The authorities were cited and it was declared that "the necessity of pleading it, or claiming it in some other manner, grows out of the nature of the grant. He must accept it."

There can be no doubt, therefore, of the contention of the Attorney General and we have quoted it in order to estimate accurately the response of the court to it. The response was complete and considered the contention in two aspects, (1) a pardon as the act of the President, the official act under the Constitution; and (2) the attitude and right of the person to whom it is tendered. Of the former it was said (p. 160) that the power had been "exercised from time immemorial by the executive of that nation (England) whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." From that source of authority and principle the court deduced and declared this conclusion: "A pardon is an act of grace, proceeding from the power entrusted with the execution of

the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the *private,* [italics ours] though official act of the executive magistrate, delivered to the individual for whose benefit it is intended." In emphasis of the official act and its functional deficiency if not accepted by him to whom it is tendered, it was said, "A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on."

Turning then to the other side, that is, the effect of a pardon on him to whom it is offered and completing its description and expressing the condition of its consummation, this was said: "A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him."

That a pardon by its mere issue has automatic effect resistless by him to whom it is tendered, forcing upon him by mere executive power whatever consequences it may have or however he may regard it, which seems to be the contention of the Government in the case at bar, was rejected by the court with particularity and emphasis. The decision is unmistakable. A pardon was denominated as the "private" act, the "private deed," of the executive magistrate, and the denomination was advisedly selected to mark the incompleteness of the act or deed without its acceptance.

Indeed, the grace of a pardon, though good its intention, may be only in pretense or seeming; in pretense, as having purpose not moving from the individual to whom it is offered; in seeming, as involving consequences of even greater disgrace than those from which it purports to relieve. Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by

confession of guilt implied in the acceptance of a pardon may be rejected,—preferring to be the victim of the law rather than its acknowledged transgressor—preferring death even to such certain infamy. This, at least theoretically, is a right and a right is often best tested in its extreme. "It may be supposed," the court said in *United States* v. *Wilson* (p. 161), "that no being condemned to death would reject a pardon; but the rule must be the same in capital cases and in misdemeanors. A pardon may be conditional; and the condition may be more objectionable than the punishment inflicted by the judgment."

The case would seem to need no further comment and we have quoted from it not only for its authority but for its argument. It demonstrates by both the necessity of the acceptance of a pardon to its legal efficacy, and the court did not hesitate in decision, as we have seen, whatever the alternative of acceptance—whether it be death or lesser penalty. The contrast shows the right of the individual against the exercise of executive power not solicited by him nor accepted by him.

The principles declared in *Wilson* v. *United States* have endured for years; no case has reversed or modified them. In *Ex parte William Wells*, 18 How. 307, 310, this court said, "It was with the fullest knowledge of the law upon the subject of pardons, and the philosophy of government in its bearing upon the Constitution, when this court instructed Chief Justice Marshall" to declare the doctrine of that case. And in *Commonwealth* v. *Lockwood* it was said by Mr. Justice Gray, speaking for the Supreme Judicial Court of Massachusetts, he then being a member of that court, "it is within the election of a defendant whether he will avail himself of a pardon from the executive (be the pardon absolute or conditional)." 109 Massachusetts, 323, 339. The whole discussion of the learned justice will repay a reference. He cites and re-

views the cases with the same accurate and masterful consideration that distinguished all of his judicial work, and the proposition declared was one of the conclusions deduced.

United States v. *Wilson*, however, is attempted to be removed as authority by the contention that it dealt with conditional pardons and that, besides, a witness cannot apprehend from his testimony a conviction of guilt, which conviction he himself has the power to avert, or be heard to say that the testimony can be used adversely to him, when he himself has the power to prevent it by accepting the immunity offered him. In support of the contentions there is an intimation of analogy between pardon and amnesty, cases are cited, and certain statutes of the United States are adduced whereby immunity was imposed in certain instances and under its unsolicited protection testimony has been exacted against the claim of privilege asserted by witnesses. There is plausibility in the contentions; it disappears upon reflection. Let us consider the contentions in their order:

(1) To hold that the principle of *United States* v. *Wilson* was expressed only as to conditional pardons would be to assert that the language and illustrations which were used to emphasize the principle announced were meant only to destroy it. Besides, the pardon passed on was not conditional. It was limited in that—and only in that—it was confined to the crime for which the defendant had been convicted and for which he had been sentenced to suffer death. This was its emphasis and distinction. Other charges were pending against him, and it was expressed that the pardon should not extend to them. But such would have been its effect without expression. And we may say that it had more precision than the pardon in the pending case. Wilson had been indicted for a specific statutory crime, convicted and sentenced to suffer death. It was to the crime so defined and established that the

pardon was directed. In the case at bar nothing is defined. There is no identity of the offenses pardoned, and no other clue to ascertain them but the information incorporated in an article in a newspaper. And not that entirely, for absolution is declared for whatever crimes may have been committed or taken part in "in connection with any other article, matter or thing concerning which he [Burdick] may be interrogated."

It is hence contended by Burdick that the pardon is illegal for the absence of specification, not reciting the offenses upon which it is intended to operate; worthless, therefore, as immunity. To support the contention cases are cited. It is asserted, besides, that the pardon is void as being outside of the power of the President under the Constitution of the United States, because it was issued before accusation, or conviction or admission of an offense. This, it is insisted, is precluded by the constitutional provision which gives power only "to grant reprieves and pardons for offenses against the United States," and it is argued, in effect, that not in the imagination or purpose of executive magistracy can an "offense against the United States" be established, but only by the confession of the offending individual or the judgment of the judicial tribunals. We do not dwell further on the attack. We prefer to place the case on the ground we have stated.

(2) May plaintiff in error, having the means of immunity at hand, that is, the pardon of the President, refuse to testify on the ground that his testimony may have an incriminating effect? A superficial consideration might dictate a negative answer but the answer would confound rights which are distinct and independent.

It is to be borne in mind that the power of the President under the Constitution to grant pardons and the right of a witness must be kept in accommodation. Both have sanction in the Constitution, and it should, therefore, be the anxiety of the law to preserve both,—to leave to each

its proper place. In this as in other conflicts between personal rights and the powers of government, technical—even nice—distinctions are proper to be regarded. Granting then that the pardon was legally issued and was sufficient for immunity, it was Burdick's right to refuse it, as we have seen, and it, therefore, not becoming effective, his right under the Constitution to decline to testify remained to be asserted; and the reasons for his action were personal. It is true we have said (*Brown* v. *Walker*, 161 U. S. 591, 605) that the law regards only mere penal consequences and not "the personal disgrace or opprobrium attaching to the exposure" of crime, but certainly such consequence may influence the assertion or relinquishment of a right. This consideration is not out of place in the case at bar. If it be objected that the sensitiveness of Burdick was extreme because his refusal to answer was itself an implication of crime, we answer, not necessarily in fact, not at all in theory of law. It supposed only a possibility of a charge of crime and interposed protection against the charge, and, reaching beyond it, against furnishing what might be urged or used as evidence to support it.

This brings us to the differences between legislative immunity and a pardon. They are substantial. The latter carries an imputation of guilt; acceptance a confession of it. The former has no such imputation or confession. It is tantamount to the silence of the witness. It is non-committal. It is the unobtrusive act of the law giving protection against a sinister use of his testimony, not like a pardon requiring him to confess his guilt in order to avoid a conviction of it.

It is of little service to assert or deny an analogy between amnesty and pardon. Mr. Justice Field, in *Knote* v. *United States*, 95 U. S. 149, 153, said that "the distinction between them is one rather of philological interest than of legal importance." This is so as to their ultimate effect, but there are incidental differences of importance. They

are of different character and have different purposes. The one overlooks offense; the other remits punishment. The first is usually addressed to crimes against the sovereignty of the State, to political offenses, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. The second condones infractions of the peace of the State. Amnesty is usually general, addressed to classes or even communities, a legislative act, or under legislation, constitutional or statutory, the act of the supreme magistrate. There may or may not be distinct acts of acceptance. If other rights are dependent upon it and are asserted there is affirmative evidence of acceptance. Examples are afforded in *United States* v. *Klein*, 13 Wall. 128; *Armstrong's Foundry*, 6 Wall. 766; *Carlisle* v. *United States*, 16 Wall. 147. See also *Knote* v. *United States*, *supra*. If there be no other rights, its only purpose is to stay the movement of the law. Its function is exercised when it overlooks the offense and the offender, leaving both in oblivion.

Judgment reversed with directions to dismiss the proceedings in contempt and discharge Burdick from custody.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

CURTIN *v.* UNITED STATES.

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

No. 472. Argued December 16, 1914.—Decided January 25, 1915.

Decided on the authority of *Burdick* v. *United States*, *ante*, p. 79.

THE facts, which are similar to those involved in the preceding case, are stated in the opinion.

Mr. Henry A. Wise, with whom *Mr. Henry W. Sackett* was on the brief, for plaintiff in error.

The Solicitor General for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This writ of error was argued and submitted at the same time as *Burdick* v. *United States*, just decided, *ante*, p. 79. Its purpose is to review a judgment for contempt against Curtin upon presentment of the Federal grand jury for refusing to answer certain questions in the same proceeding considered in the *Burdick Case* in regard to a certain article published in the New York Tribune. Curtin is a reporter on that paper. He declined to answer the questions on the ground that the answers would tend to incriminate him. At a subsequent hearing a pardon issued by the President was offered him (it was the same in substance as that offered Burdick) and he was again questioned. He declined to receive the pardon or to answer the questions on the same ground as before. He was, on presentment of the grand jury, adjudged guilty of

contempt, fined as Burdick was, with the same leave to purge himself of the contempt, the court deciding that the pardon was valid and sufficient for immunity. Upon Curtin again refusing to answer, the judgment was made absolute and he was committed to the custody of the United States Marshal.

It will be observed, therefore, the case is almost identical in its facts with the *Burdick Case* and exactly the same in principle. On the authority of that case, therefore, the judgment is reversed and the case remanded with instruction to dismiss the proceedings in contempt and discharge Curtin from custody.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

DUFFY *v.* CHARAK, TRUSTEE IN BANKRUPTCY OF JULES & FREDERIC COMPANY.

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

No. 120. Argued January 14, 1915.—Decided January 25, 1915.

A taking possession by the mortgagee of the personal property under the power contained in the mortgage is a delivery that satisfies the requirements of the Massachusetts statute in regard to the delivery of goods sold or mortgaged unless recorded.

Goods under attachment may be sold or mortgaged upon notice to the officer, as effectively as though a true delivery took place.

The holder of a recorded mortgage on personal property in Massachusetts, made within four months of the petition, took possession under the power contained in his mortgage after the sheriff had levied under an attachment, and the next day the petition was filed. *Held* that the mortgagee was entitled to his security to the extent that

the mortgage represented cash advanced at the time it was given.

No order having been made in the bankruptcy court as to whether the lien of the attachment should be preserved for the benefit of the estate, the case is sent back to that court without prejudice to further action on that point.

200 Fed. Rep. 747, reversed.

THE facts, which involve the validity of a chattel mortgage and the lien thereof on goods of the bankrupt, are stated in the opinion.

Mr. James H. Duffy pro se.

Mr. William Charak pro se.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a proceeding by a trustee in bankruptcy to obtain the surrender of the proceeds of goods in possession of the appellant and sold by him under an agreement with the trustee, without prejudice to the rights of the parties in the property. The petition in bankruptcy was filed on May 26, 1909. The appellant claims under a mortgage to him for $5675, made on March 2, 1909, but admits that $4175 of this sum was a preëxisting debt and claims only $1500, lent on the day when the mortgage was given. The mortgage was not recorded, and on May 24, 1909, the goods were attached by a third person, the shop where they were was closed and no more business was done. Afterwards on the same day the mortgagee put in a keeper subject to the possession of the sheriff's officer. On May 25 he notified the deputy sheriff of his claim and also gave notice to the bankrupt that the property was in his possession and that he intended to foreclose. The latter notice was recorded on May 26, after the filing of the petition in bankruptcy on that day. Under the Massachusetts laws the unrecorded mortgage was invalid

against others than the parties unless the property was delivered to and retained by the mortgagee, Rev. Laws, c. 198, § 1. The District Court and the Circuit Court of Appeals held the mortgage void on the ground that the deputy sheriff's possession was exclusive and that therefore what was done by the mortgagee on May 24 and 25 had no effect. 193 Fed. Rep. 533. 200 Fed. Rep. 747; 119 C. C. A. 191. The main question before us is whether this ruling is right.

We may assume that the trustee in bankruptcy is not a party within the meaning of the Massachusetts act. For although there have been decisions by the courts of the United States that the assignee under former acts is the bankrupt, that is to say that he is a universal successor who like the executor represents the person of him to whom he succeeds, the Supreme Court of the State has established the construction of the Massachusetts statute. *Humphrey* v. *Tatman*, 198 U. S. 91, 93. *Haskell* v. *Merrill*, 179 Massachusetts, 120, 124. *Clark* v. *Williams*, 190 Massachusetts, 219, 223. We assume on the other hand that if possession was delivered and retained, within the meaning of the act, at any time before the bankruptcy, the title of the mortgagee will be good. *Blanchard* v. *Cooke*, 144 Massachusetts, 207, 227. *Keepers* v. *Fleitmann*, 213 Massachusetts, 210, 211. *Humphrey* v. *Tatman, supra.* Moreover a taking possession under the power in the mortgage is a delivery that satisfies the statute. *Keepers* v. *Fleitmann, supra.* So the issue is narrowed to the precise point of the ruling below.

We agree that the possession of the deputy sheriff was exclusive and that there cannot be two possessions properly so called at the same time. But that which would be deemed a delivery sufficient to make a sale good as against attaching creditors, also satisfies the statute. *Clark* v. *Williams*, 190 Massachusetts, 219, 222. *Wright* v. *Tetlow*, 99 Massachusetts, 397, 400. And it is familiar that what

is called a change of possession may be accomplished when the goods are in the hands of a third person claiming a lien. *Hallgarten* v. *Oldham*, 135 Massachusetts, 1, 9, 10. *Union Trust Co.* v. *Wilson*, 198 U. S. 530, 536. Accordingly goods under attachment may be sold or mortgaged upon notice to the officer, as effectively as if a true delivery took place. *Grant* v. *Lyman*, 4 Met. 470, 477. *Mann* v. *Huston*, 1 Gray, 250, 253. *Clark* v. *Williams*, *supra*. The acts of the appellant had the same effect as if the mortgagor had been present and assenting, *Keepers* v. *Fleitmann*, 213 Massachusetts, 210, and we see in the attachment no sufficient ground for denying him his security. The mortgage embraced after acquired property with power of sale and substitution in the mortgagor, but we assume that it was good under Massachusetts law. *Blanchard* v. *Cooke*, 144 Massachusetts, 207. *Thompson* v. *Fairbanks*, 196 U. S. 516.

Whether or not the lien of the attachment should be preserved for the benefit of the estate, and whether it still is open to the Bankruptcy Court to make an order to that effect if on due notice it should deem just, is not before us. No such order has been made. The decree will be reversed without prejudice to further action upon that point.

Decree reversed.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER *v.* HOME SAVINGS BANK.

WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 126. Argued January 15, 1915.—Decided January 25, 1915.

No exception or bill of exception is necessary to open a question of law apparent on the record where the record shows no waiver of rights of plaintiffs in error. *Nalle* v. *Oyster*, 230 U. S. 165.

When a municipality is authorized to raise money by sale of bonds this court will take it that the authority extends to putting the bonds in the form that would be necessary to obtain a purchaser. And this applies also to certificates of indebtedness.

There is no essential difference between bonds of a municipality and its certificates of indebtedness, and in this case *held* that the purchasers for value before maturity and in good faith of negotiable certificates of indebtedness of the City of Denver were entitled to recover, and the defense that the authority to issue certificates did not authorize making them negotiable could not be maintained.

200 Fed. Rep. 28, affirmed.

THE facts, which involve the validity of certificates of indebtedness issued by the City and County of Denver in payment for voting machines, are stated in the opinion.

Mr. Charles R. Brock, with whom *Mr. I. N. Stevens*, *Mr. Milton Smith* and *Mr. William H. Ferguson* were on the brief, for petitioner:

An exception to the ruling of the trial court upon a demurrer is not a condition precedent to the right to have that ruling reviewed upon writ of error, and such an exception is unauthorized by any rule at common law or in the Federal courts. *Barnes* v. *Scott*, 11 So. Rep. 48; 3 Blackstone, p. 372; *Chateaugay Ore Co., Petitioner*, 128

U. S. 544; *Manning* v. *German Ins. Co.*, 107 Fed. Rep. 52; *Consumers Oil Co.* v. *Ashburn*, 81 Fed. Rep. 331; *Aurora* v. *West*, 7 Wall. 82; *Clune* v. *United States*, 159 U. S. 590; 1 Coke upon Littleton, § 155b, note; *Doty* v. *Jewett*, 19 Fed. Rep. 337; 3 Ency. Pl. & Pr., pp. 378, 404; *Francisco* v. *Chi. & Alt. R. R.*, 149 Fed. Rep. 354; *Ghost* v. *United States*, 168 Fed. Rep. 841; *Hanna* v. *Maas*, 122 U. S. 24; Hopkins' New Fed. Eq. Rules, p. 10; *Knight* v. *Ill. Cent. R. R.*, 180 Fed. Rep. 368; *Lowry* v. *Mount Adams R. R.*, 68 Fed. Rep. 827; *Mitsui* v. *St. Paul Ins. Co.*, 202 Fed. Rep. 26; *Newport News Ry.* v. *Pace*, 158 U. S. 36; *Potter* v. *United States*, 122 Fed. Rep. 49; *Preble* v. *Bates*, 40 Fed. Rep. 745; *Pickett* v. *Legerwood*, 7 Pet. 144; *Railway Co.* v. *Heck*, 102 U. S. 120; Rev. Stat., § 953; Rule 4, Supreme Court U. S.; Rule 10, U. S. C. C. App.; *Rogers* v. *Burlington*, 3 Wall. 654; Statute of Westminster, 2, 13 Edw. I, c. 31; Stephen on Pleading (Tyler's ed.), p. 142; *Suydam* v. *Williamson*, 20 How. 427; *Tullis* v. *Lake Erie & W. Ry.*, 105 Fed. Rep. 554; *Webb* v. *National Bank*, 146 Fed. Rep. 717.

As respects the power or authority of the Board of County Commissioners of the City and County of Denver to issue negotiable certificates of indebtedness, see Const., Colorado, Art. VII, § 8; Rev. Stats., Colorado, 1908, § 2341; Sess. Laws, Colorado, 1905, p. 222.

Neither § 8 of Art. VII of the constitution of Colorado, nor the act of 1905, authorizes the Board of County Commissioners of the City and County of Denver to issue negotiable certificates of indebtedness, and the certificate and coupon sued upon, being negotiable in form, are therefore absolutely void. *Barnett* v. *Denison*, 145 U. S. 135; *Brenham* v. *Bank*, 144 U. S. 173; Const. of Colorado, Art. VII, § 8; *Coffin* v. *Commissioners*, 57 Fed. Rep. 139; *German Ins. Co.* v. *Manning*, 95 Fed. Rep. 597; *Hedges* v. *Dixon Co.*, 150 U. S. 182; *Mayor* v. *Ray*, 19 Wall. 468; *Merrill* v. *Monticello*, 138 U. S. 673; *National*

Bank v. *School District*, 56 Fed. Rep. 197; *Nashville* v. *Ray*, 19 Wall. 468; *Ottawa* v. *Carey*, 108 U. S. 110; Rev. Stat. Colorado, 1908, § 2342; Session Laws Colorado, 1905, p. 224; *Swanson* v. *Ottumwa*, 131 Iowa, 547; *West Plains* v. *Sage*, 69 Fed. Rep. 943.

Even if the constitutional provision and statute in question should be held to authorize the issuance of negotiable bonds, the security sued on in this action is not a bond, is not negotiable, and therefore the plaintiff took it subject to any equities existing between the county and the payee. 2 Dillon on Municipal Corporations, 5th ed., pp. 1273–1295; *Nashville* v. *Ray*, 19 Wall. 468; *Watson* v. *Huron*, 97 Fed. Rep. 449; *West Plains* v. *Sage*, 69 Fed. Rep. 943.

Mr. John M. Zane, with whom *Mr. Charles F. Morse* and *Mr. Charles W. Waterman* were on the brief, for respondent.

Mr. Justice Holmes delivered the opinion of the court.

This is an action brought by the respondent upon a certificate of indebtedness and an interest coupon attached to the same, against the petitioner. There was a verdict and judgment for the plaintiff and the Circuit Court of Appeals affirmed the judgment. 118 C. C. A. 256; 200 Fed. Rep. 28. The plaintiff held the instrument by endorsement and was found to have purchased it in good faith before maturity, but the defendant denied the authority to issue the certificate in negotiable form and sought to raise the question by its third defence which set up failure of consideration. There was a demurrer to this defence which was sustained by the Circuit Court, and the trial took place upon the other issues. The Circuit Court of Appeals declined to consider the correctness of this ruling because no exception was taken to it. But

no exception or bill of exceptions is necessary to open a question of law already apparent on the record and there is nothing in the record that indicates a waiver of the defendant's rights. Therefore we must consider the merits of the defence. *Nalle* v. *Oyster*, 230 U. S. 165.

The certificate recites the allowance of a claim for ballot machines by the Board of County Commissioners of the City and County of Denver and goes on "the Board of County Commissioners being authorized thereto by the laws of the State of Colorado, Act of 1905, thereby issues its certificate of indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of eleven thousand two hundred and fifty dollars, with interest on this sum, from the date hereof, at the rate of five per cent. per annum; the said interest payable semi-annually, as per two (2) coupons, hereto attached." This certificate was one of ten issued to provide for the payment for ballot machines and the constitution of the State authorized provision for payment in such case "by the issuance of interest-bearing bonds, certificates of indebtedness, or other obligations, which shall be a charge upon such city, city and county, or town; such bonds, certificates or other obligations may be made payable at such time or times, not exceeding ten years from the date of issue, as may be determined, but shall not be issued or sold at less than par." Art. VII, § 8, as amended, November 6, 1906. A statute in like words previously had been passed to be effective if the amendment to the constitution should be adopted as it was. Laws of 1905, c. 101, § 6. See Rev. St. 1908, § 2342. The defence that we are considering is that the foregoing words did not warrant making the certificates of indebtedness negotiable, relying especially upon *Brenham* v. *German American Bank*, 144 U. S. 173. But the argument seems to us to need no extended answer. The power to issue certificates of indebtedness or bonds is given in terms and

it is contemplated that these instruments may be sold to raise money for the purpose named. But however narrowly we may construe the power of municipal corporations in this respect, when they are authorized to raise money by the sale of bonds we must take it that they are authorized to put the bonds in the form that would be almost a necessary condition to obtaining a purchaser—the usual form in which municipal bonds are put upon the market. *Gunnison County Commissioners* v. *Rollins*, 173 U. S. 255, 276. What is true about bonds is true about certificates of indebtedness. Indeed it is difficult to see any distinction between the two as they are commonly known to the business world. The essence of each is that they contain a promise under the seal of the corporation, to pay a certain sum to order or to bearer. We are of opinion that the Board of County Commissioners was authorized to issue certificates in the negotiable form. *Carter County* v. *Sinton*, 120 U. S. 517, 525. *Gelpcke* v. *Dubuque*, 1 Wall. 175, 203. *Cadillac* v. *Woonsocket Savings Institution*, 58 Fed. Rep. 935, 937. *Ashley* v. *Board of Supervisors*, 60 Fed. Rep. 55, 67. *D'Esterre* v. *Brooklyn*, 90 Fed. Rep. 586, 590. Dillon, Munic. Corp., 5th Ed., § 882.

Judgment affirmed.

UNITED STATES *v.* JONES, ADMINISTRATOR.

APPEAL FROM THE COURT OF CLAIMS.

No. 450. Argued December 9, 1914.—Decided January 25, 1915.

The tax imposed by the War Revenue Act of 1898 was purely a succession tax. It was not laid upon the entire estate, but was a charge upon the transmission of personal property from a deceased owner to legatees or distributees.

Personal property does not pass directly from a decedent to legatees or distributees, but goes primarily to the executor or administrator who passes to them the residue after settlement of the estate.

Until in due course of the administration of an estate it has been ascertained that a surplus remains, it cannot be said that the legatees or distributees are certainly entitled to receive or enjoy any part of the property; and so *held* as to an estate of one dying prior to July 1, 1902, that until such fact was ascertained the interests of legatees and distributees were not absolute, but were contingent within the meaning of § 29 of the War Revenue Act of 1898 and of § 3 of the Refunding Act of June 27, 1902. *Vanderbilt* v. *Eidman*, 196 U. S. 480; *Hertz* v. *Woodman*, 218 U. S. 205, distinguished.

49 Ct. Cls. 408, affirmed.

THE facts, which involve the construction of the War Revenue Act of 1898 and the subsequent Acts relating thereto, and their application to inheritances, are stated in the opinion.

Mr. Assistant Attorney General Thompson for the United States:

The questions involved in this case have been explicitly passed upon by this court and determined adversely to the position taken by appellee. The position of the Government is covered by Mr. Solicitor General Bowers in his brief in *Hertz* v. *Woodman*, 218 U. S. 205. That decision is *stare decisis* of all questions raised here.

The thing to be taxed in this case was not a contingent

beneficial interest, but, on the contrary, was subject to the tax, having vested prior to July 1, 1902.

As held in *Knowlton* v. *Moore*, 178 U. S. 41, 56, the thing taxed is the power to transmit or the transmission from the dead to the living. See *Hertz* v. *Woodman*, *supra*.

A legacy to pay over the net income from a fund in periodical payments during the life of the legatee is not a contingent beneficial interest, but a vested life estate, the income from which as determined by the mortuary tables and an interest rate of 4 per cent was subject to the tax. *United States* v. *Fidelity Trust Co.*, 222 U. S. 158.

The tax accrued when the testator died on June 28, 1902, although her personal estate was not distributed to her two children until May, 1903, and the tax was not collected until October 24, 1905.

Appellee contends, and the court below sustained his contention, that under a Pennsylvania statute providing that no administrator shall be compelled to make distribution of the goods of an intestate until one year be fully expired from the granting of the administration of the estate, act of Feb. 24, 1834, § 38, P. L., 80 Purd. 447, the administrator had exclusive possession of the personal property up to and subsequent to July 1, 1902, and that therefore no tax had accrued on the several estates, they being contingent beneficial interests at the time of the repeal; but this cannot be sustained. *Beer* v. *Moffat*, 209 Fed. Rep. 779; *Baldwin* v. *Eidman*, 202 Fed. Rep. 968; *United States* v. *Fidelity Trust Co.*, 222 U. S. 158. *Hertz* v. *Woodman*, 218 U. S. 205, cannot be distinguished. *Farrell* v. *United States*, 167 Fed. Rep. 639, does not apply.

As the thing taxed was the right of succession, which occurred upon the death of the intestate prior to July 1, 1902, the distributive shares of the two legatees became vested within the meaning of the act of June 13, 1898, at the moment of her death and subject to taxation regard-

less of the fact that the administrator, under the state law, had the right to retain possession of the legacies for a period extending beyond July 1, 1902.

Mr. Barry Mohun for appellee:

The court has jurisdiction.

The moneys paid by claimant as taxes upon the distributive shares of the Dalzell estate are refundable under the terms of and directions contained in the refunding act of June 27, 1902.

Under the terms of the taxing statute, amendments thereof, the repealing act and the refunding act, as construed by this and other Federal courts, the criterion of liability for taxation of legacies and distributive shares of estates of persons who died during the period the taxing statute and amendments were in force, was whether such beneficial interests were, during that time, absolutely vested in possession or enjoyment of the legatees or next of kin. In the absence of such possession or enjoyment all taxes collected upon such beneficial interests are directed to be returned by the refunding act.

The distributive shares of this estate were not absolutely vested in possession of the distributees prior to July 1, 1902; hence the taxes collected thereon are refundable.

An examination of the history of the times discloses a fixed purpose on the part of Congress to prohibit the collection of taxes upon all interests unless the right of absolute possession or enjoyment existed prior to July 1, 1902, and if collected to direct their refundment.

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

This is a suit to recover a succession tax paid under §§ 29 and 30 of the act of June 13, 1898, c. 448, 30 Stat. 448, 464. The facts are these: Adelaide P. Dalzell, a

resident of Allegheny County, Pennsylvania, died intestate June 28, 1902, leaving personal property of considerable value, and being survived by two daughters as her only next of kin. July 14, 1902, an administrator was appointed and the property was committed to his charge for the purposes of administration. Under the local law the debts of the intestate and the expenses of administration were to be paid out of the property and what remained was to be distributed in equal shares between the two daughters, but distribution could not be made for several months after the appointment of the administrator. In regular course the debts and expenses were ascertained and paid, and this left for distribution property of the value of $219,341.74. The Collector of Internal Revenue then collected from the administrator, without protest from him, a succession tax of $3,290.12 upon the distributive shares of the daughters, and the tax was covered into the Treasury. About seven months after paying the tax the administrator sought, in the mode prescribed, to have it refunded under § 3 of the Act of June 27, 1902, c. 1160, 32 Stat. 406, but the Secretary of the Treasury denied the application. The administrator then brought this suit and the Court of Claims gave judgment in his favor. 49 Ct. Cls. 408. A reversal of the judgment is sought by the United States.

By § 29 of the act of 1898 an executor, administrator or trustee having in charge any legacy or distributive share arising from personal property, and passing from a decedent to another by will or intestate laws, was subjected to a tax graduated according to the value of the beneficiary's interest in the property and the degree of his kinship to the decedent. Interests which were contingent and uncertain were not affected, but only those whereof the beneficiary had become invested with a present right of possession or enjoyment. *Vanderbilt* v. *Eidman*, 196 U. S. 480, 491–495, 498. Section 29 was

repealed April 12, 1902, but the repeal was not to take effect until July 1, 1902, and was not to prevent the collection of any tax imposed prior to that date. 32 Stat. 96, c. 500, §§ 7, 8, 11.

As before indicated, the claimant principally relies upon § 3 of the act of June 27, 1902, *supra*. It reads as follows:

"That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

In construing this section this court said in *Vanderbilt* v. *Eidman*, *supra* (p. 500):

"It is, we think, incontrovertible that the taxes which the third section of the act of 1902 directs to be refunded and those which it forbids the collection of in the future are one and the same in their nature. Any other view would destroy the unity of the section and cause its provisions to produce inexplicable conflict. From this it results that

the taxes which are directed in the first sentence to be refunded, because they had been wrongfully collected on contingent beneficial interests which had not become *vested* prior to July 1, 1902, were taxes levied on such beneficial interests as had not become *vested in possession or enjoyment* prior to the date named, within the intendment of the subsequent sentence. In other words, the statute provided for the refunding of taxes collected under the circumstances stated and at the same time forbade like collections in the future."

This view was repeated in *United States* v. *Fidelity Trust Co.*, 222 U. S. 158.

The decisive question, therefore, in the present case is whether the beneficial interests of the daughters, upon which the tax was collected, had become absolutely vested in possession or enjoyment prior to July 1, 1902, or were at that time contingent. If they had become so vested, the effort to recover the tax must fail; but, if they were contingent, the tax must be refunded. Recognizing that this is so, counsel for the United States insists that the distributive interests to which the daughters succeeded became vested in the full sense of the statute the moment the intestate died, which was three days before July 1, 1902. The court below rejected this contention and held that those interests did not become so vested until the daughters were entitled to receive their respective shares in the property remaining after the debts and expenses were paid, which was not until several months after July 1, 1902.

The question should, of course, be determined with due regard to the situation to which the refunding statute was addressed.

The tax imposed by the act of 1898 was purely a succession tax, a charge upon the transmission of personal property from a deceased owner to legatees or distributees. It was not laid upon the entire personal estate or upon all

that came into the hands of the executor or administrator, but upon "any legacies or distributive shares" in his charge "arising from" such estate and passing to others by will or intestate laws.

It hardly needs statement that personal property does not pass directly from a decedent to legatees or distributees, but goes primarily to the executor or administrator, who is to apply it, so far as may be necessary, in paying debts of the deceased and expenses of administration, and is then to pass the residue, if any, to legatees or distributees. If the estate proves insolvent nothing is to pass to them. So, in a practical sense their interests are contingent and uncertain until, in due course of administration, it is ascertained that a surplus remains after the debts and expenses are paid. Until that is done, it properly cannot be said that legatees or distributees are certainly entitled to receive or enjoy any part of the property. The only right which can be said to vest in them at the time of the death is a right to demand and receive at some time in the future whatever may remain after paying the debts and expenses. But that this right was not intended to be taxed before there was an ascertained surplus or residue to which it could attach is inferable from the taxing act as a whole and especially from the provision whereby the rate of tax was made to depend upon the value of the legacy or distributive share.

True, by that act, the executor or administrator was required, before surrendering a legacy or distributive share to whoever was entitled to it, to pay the tax assessed thereon and to deduct the amount from the particular legacy or distributive share, but this did not mean that the tax was to be assessed or paid in the absence of a right to immediate possession or enjoyment. On the contrary, as was held in *Vanderbilt* v. *Eidman*, *supra*, p. 499, it imported the existence of "a practically contemporaneous right to receive the legacy or distributive share." In that

case it was said, after separately considering the several parts of the act (p. 495): "In view of the express provisions of the statute as to possession or enjoyment and beneficial interest and clear value, and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment was subordinated to an uncertain contingency, it would, we think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached."

The actual enforcement of the taxing act by the administrative officers was not uniform as respects contingent interests. At first the tax was regarded as not reaching them until they became absolute, but afterwards it came to be treated as imposing the tax at the time of the death.

The provisions of the repealing act of April 12, 1902, were such that the tax was to be discontinued on July 1 of that year, but without affecting its collection where the right to it became fixed before that time.

Bearing in mind that this was the situation in which § 3 of the act of June 27, 1902, before quoted, was enacted, we think its meaning and purpose are plain. Briefly stated, it deals with legacies and distributive shares upon the same plane, treats both as "contingent" interests until they "become absolutely vested in possession or enjoyment," directs that the tax collected upon contingent interests not so vested prior to July 1, 1902, shall be refunded, and forbids any further enforcement of the tax as respects interests remaining contingent up to that date. In other words, it recognizes that the tax was being improperly collected upon legacies and distributive shares which were not absolutely vested in possession or enjoyment; and, for the purpose of avoiding the injustice that otherwise might result from this, it requires that the tax be refunded in all instances where the interests upon which it was collected had not become absolutely vested in the

sense indicated before July 1, 1902, that being the time when the tax was discontinued.

Applying this statute to the facts before stated, we see no escape from the conclusion that the tax in question must be refunded. It was collected upon distributive shares which neither were nor could have been absolutely vested in possession or enjoyment prior to July 1, 1902. The intestate's death had occurred only three days before, no administrator had been appointed, the debts and expenses had not been ascertained, what, if anything, would remain after their payment was uncertain, and the time had not come when the daughters were entitled to a distribution.

The case of *Hertz* v. *Woodman*, 218 U. S. 205, is cited as making for a different conclusion, but it is without real bearing here. The refunding statute was not there in question and was not mentioned in the opinion. The case came to this court upon a certificate from the Circuit Court of Appeals for the Seventh Circuit, the question certified being (p. 210): "Does the fact that the testator dies within one year immediately prior to the taking effect of the repealing act of April 12, 1902, relieve from taxation legacies otherwise taxable under §§ 29 and 30 of the act of June 13, 1898, as amended by the act of March 2, 1901?" Thus it was expressly stated that the legacies were otherwise taxable and the question propounded was merely whether they were relieved from taxation by the fact that the testator died within one year of July 1, 1902, when the repealing act took effect. The inquiry was prompted by the provision in the amendatory act of March 2, 1901, c. 806, 31 Stat. 938, 948, that the tax should be due and payable one year after the death. The answer was in the negative, it being held that the time when the tax was made due and payable was not determinative of when it was imposed. The opinion contains some language, which, separately considered, gives color to the present

contention of the Government, but this must be read in the light of the question presented for decision and be taken as restrained accordingly. Besides, the opinion approvingly refers (p. 219) to *Vanderbilt* v. *Eidman*, *supra*, as having "conclusively decided" that the tax "does not attach to legacies or distributive shares until the right of succession becomes an absolute right of immediate possession or enjoyment." Here, as we have said, there was no right of immediate possession or enjoyment at the time designated in the refunding statute.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

SIMON *v.* SOUTHERN RAILWAY COMPANY.

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

No. 34. Argued November 2, 3, 1914.—Decided January 25, 1915.

United States courts by virtue of their general equity powers have jurisdiction to enjoin the enforcement of a judgment obtained by fraud or without service.

In the absence of service of process, a person named as defendant can no more be regarded as a party than any other member of the community.

A judgment against a person on whom no process has been served is not erroneous and voidable, but, upon principles of natural justice, and also under the due process clause of the Fourteenth Amendment, is absolutely void.

Jurisdiction of the United States courts cannot be lessened or increased by state statutes regulating venue or establishing rules of procedure.

While § 720, Rev. Stat., prohibits United States courts from staying proceedings in a state court, it does not prevent them from depriving a party of the fruits of a fraudulent judgment, nor from enjoining a party from using that which he calls a judgment but which is, in

fact and in law, a mere nullity and absolutely void for lack of service of process. *Marshall* v. *Holmes*, 141 U. S. 589.

This rule obtains whether the case was one removed from the state court to, or originally commenced in, the Federal court.

The broader the ground of a decision, the more likelihood there is of affecting interests of persons not before the court, and, therefore, this court refrains from passing upon propositions not necessary to the decision of the case although passed upon by the courts below.

Quære, whether the acts of the foreign corporation against whom judgment was entered amounted to doing business within the State.

Quære, whether, under the statute of Louisiana providing for service of process on foreign corporations doing business within the State, but who have not appointed an agent therein, by service upon the Secretary of State, service upon the Assistant Secretary is sufficient in the absence of the Secretary.

Quære, whether the state court has jurisdiction of a suit on a transitory cause of action against a foreign corporation arising in another State, based on service of process on an agent voluntarily appointed by such corporation.

A State may by statute require a foreign corporation doing business therein to designate agents upon whom service may be made, or in default of its so doing, to provide upon whom such service may be made in suits relating to business transacted therein, but such statutory requirements cannot extend to causes of action arising in other States.

Service of process, in a suit against a foreign corporation who has not appointed a resident agent, upon the Secretary of State under the Louisiana statute providing for such service is not sufficient to give the court jurisdiction of a suit based on a cause of action arising in another State, and judgment entered thereon by default is absolutely void, and enforcement thereof, other jurisdictional facts existing, can be enjoined by the Federal court.

195 Fed. Rep. 56, affirmed.

THIS appeal raises a question of the power of a United States court to enjoin the appellant, Ephraim Simon, from enforcing a judgment alleged to have been fraudulently obtained by him in a state court, in a suit against the Southern Railway. The Company had no notice that the suit had been brought,—other than that arising from the service which purported to have been made in pursuance of the Louisiana Act No. 54, which provides (§ 1) that it shall

be the duty of every foreign corporation doing any business in this State to file a written declaration setting forth the places in the State where it is doing business, and the name of its "agents in this State upon whom process may be served."

"Section 2.—Whenever any such corporation shall do any business of any nature whatever in this State without having complied with the requirements of Sec. 1 of this act, it may be sued for any legal cause of action in any Parish of the State where it may do business, and such service of process in such suit may be made upon the Secretary of State the same and with the same validity as if such corporation had been personally served."

Availing himself of the provisions of this statute, Ephraim Simon, on December 1, 1904, brought suit, in the Civil District Court for the Parish of Orleans, against the Southern Railway Company averring that the defendant was a Virginia corporation "doing business in the city of New Orleans." The petition alleged that Simon, a New Orleans merchant and manufacturer, purchased, on February 8, 1904, a ticket from Selma, Alabama, to Meridian, Mississippi, and while riding over its lines through the negligence of defendant a collision occurred in which were inflicted upon him great personal injuries and financial loss. The petitioner claimed as damages $5,000 for personal injury; $340 for medical expenses; $4,000 for loss of profit that he would have earned; $3,000 for deterioration in the stock while he was confined to his bed and unable to sell, and $1,000 for increased cost of manufacture due to his absence from business.

There was a prayer that the Company be cited to appear and answer, and "it having failed to comply with the provisions of Section One of Act No. 54 of the Session of 1904, the service of process in this suit be made upon Hon. John T. Michel, Secretary of State, said service, so made, to be a service upon the said Southern Railway

Company, as provided for in the act aforesaid." The plaintiff asked for judgment for $13,348.

The summons was directed to "the Southern Railway Company, through Hon. John T. Michel, Secretary of State of Louisiana, New Orleans," and required the defendant to answer within ten days after service. The Deputy Sheriff on December 3, 1904, made return that he had served the citation and petition "on the within named Southern Railway Co. in the Parish of East Baton Rouge, State of Louisiana, by personal service on E. J. McGivney, Ass't Sec'y of State, Jno. T. Michel, Sec'y of State being absent at the time of service." The Assistant Secretary of State, acting under the instructions of the Attorney General, filed the citation and petition in his office.

No notice, however, was given to the Southern Railway of the service of the citation or of the fact that suit had been brought. It therefore made no appearance in the suit brought against it by Simon, and, on January 10, 1905, the court, on motion of the plaintiff, ordered that judgment by default be entered against the Railway Company. Under the Louisiana practice, the case was thereafter submitted to a "trial by jury on confirmation of default." The plaintiff himself testified and other witnesses were examined and on January 16 the jury returned a verdict in favor of the plaintiff for $13,348—being the exact amount claimed in the petition. On January 20 the court considering "the verdict of the jury in this matter, and that the demand of the plaintiff was proved, and the law and the evidence being in favor of said plaintiff" entered judgment on the verdict.

Thereafter the Company learned of the existence of the judgment and averring itself to be a citizen of Virginia, filed (February 6, 1905) in the United States Circuit Court for the District of Louisiana a bill against Simon, a citizen of Louisiana, asking that he be perpetually enjoined from enforcing the same.

The Bill attached, as an Exhibit, a copy of the record in the state court and alleged that, in the collision referred to, Simon had received injuries which a surgeon had reported were slight; that the Company had offered him $350 in settlement. Simon refused to accept this sum but considered and discussed the acceptance of $750, which, however, was not agreed to by the defendant; the matter was temporarily left in abeyance, it being understood that negotiations were still pending and would probably result in an agreement of settlement. It was alleged that thereafter the plaintiff surreptitiously and without the knowledge of the Railway Company entered suit for $13,348, "falsely and fraudulently pretending that he had been injured in that sum"; that Simon's personal injuries were slight as shown by the report of the surgeon; that the claim for loss of profit on stock and the extra cost of manufacturing stock were claims that he well knew were fraudulent, fictitious and utterly untrue; but by false testimony he secured a verdict therefor.

The bill further alleged that the Southern Railway was not doing business in the State of Louisiana; that the service upon the Secretary or Assistant Secretary of State was not a citation upon the Railway Company and was null and void for the purpose of bringing it under the jurisdiction of the Civil District Court; that any judgment rendered upon such attempted "citation would be, if rendered without appearance of the defendant, a judgment without due process of law, and consequently, in violation of the Constitution;" that the Railway Company had never received the citation issued in the suit, nor was it advised, nor had it any knowledge of the pendency of said proceedings until after the rendition of the judgment; that the verdict of the jury having been rendered upon false testimony and without notice, it would be against good conscience to allow the judgment thereon to be enforced against the Railway Company, which has

no remedy at law in the premises and has a complete meritorious defense to the claim on which the judgment is based; that by fraud and accident, unmixed with its own negligence, the Railway Company has been prevented from making such defense.

As stated in *Ex parte Simon*, 208 U. S. 144, on another branch of this case, 'The bill further alleges that Simon will attempt to collect the fraudulent judgment by *fieri facias*, and prays as specific relief an injunction against his further proceeding under the same. A preliminary injunction was issued, after a hearing on affidavits, on June 30, 1905, and Simon appears to have obeyed the order for over two years. A demurrer to the bill was overruled in December, 1906, and a plea to the jurisdiction, filed in February, 1907, was overruled in the following May. Simon answered in August and issue was joined in the same month. Notwithstanding the injunction Simon, in contempt therefor, obtained a writ of *fieri facias* and directed a levy and the service of garnishment process to collect the judgment. . . . The punishment was a small fine, and the imprisonment was ordered until the fine was paid.'

In *habeas corpus* proceedings instituted in this court he sought to be discharged from the sentence of imprisonment imposed in the contempt case, claiming that, under Revised Statutes 720, the Circuit Court was without jurisdiction to grant the injunction and therefore the order in the contempt proceedings was absolutely void. The writ was denied.

After this court refused to grant the writ of *habeas corpus* the case, on the main bill, was referred to a Master to hear evidence and to report his conclusions of law and facts. He found that the Railway was not doing business in Louisiana in the sense of the statute; that the judgment was not fraudulent, but held it to be void because service upon the *Assistant* Secretary of State was not

the "service upon the Secretary of State" required by the statute.

The Circuit Court did not consider the question of fraud, but held (184 Fed. Rep. 959) that the state judgment was void because the Louisiana statute providing for service on foreign corporations was unconstitutional. It thereupon entered a permanent injunction against Simon as prayed for in the bill. From that decree Simon appealed making many assignments of error, attacking the jurisdiction of the court to entertain the bill and especially denying its power to grant the relief prayed for in view of the provisions of § 720 of the Revised Statutes. The Circuit Court of Appeals held (195 Fed. Rep. 56) that it had been authoritatively decided in *Ex parte Simon*, 208 U. S. 144, that the Circuit Court had jurisdiction. It found that the Railway Company was doing business in New Orleans; but ruled that Act 54 did not provide for service on the Assistant Secretary of State and hence that the judgment by default in the state court was void for want of jurisdiction of the person of the defendant. The decree of the Circuit Court was affirmed and thereupon Simon prosecuted the present appeal.

Mr. Henry L. Lazarus, with whom *Mr. Herman Michel*, *Mr. Eldon S. Lazarus*, *Mr. David Sessler* and *Mr. Girault Farrar* were on the brief, for appellant.

Mr. J. Blanc Monroe, with whom *Mr. Monte M. Lemann* and *Mr. Alfred P. Thom* were on the brief, for appellee.

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

The primary question whether the United States court had jurisdiction of the case must of course be determined by considering the allegations of the Bill. It shows

diversity of citizenship and charges that Simon was seeking to enforce by levy a judgment obtained by fraud and without notice to the Railway Company. If that be so the United States courts, by virtue of their general equity powers, had jurisdiction to enjoin the plaintiff from enforcing a judgment thus doubly void. For even where there has been process and service, if the court "finds that the parties have been guilty of fraud in obtaining a judgment . . . it will deprive them of the benefit of it." *McDaniel* v. *Traylor*, 196 U. S. 415, 423. Much more so will equity enjoin parties from enforcing those obtained without service. For in such a case the person named as defendant "can no more be regarded as a party than any other member of the community." Such judgments are not erroneous and not voidable but upon principles of natural justice, and under the due process clause of the Fourteenth Amendment, are absolutely void. They constitute no justification to a plaintiff who if concerned in executing such judgments is considered in law as a mere trespasser. *Harris* v. *Hardeman*, 14 How. 339 (default judgment entered on improper service). *Williamson* v. *Berry*, 8 How. 541; *Scott* v. *McNeal*, 154 U. S. 46; *Western Indemnity Co.* v. *Rupp*, 235 U. S. 273.

On principle and authority, therefore, a judgment, obtained in a suit of which the defendant had no notice, was a nullity and the party against whom it was obtained was entitled to relief. It serves to illustrate the existence of appellee's right and the method of its enforcement to note that under the law of Louisiana the Railway Company was not obliged to attack a void judgment in the court that rendered it—but, in a court having jurisdiction of the plaintiff's person, could have instituted a new and independent proceeding to enjoin Simon from enforcing it. See *Sheriff* v. *Judge*, 46 La. Ann. 29, where a suit was brought in the 21st District Court to enjoin the enforcement of a void judgment obtained in the 17th District

Court. See also *Hibernia Bank* v. *Standard Guana Co.*, 51 La. Ann. 1321. Of course, the jurisdiction of the United States courts could not be lessened or increased by state statutes regulating venue or establishing rules of procedure. But, manifestly, if a new and independent suit could have been brought in a state court to enjoin Simon from enforcing this judgment, a like new and independent suit could have been brought for a like purpose in a Federal court, which was then bound to act within its jurisdiction and afford redress (*Hyde* v. *Stone*, 20 How. 175; *Reagan* v. *Farmers' Trust Co.*, 154 U. S. 391; *Payne* v. *Hook*, 7 Wall. 429). The United States courts could not stay original or supplementary proceedings in a state court (*Mutual Reserve* v. *Phelps*, 190 U. S. 159); or revise its judgment. But by virtue of their general equity jurisdiction they could enjoin a party from enforcing a void judgment.

2. The Appellant, Simon, however, contends that even if there was equity in the bill; and even if the Railway Company could have brought a new and independent suit in the state court to enjoin him from using the judgment,—yet in the present case the Federal court was without power to afford the same relief because § 720 of the Revised Statutes provides that, except in bankruptcy cases, a United States court shall not "stay proceedings in any court of a State."

In 1793, when that statute was adopted (1 Stat. 334), courts of equity had a well-recognized power to issue writs of injunction to stay proceedings pending in court,—in order to avoid a multiplicity of suits, to enable the defendant to avail himself of equitable defenses and the like. It was also true that the courts of equity of one State or country could enjoin its own citizens from prosecuting suits in another State or country. *Cole* v. *Cunningham*, 133 U. S. 107. This, of course, often gave rise to irritating controversies between the courts themselves

which could, and sometimes did, issue contradictory injunctions.

On principles of comity and to avoid such inevitable conflicts the act of 1793 was passed. *Diggs* v. *Wolcott*, 4 Cranch, 179, 180 (1807) and *Hull* v. *Burr*, 234 U. S. 712 (1914), (the first and last cases in this court dealing with that question) furnish typical instances in which the statute has been applied. Those decisions, and the authorities therein cited, show that although the facts might have been such as to warrant an injunction against a suit then pending in a state court, yet § 720 prevented the Federal court from staying the proceedings in the state court.

3. But when the litigation has ended and a final judgment has been obtained—and when the plaintiff endeavors to use such judgment—a new state of facts, not within the language of the statute may arise. In the nature of the case, however, there are few decisions dealing with such a question. For where the state court had jurisdiction of the person and subject-matter the judgment rendered in the suit would be binding on the parties until reversed and there would therefore usually be no equity in a bill in a Federal court seeking an injunction against the enforcement of a state judgment thus binding between the parties. See *Marshall* v. *Holmes*, 141 U. S. 600, where *Nougué* v. *Clapp*, 101 U. S. 551, relied on by Appellant, is discussed.

There have, however, been a few cases in which there was equity in the bill brought to enjoin the plaintiff from enforcing the state judgment, and where that equity was found to exist appropriate relief has been granted. For example, in *Julian* v. *Central Trust Company*, 193 U. S. 112, a judgment was obtained in a state court, execution thereon was levied on property which, while not in possession of the Federal court, was in possession of a purchaser who held under the conditions of a Federal decree. It

was held that the existence of that equity authorized an injunction to prevent the plaintiff from improperly enforcing his judgment, even though it may have been perfectly valid in itself.

Other cases might be cited involving the same principle. But this is sufficient to show that if, in a proper case, the plaintiff holding a valid state judgment can be enjoined by the United States court from its inequitable use,—by so much the more can the Federal courts enjoin him from using that which purports to be a judgment but is, in fact, an absolute nullity. *Marshall* v. *Holmes*, 141 U. S. 597; *Gaines* v. *Fuentes*, 92 U. S. 10; *Barrow* v. *Hunton*, 99 U. S. 85.

That the United States Circuit Court here could enjoin Simon from enforcing a void judgment against the Southern Railway Company, has already been ruled in another branch of this very case. In *habeas corpus* proceedings (*Ex parte Simon*, 208 U. S. 144) he sought relief from the punishment imposed because of his violation of the temporary injunction granted in this cause. He there claimed that the attachment for contempt was void because the court was without power to issue the injunction which he had violated. On that subject this court said:

"This is not a suit *coram non judice* and wholly void by reason of Rev. Stat., § 720, forbidding United States courts to stay by injunction proceedings in any state court. The Circuit Court had jurisdiction of the cause. That must be assumed at this stage, and finally unless we overrule the strong intimations in *Marshall* v. *Holmes*, 141 U. S. 589, and the earlier cases cited in that case."

The appellant insists, however, that *Marshall* v. *Holmes*, referred to as conclusive unless overruled, does not support the jurisdiction of the Circuit Court because there no injunction was granted by the United States court.

In that case Mrs. Marshall brought a suit, in a Louisiana court, and obtained a temporary injunction restraining

Holmes, Sheriff, from levying Mayer's judgments alleged to be fraudulent. Her petition for removal to the United States court was denied and the case proceeded to final hearing in the state court where the temporary injunction was dissolved. That decree was affirmed by the Supreme Court of Louisiana. The case was then brought here to review the order refusing to allow the case to be removed to the Federal court. In discussing that issue the Appellee contended that 'it was not competent for the Circuit Court of the United States, by any form of decree, to deprive Mayer of the benefit of his judgment at law, and that Mrs. Marshall could obtain the relief asked only in the court in which the judgment had been rendered.' In considering that contention (which is substantially the same as that urged by the Appellant Simon here), the court asked 'whether, where the requisite diversity of citizenship existed, the Circuit Court of the United States could not deprive a party of the benefit of a judgment fraudulently obtained by him in a state court?' In answering this question the court pointed out the difference between enjoining a court and enjoining a party; and the difference between setting aside a judgment for irregularity and setting it aside for fraud. It was held that the case was removable, since, there being diversity of citizenship, the Circuit Court of the United States had jurisdiction to award Mrs. Marshall protection by preventing the plaintiff from enforcing his judgments if they were found to be fraudulent in fact, saying that the

"Authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall

not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. 'It would simply take from him the benefit of judgments obtained by fraud.'" And if a United States court can enjoin a plaintiff from using a judgment, proved to be fraudulent, it can likewise enjoin him from using a judgment absolutely void for want of service.

4. The Appellant Simon further contends that *Marshall* v. *Holmes*, is not applicable here because that was a removal case; and it is urged that even if a Federal court can grant an injunction in a case removed, it cannot award the same relief in a bill originally brought in the Federal court. But that is a clear case of distinction without a difference and was not the basis of the decision.

Indeed (excluding ancillary bills *Traction Company* v. *Mining Company*, 196 U. S. 245), it seems always to have been assumed that the prohibition of § 720 applied to cases removed to the United States courts, as well as to those originally instituted therein. Such was true in *Diggs* v. *Wolcott*, 4 Cranch, 179, the first reported case arising under the law. There a bill in Chancery was filed in a Connecticut court to enjoin a suit then pending in a Connecticut court. The case was removed to the United States Circuit Court and after removal the injunction was granted. On appeal the decree was reversed on the ground that a United States court could not [even on removal] "stay proceedings in a state court." In later decisions it has been pointed out that if there was a difference between cases brought and those removed, it would have been easy, as the law then stood, for the nonresident to bring a suit for injunction in a state court, remove it to the Federal court, secure therein the injunction sought, and thus evade

the statute. *Bondurant* v. *Watson*, 103 U. S. 288; *Lawrence* v. *Morgan's Railroad*, 121 U. S. 636.

The ground of the decision in the *Marshall Case*, in *Gaines* v. *Fuentes*, 92 U. S. 10; *Barrow* v. *Hunton*, 99 U. S. 85; *McDaniel* v. *Traylor*, 196 U. S. 415; *Arrowsmith* v. *Gleason*, 129 U. S. 86; *Johnson* v. *Waters*, 111 U. S. 640; *Sharon* v. *Terry*, 36 Fed. Rep. 337 cited in *Julian* v. *Central Trust Co.*, 193 U. S. 112; *Dobbins* v. *Los Angeles*, 195 U. S. 224; *Howard* v. *De Cordova*, 177 U. S. 609, is that while § 720 prohibits United States courts from "staying proceedings in a state court," it does not prevent them from depriving a party of the fruits of a fraudulent judgment, nor prevent the Federal courts from enjoining a party from using that which he calls a judgment but which is, in fact and in law, a mere nullity. That conclusion is inevitable, or else the Federal court must hold that a judgment—void for want of service—is "a proceeding in a state court" even after the pretended litigation has ended and the void judgment has been obtained. Such a ruling would involve a contradiction in terms, and treat as valid for some purposes that which the courts have universally held to be a nullity for all purposes.

5. If, then, there was equity in the bill, and if the United States court had jurisdiction of a suit brought to enjoin the plaintiff from using a judgment alleged to be void because of fraud in its procurement and for want of service on the defendant, it becomes necessary to determine whether the Railway Company established the allegations of its bill.

The Master found as a fact that the Southern Railway was not doing business within the State of Louisiana; that there had been no fraud in the procurement of the judgment; and that the service on the *Assistant* was not the service on the Secretary of State required by the statute. He therefore recommended that a decree be entered enjoining the plaintiff from using the judgment obtained in

the District Court of the Parish of Orleans. The Circuit Court made no finding on the question of fraud, but ruled (184 Fed. Rep. 959) that the service was void because Act 54 was unconstitutional in that it contained no provision requiring the Secretary of State to give the foreign corporation notice that suit had been brought and citation served. In support of that construction it quoted at length a statement of the Supreme Court of Louisiana in *Gouner* v. *Missouri Valley Bridge Co.*, 123 Louisiana, 964. In that case service was made on the Secretary of State after the foreign corporation sued had left the State. As the court held that the statute did not apply to such absent corporation it did not finally pass on the validity of Act 54 under the state constitution, though it did say:

"This law makes no provision whatever for the service on the defendant. The officer may decline to communicate with the person sued and give no notice whatever; not even by mail. A judgment might be obtained without the least knowledge of the person sued. Under the phrasing of the statute, the duty of the officer begins and ends in his office. If such a judgment were rendered, it could receive no recognition whatever at the place of the domicile. When a petition cannot legally be served on a defendant, the court can exercise no jurisdiction over him. The service defines the court's jurisdiction."

On the other hand, the Circuit Court of Appeals (195 Fed. Rep. 56), while referring to this case, held, citing *Amy* v. *Watertown*, 130 U. S. 317, that though the Southern Railway was doing business in Louisiana, yet the default judgment was void because entered in a suit served on the *Assistant* when the statute designated the Secretary of State as the officer upon whom the citation should be served.

The broader the ground of the decision here, the more likelihood there will be of affecting judgments held by persons not before the court. We therefore purposely

refrain from passing upon either of the propositions decided in the courts below, and without discussing the right to sue on a transitory cause of action and serve the same on an agent voluntarily appointed by the foreign corporation, we put the decision here on the special fact, relied on in the court below, that in this case the cause of action arose within the State of Alabama, and the suit therefor, in the Louisiana court, was served on an agent designated by a Louisiana statute.

Subject to exceptions, not material here, every State has the undoubted right to provide for service of process upon any foreign corporations doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. *Mutual Reserve Ass'n* v. *Phelps*, 190 U. S. 147; *Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 603. But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the State enacting the law. Otherwise, claims on contracts wherever made and suits for torts wherever committed might by virtue of such compulsory statute be drawn to the jurisdiction of any State in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extra-territorial extension of jurisdiction, by virtue of the power to make such compulsory appointments, could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in *Old Wayne Life Association* v. *McDonough*, 204 U. S. 22, that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other States.

In that case the Pennsylvania statute, as a condition of

their doing business in the State, required foreign corporations to file a written stipulation agreeing "that any legal process affecting the Company served on the Insurance Commissioner . . . shall have the same effect as if served personally on the Company within this State" (18). The Old Wayne Life Association having executed and delivered, in Indiana, a policy of insurance on the life of a citizen of Pennsylvania (20) was sued thereon in Pennsylvania. The declaration averred that the Company "has been doing business in the State of Pennsylvania, issuing policies of life insurance to numerous and divers residents of said County and State," and service was made on the Commissioner of Insurance. The Association made no appearance and a judgment by default was entered against it. Thereafter suit on the judgment was brought in Indiana. The plaintiff there introduced the record of the Pennsylvania proceedings and claimed that, under the full faith and credit clause of the Constitution, he was entitled to recover thereon in the Indiana court. There was no proof as to the Company having done any business in the State of Pennsylvania, except the legal presumption arising from the statements in the declaration as to soliciting insurance in that State. This court said:

"But even if it be assumed that the Company was engaged in *some* business in Pennsylvania at the time the contract in question was made, it cannot be held that the Company agreed that service of process upon the Insurance Commissioner of that Commonwealth would alone be sufficient to bring it into court in respect of all business transacted by it, no matter where, with or for the benefit of citizens of Pennsylvania (21). . . . Conceding, then, that by going into Pennsylvania, without first complying with its statute, the defendant Association may be held to have consented to the service upon the Insurance Commissioner of process in a suit brought against it there in respect of business transacted by it

in that Commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania. . . . As the suit in the Pennsylvania court was upon a contract executed in Indiana; as the personal judgment in that court against the Indiana corporation was only upon notice to the Insurance Commissioner, without any legal notice to the defendant Association and without its having appeared in person, or by Attorney, or by agent in the suit; and as the act of the Pennsylvania court in rendering the judgment must be deemed that of the State within the meaning of the Fourteenth Amendment, we hold that the judgment in Pennsylvania was not entitled to the faith and credit which, by the Constitution, is required to be given to the . . . judicial proceedings of the several States, and was void as wanting in due process of law."

From the principle announced in that case it follows that service under the Louisiana statute, would not be effective to give the District Court of Orleans jurisdiction over a defendant as to a cause of action arising in the State of Alabama. The service on the Southern Railway, even if in compliance with the requirements of Act 54, was not that kind of process which could give the court jurisdiction over the person of the defendant for a cause of action arising in Alabama. As the Company made no appearance the default judgment was void. Being void the plaintiff acquired no rights thereby and could be enjoined by a Federal court from attempting to enforce what is a judgment in name but a nullity in fact. This conclusion makes it unnecessary to consider whether the Southern Railway was doing business in Louisiana. It also makes it unnecessary to consider the question of fact as to whether the judgment was void because of fraud in its procurement.

The decree of the Circuit Court of Appeals must be

Affirmed.

GRANT TIMBER AND MANUFACTURING COMPANY *v.* GRAY.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 136. Argued January 19, 20, 1915.—Decided February 1, 1915.

A State may, without violating the Fourteenth Amendment, protect established possession of property against disturbance by anything other than process of law.

Article 55, Code of Practice of Louisiana, providing that one sued in a possessory action cannot bring a petitory action until after judgment shall have been rendered in the possessory action, and, in case he shall have been condemned, until he shall have satisfied the judgment given against him, is not unconstitutional under the due process provision of the Fourteenth Amendment.

131 Louisiana, 865, affirmed.

THE facts, which involve the constitutionality, under the due process clause of the Fourteenth Amendment, of Article 55, Louisiana Code of Procedure, relating to possessory and petitory actions, are stated in the opinion.

Mr. Horace H. White, with whom *Mr. Henry Moore, Jr.*, and *Mr. J. R. Thornton* were on the brief, for plaintiff in error.

Mr. Patrick H. Loughran and *Mr. John H. Mathews* for defendant in error, submitted.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a possessory action for land coupled with a demand for damages for timber taken by the defendant, the plaintiff in error, from the premises. After it was

begun the defendant brought a petitory suit to establish its title to the land and sought for a stay of proceedings in the present case until its title could be adjudicated, setting up that to allow the plaintiff to recover the value of the timber without proving ownership would be contrary to the Fourteenth Amendment and a taking of the defendant's property without due process of law. The plaintiff recovered a judgment for possession and money damages, subject to a stay of execution, but the Supreme Court struck the stay of execution out. It seems also to have ordered the defendant's petitory suit to be dismissed. The ground for both orders was Art. 55, Code of Practice. "He who is sued in a possessory action cannot bring a petitory action until after judgment shall have been rendered in the possessory action, and until, if he has been condemned, he shall have satisfied the judgment given against him." The only question is whether this act is valid. Some argument was attempted as to the scope and proper interpretation of the law but we have nothing to do with that.

It would be a surprising extension of the Fourteenth Amendment if it were held to prohibit the continuance of one of the most universal and best known distinctions of the mediæval law. From the *exceptio spolii* of the Pseudo-Isidore the Canon Law and Bracton to the assize of novel disseisin the principle was of very wide application that a wrongful disturbance of possession must be righted before a claim of title would be listened to—or at least that in a proceeding to right such disturbance a claim of title could not be set up; and from Kant to Ihering there has been much philosophising as to the grounds. But it is unnecessary to follow the speculations or to consider whether the principle is eternal or a no longer useful survival. The constitutionality of the law is independent of our views upon such points.

No doubt circumstances have changed. The proof of

title does not depend upon difficult evidence, technical procedure, or the duel. Usually a few sheets of paper copied from the registry and costing but a trifle will establish the right, often with less trouble than it takes to prove possession. But these are not the only considerations. The State is within its constitutional power when it limits the sphere of self-help. It may protect an established possession against disturbance by anything except process of law. It may attach such consequences to the disturbance as it sees fit, short of cruel and unusual punishment. If it ordains a *restitutio in integrum* or its equivalent in money it not only is adopting a familiar remedy, but, with the conditions attached in Louisiana, does not go so far as it might. The law of Louisiana requires uninterrupted possession for a year for the possessory action. Civil Code, Arts. 3454, 3455. If it had made a year the limitation for a petitory suit and had provided that the title should be lost in that time it would be hard to maintain that it had exceeded its constitutional power. *Blinn* v. *Nelson*, 222 U. S. 1, 7. *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 156. *Turner* v. *New York*, 168 U. S. 90.

Judgment affirmed.

GALLARDO Y SEARY *v.* NOBLE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

No. 141. Argued January 20, 1915.—Decided February 1, 1915.

A statement of the condition of the record title made by an owner of property in Porto Rico does not necessarily enlarge the scope of an incumbrance mentioned in the statement from what it actually is

or estop the person making the statement; e. g., a reference to a mortgage on crops as being one on the land.

A mortgage on property in Porto Rico held in this case to be one on the crops alone and not on the land.

THE facts, which involve the construction of a mortgage affecting property in Porto Rico and the determination of the question of whether it embraced the land or only the crops, are stated in the opinion.

Mr. Frederic R. Coudert, with whom *Mr. Howard Thayer Kingsbury* was on the brief, for appellants.

Mr. N. B. K. Pettingill, with whom *Mr. Roberto H. Todd* was on the brief, for appellees:

The instrument created a lien on the land; the rule that mortgages must be upon specific real estate is confined to its effect upon rights of third parties.

The instrument bound the title of Gallardo. The allegations of the bill are sufficient. Upon a decree *pro confesso* the question is of substance—not form.

The allegations are supported by findings of fact. In the absence of evidence in the records there is a conclusive presumption that the decree was warranted.

The only open question here is the sufficiency of the findings to support the decree.

The appellants are estopped to deny the lien because of their conduct in obtaining possessory title.

The presumption is that public officials have properly performed their duties.

The instrument imposed a tacit mortgage although described as a deed of refaccion.

The defense of prescription is not sustained, and if prescription is not pleaded, it is waived.

The plea was bad because it was double; also because it states no defense; and also because the thirty-year statute was not pleaded. Prescription is a rule of real property.

The complainants are entitled to the remedy pursued; summary proceedings are optional.

A record of a mortgage need be transferred only as against third persons, and the appellants are not third persons.

The Registrar's ruling is not binding, but if it were the result would be favorable to appellees.

The refusal of the court to open the *pro confesso* decree was not abuse of discretion.

The records did not prove recognitions insufficient.

There was no sufficient defense presented to the court below, nor was the answer presented signed by defendants.

The failure to answer within the time was not excused.

Suspension of entry of decree is a matter of discretion and this record is not in a condition to review its exercise.

Judge Hamilton's opinion held the contract was one of refaccion and that it gave a tacit lien upon the realty. It erroneously held that the lien bound only the interest of Gandia and that it was barred by prescription.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to foreclose a mortgage annexed to the bill and alleged to create a lien upon the Cacique sugar plantation. It was brought against the appellants, who are the heirs of one Gallardo, a purchaser of the estate. A demurrer and a plea of prescription of thirty, twenty, fifteen and five years were filed and overruled, subject to exception, and thereafter the bill was taken as confessed and a decree entered as prayed. The mortgage was made on December 22, 1865, and the plaintiffs agree that their claim depends upon its being construed to embrace the land. The construction of the instrument therefore is the main question to be dealt with. It is made more difficult by the fact that still, as when the case was here

before, 223 U. S. 65, there is only an obviously inartificial translation in the record, but enough can be gathered to make the result tolerably plain.

The mortgage after reciting a debt due from the mortgagor, Don Ramon Ruiz, to the mortgagee, Mr. William Noble, 'for the payment of the lease' on the Cacique estate goes on to say that the mortgagor 'binds himself to pay the above-mentioned sum to his creditor Noble, with the proceeds of the first crops which may be ground,' &c. It then recites a debt of Ruiz to Goenaga that must be paid in October, 1866, 'thereby being cancelled that deed of refaccion, and Ruiz obliged not to execute any other agreement or deed with damage to this present one.' "For the better security of the aforesaid, besides the general obligation which he hereby makes of all his property hindering the special obligation, neither the special hindering the general, the appearing party hereto mortgages expressly and especially not only the canes which may be ground in the next crop by the Cacique plantation, . . . but also those which it may grind in the following crops, until the complete payment of the amount herein acknowledged." The appellee gives the original Spanish: "y sin que la obligación general que hace de todos sus bienes impide la especial ni por el contrario ésta a aquella, el compareciente don Ramón Ruiz hipoteca expresa y señaladamente no tan sólo los frutos que en la proxima cosecha elabore la Hacienda Casique . . . como ya queda precisado, sino tambien los que fabrique en los demás cosechas venideras hasta el completo pago de la cantidad que deja reconocida." We agree with the appellant that a negative is left out in the translation and that the meaning is: without the general obligation of all the debtor's property hindering the special, or conversely this hindering that. So translated we think it is obvious that the general obligation of all the mortgagor's property is referred to not as the object

or effect of 'this' special one, but as something presupposed. It is in fact the general obligation of all a debtor's property that is incident to the existence of a debt; an obligation which is recognized in some degree by every system of law and shown in ours by the invalidity of conveyances in fraud of creditors, but which in the civil law is more emphasized and expressed. The object of the instrument and the only object is to pledge the crops and to provide for the severance and application of them to the debt—what is called an anticipatory mobilization. *Williamson* v. *Richardson,* 31 La. An. 685, 687. It could not well have gone further seeing that by the allegations of the bill Ruiz owned only an undivided interest in the plantation and was in possession under a lease.

The reference to the cancelling of a deed of refaccion has no bearing upon the nature of the present instrument, although that point was argued. The obligation of Ruiz not to execute any other agreement to the damage of the present one is the well-known general pact *de non alienando* intended to give an additional safeguard to the mortgagee against later alienees of the mortgaged property. Febrero, Part 2, Book 3, c. 2, no. 85. Curia Filipica, Part 2, § 11, no. 11; Tercero Poseedor. *Nathan* v. *Lee,* 2 Martin (La.), N. S. 32. The language means any agreement other than the present—not any deed of refaccion other than the present, and so we need not consider the nature and effect of such deeds in creating, so to speak, a salvage lien. We turn therefore to a so-called acknowledgment that is relied upon as estopping the appellants from denying the operation of the mortgage upon the land. It seems from the bill that Ruiz became bankrupt, that a coöwner, Gallardo, obtained a possessory title, and that on his applying for registry of the same in 1882 he was required to set forth the incumbrances and mentioned among them the mortgage to Noble. But even on the allegations of the bill and still more plainly on looking at the instrument,

which is in the record and is referred to by both parties, this is merely a statement of the condition of the record title. It does not in any way enlarge or purport to enlarge the scope of the original transaction. The mortgage of course bound the land in a certain sense, because the crops were land until they were severed. *Williamson* v. *Richardson*, 31 La. An. 685. But that was the extent to which it bound it, and the recital of it in the registry means no more. At a later date a registrar declined to recognize the mortgage as a lien upon the property, on the ground that it affected only the products to be manufactured in the plantation. He may have been wrong in his law for the reason that we have suggested, but he was plainly right in his construction of the document. There is no other recognition needing mention.

As our opinion is that the mortgage bound only the crops it follows without more that the decree must be reversed.

Decree reversed.

UNITED STATES *v.* HOLTE.

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

No. 628. Argued January 8, 1915.—Decided February 1, 1915.

A woman who is transported in violation of the White Slave Traffic Act of 1910 may be guilty of conspiracy with the person transporting her to commit a crime against the United States under § 37 of the Penal Code of March 4, 1899.

THE facts, which involve the construction of the White Slave Traffic Act of 1910 and of § 37 of the Penal Code, are stated in the opinion.

Mr. Assistant Attorney General Wallace for the United States:

The woman subjected to an unlawful interstate transportation may, if a guilty participator, be indicted as a conspirator with the person causing her to be transported.

The court below misapplied the doctrine that, where a concert of action or a plurality of agents is essential to complete an offence, such agents cannot be indicted for a conspiracy to commit that offence. See Wharton's Criminal Law, 11th ed., § 1502.

Chadwick v. *United States*, 141 Fed. Rep. 236; *Dietrich* v. *United States*, 126 Fed. Rep. 664, and *United States* v. *N. Y. C. & H. R. R.*, 146 Fed. Rep. 303, are decisive against the application of that doctrine to this case. See also *Ex parte Lyman*, 202 Fed. Rep. 303, construing § 138, Penal Code; *The Queen* v. *Whitchurch*, 24 L. R. Q. B. Div. 420; *State* v. *Crofford*, 133 Iowa, 478; *State* v. *Heugin*, 110 Wisconsin, 189, 244; *Hannon* v. *Commonwealth*, 14 Pa. St. 226; *Thomas* v. *United States*, 156 Fed. Rep. 897, 903; *Drew* v. *Thaw*, 235 U. S. 432, holding that it is perfectly possible to enact that a conspiracy to accomplish what an individual is free to do shall be a crime.

Concursus necessarius is not an essential to the offence defined by § 2 of the White Slave Act. See H. R. No. 47, 61st Cong., 2d Sess., p. 11; *Hoke* v. *United States*, 227 U. S. 320; *Bennett* v. *United States*, 194 Fed. Rep. 630; *S. C.*, 227 U. S. 333; *United States* v. *Westman*, 182 Fed. Rep. 1017.

The offence of conspiracy to commit the main offence is not legally identical with that offence as defined by § 2 of the White Slave Act. As it is not identical, the woman transported may be punished, if a guilty party to a criminal plan for her own unlawful transportation. See *Gavieres* v. *United States*, 220 U. S. 342; *Heike* v. *United States*, 227 U. S. 131, 144; *United States* v. *McAndrews Co.*, 149 Fed. Rep. 836.

The case is not within the exception of *concursus necessarius*. The rule of diversity of offences, and not the above exception, must be applied. The case at bar responds completely to every test under the diversity rule.

As the law stood before the White Slave Act, any person, man or woman, who wilfully planned to commit any offence against the United States was subject to punishment under § 37, Penal Code. In creating the new offence under § 2 of the White Slave Act, Congress had no purpose to amend the conspiracy statute so that it should read "any offence against the United States, save only that defined by the White Slave Traffic Act;" nor any purpose to give the woman transported a license to plan with others to devote her body to prohibited sexual uses; nor any purpose to give her in advance a full pardon for any such after conspiracy.

Section 37, Penal Code, automatically operates on new offences from time to time, *United States* v. *Stevenson*, 215 U. S. 202; *Curley* v. *United States*, 130 Fed. Rep. 1, and will punish persons planning for the commission by another person of an offence against the United States.

The indictment here contains the essential averment of a plan and agreement by both defendants that one should commit the offence of unlawfully transporting defendant—an averment that would have no place in an indictment against the former for unlawfully transporting her. And had the indictment omitted the first, third, and fourth overt acts (showing actual after transportation), the second (the ticket purchase) alone would have completed the conspiracy offence. On trial none other than the second overt act need be proven. If the others were proven, the later consummation of the main offence by Laudenschleger could not swallow up, or give immunity to, the earlier completed crime of conspiracy. *Heike* v. *United States*, 227 U. S. 131, 144; *Curley* v. *United States*, 130 Fed. Rep. 1; *United States* v. *Stamatopolous*, 164

Fed. Rep. 524; *Solander* v. *People*, 2 Colorado, 48; *State* v. *Crofford*, 133 Iowa, 478.

Though the penalty provisions of the crime punished by § 2 were limited exclusively to procurers, no corresponding limitation is to be found in § 37, which, being aimed at every person, must apply to the woman transported. *United States* v. *Portale*, 235 U. S. 27; *United States* v. *Lewis*, 235 U. S. 282.

It is not the policy of the law to suffer people to, with impunity, jointly plan the commission of crime. *Drew* v. *Thaw*, 235 U. S. 432. It is often but a step from plan to performance, and if people could, without risk, jointly plan, such plans would be more frequent, and when developed, might appear so inviting as to themselves induce performance. Where, as here, the large purpose of the law was to reach those systematically conducting the traffic—and system always demands plan—there could have been no thought of making this particular crime an exception to the general prohibition of the conspiracy statute.

This view is strengthened by the thought that because practically the same language is found in §§ 2 and 3 of the Immigration Act as amended March 26, 1910, 36 Stat. 263, the application of the principle here contended for would materially aid, through the enforcement of that act also, in the accomplishment of the results sought by the Paris Conference treaty of July 25, 1902, 35 Stat. 1979.

No appearance or brief filed for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an indictment for a conspiracy between the present defendant and one Laudenschleger that Laudenschleger should cause the defendant to be transported from Illinois to Wisconsin for the purpose of prostitution,

contrary to the act of June 25, 1910, c. 395; 36 Stat. 825. As the defendant is the woman, the District Court sustained a demurrer on the ground that although the offence could not be committed without her she was no party to it but only the victim. The single question is whether that ruling is right. We do not have to consider what would be necessary to constitute the substantive crime under the act of 1910, or what evidence would be required to convict a woman under an indictment like this; but only to decide whether it is impossible for the transported woman to be guilty of a crime in conspiring as alleged.

The words of the penal code of March 4, 1909, c. 321, § 37, 35 Stat. 1088, are "conspire to commit an offence against the United States" and the argument is that they mean an offence that all the conspirators should commit; and that the woman could not commit the offence alleged to be the object of the conspiracy. For although the statute of 1910 embraces matters to which she could be a party, if the words are taken literally, for instance, aiding in procuring any form of transportation for the purpose; the conspiracy alleged, as we have said, is a conspiracy that Laudenschleger should procure transportation and should cause the woman to be transported. Of course the words of the penal code could be narrowed as we have suggested, but in that case they would not be as broad as the mischief and we think it plain that they mean to adopt the common law as to conspiracy and that 'commit' means no more than bring about. For as was observed in *Drew* v. *Thaw*, 235 U. S. 432, a conspiracy to accomplish what an individual is free to do may be a crime, *Reg* v. *Mears*, 4 Cox. C. C. 423; 2 Den. C. C. 79; *Reg* v. *Howell*, 4 F. & F. 160, and even more plainly a person may conspire for the commission of a crime by a third person. We will assume that there may be a degree of coöperation that would not amount to a crime, as where it was held that a purchase of spirituous liquor from an unlicensed vendor

was not a crime in the purchaser although it was in the seller. *Commonwealth* v. *Willard,* 22 Pick. 476. But a conspiracy with an officer or employé of the government or any other for an offence that only he could commit has been held for many years to fall within the conspiracy section, now § 37 of the penal code. *United States* v. *Martin,* 4 Cliff. 156, 164; *United States* v. *Bayer,* 4 Dillon, 407, 410; *United States* v. *Stevens,* 44 Fed. Rep. 132, 140; *State* v. *Huegin,* 110 Wisconsin, 189, 246. So a woman may conspire to procure an abortion upon herself when under the law she could not commit the substantive crime and therefore, it has been held, could not be an accomplice. *The Queen* v. *Whitchurch,* 24 Q. B. D. 420, 422; *Solander* v. *The People,* 2 Colorado, 48, 63; *State* v. *Crofford,* 133 Iowa, 478, 480.

So we think that it would be going too far to say that the defendant could not be guilty in this case. Suppose, for instance, that a professional prostitute, as well able to look out for herself as was the man, should suggest and carry out a journey within the act of 1910 in the hope of blackmailing the man, and should buy the railroad tickets, or should pay the fare from Jersey City to New York, she would be within the letter of the act of 1910 and we see no reason why the act should not be held to apply. We see equally little reason for not treating the preliminary agreement as a conspiracy that the law can reach, if we abandon the illusion that the woman always is the victim. The words of the statute punish the transportation of a woman for the purpose of prostitution even if she were the first to suggest the crime.—The substantive offence might be committed without the woman's consent, for instance, if she were drugged or taken by force. Therefore the decisions that it is impossible to turn the concurrence necessary to effect certain crimes such as bigamy or duelling into a conspiracy to commit them do not apply.

Judgment reversed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

MR. JUSTICE LAMAR, with whom MR. JUSTICE DAY concurs, dissenting.

I dissent from the conclusion that a woman can be guilty of conspiring to have herself unlawfully transported in interstate commerce for purposes of prostitution.

Congress had no power to punish immorality and certainly did not intend by this act of June 25, 1910 (36 Stat. 825) to make fornication or adultery, which was a state misdemeanor, a Federal felony punishable by $5,000 fine and five years' imprisonment. But when it appeared that there was a traffic in women to be used for purposes of prostitution, debauchery and immoral purposes, Congress legislated so as to prohibit their interstate transportation in such vicious business. That there was such traffic in women and girls; that they were "literally slaves," "owned and held as property and chattels," and that their traffickers made large profits, is set out at length in the Reports of the House and Senate Committees (61st Congress, 2d Session) recommending the passage of the bill. So that an argument based on the use of the words "slave," "enslaved," "traffic in women," "business in women," "subject of transportation" and the like,—which might otherwise appear to be strained,—is amply justified by the amazing facts which those reports show as to the existence and extent of the business and the profits made by the traffickers in women. The argument based on the use of these words, and what they imply, is further justified by the fact that the statute itself declares (§ 8) that it shall be known as the "White Slave Traffic Act." In giving itself such a title the statute specifically indicates that, while of right, woman is not an object of merchandise or traffic, yet for gain she has by

some been wrongfully made such for purposes of prostitution—and that trade Congress intended to bar from interstate commerce.

The Act either applies to women who are willingly transported or it does not. If it does not apply to those who willingly go (47 H. R. 61st Cong. 2d Session, p. 10) then there was no offence by the man who transported her or in the woman who voluntarily went,—and, in that event there was, of course, no conspiracy against the laws of the United States in her agreeing to go. The indictment here, however, assumes that the Act applies not only to those who are induced to go, but also to those who aid the panderer in securing their own transportation. On that assumption, every woman transported for the purposes of the business stands on the same footing and cannot by her consent change her legal status. And if she cannot be directly punished for being transported, she cannot be indirectly punished by calling her assistance in the transportation a conspiracy to violate the laws of the United States. For if she is within the circle of the statute's protection she cannot be taken out of that circle by the law of conspiracy and thus be subjected to punishment because she agreed to go.

The statute does not deal with the offence of fornication and adultery, but treats the woman who is transported for use in the business of prostitution as a victim—often a willing victim but nevertheless a victim. It treats her as enslaved and seeks to guard her against herself as well as against her slaver; against the wiles and threats, the compulsion and inducements, of those who treat her as though she was merchandise and a subject of interstate transportation. The woman, whether coerced or induced, whether willingly or unwillingly transported for purposes of prostitution, debauchery and immorality, is regarded as the victim of the trafficker and she cannot therefore be punished for being enslaved nor for consenting and agree-

ing to be transported by him for purposes of such business. To hold otherwise would make the law of conspiracy a sword with which to punish those whom the Traffic Act was intended to protect.

The fact that prostitutes and others have used this statute as a means by which to levy blackmail may furnish a reason why that should be made a Federal offence, so that she and they can be punished for blackmail or malicious prosecution. But those evils are not to be remedied by extending the law of conspiracy so as to treat the enslaved subject of transportation as a guilty actor in her own transportation; and then punish her because she agreed with her slaver to be shipped in interstate commerce for purposes of prostitution. Such a construction would make every willing victim indictable for conspiracy. Even that elastic offence cannot be extended to cover such a case.

There are no decisions dealing directly with the question as to whether a woman assisting in her own illegal transportation can be prosecuted for conspiracy. There are, however, a number of authorities dealing with somewhat analogous subjects. For example, in prosecutions for abortion "the woman does not stand legally in the situation of an accomplice, for although she no doubt participated in the immoral offence imputed to the defendant, she could not have been indicted for the offence. The law regards her as the victim rather than the perpetrator." *Dunn* v. *People*, 29 N. Y. 523; *Commonwealth* v. *Wood*, 11 Gray, 85; *State* v. *Hyer*, 39 N. J. Law, 598; *State* v. *Murphy*, 27 N. J. Law, 112, 114; *Commonwealth* v. *Follansbee*, 155 Massachusetts, 274; *State* v. *Owens*, 22 Minnesota, 238, 244; *Watson* v. *State*, 9 Tex. App. 237; *Keller* v. *State*, 102 Georgia, 506, 510 (seduction). *Contra* apparently in England and Colorado. *Queen* v. *Whitchurch*, 24 Q. B. D. 420; *Solander* v. *People*, 2 Colorado, 48. So, too, a person who knowingly purchases liquor from one

unauthorized to sell it is not guilty of a criminal offence and is not an accomplice. *State* v. *Teahan*, 50 Connecticut, 92, 100; *Commonwealth* v. *Pilsbury*, 12 Gray, 127; *People* v. *Smith*, 28 Hun, 626; affirmed on opinion below, 92 N. Y. 665; *State* v. *Baden*, 37 Minnesota, 212.

Where the purchaser of liquor sold in violation of law was prosecuted for inducing the seller to commit a crime, the court said:

"Every sale implies a purchaser; there must be a purchaser as well as a seller, and this must have been known and understood by the legislature. Now, if it were intended that the purchaser should be subject to any penalty, it is to be presumed, that it would have been declared in the statute, either by imposing a penalty on the buyer in terms, or by extending the penal consequences of the prohibited act, to all persons aiding, counselling or encouraging the principal offender. There being no such provision in the statute, there is a strong implication, that none such was intended by the legislature." *Commonwealth* v. *Willard*, 22 Pick. 479. *United States* v. *Dietrich*, 126 Fed. Rep. 667, though not directly in point sheds light on the subject. There two persons were indicted under Rev. Stat. 5440 for conspiring to violate that law of the United States (Rev. Stat. 1781) which makes it a criminal offence to agree to give or to receive a bribe. The court held that agreeing to give or receive a bribe was the substantive offence and not a conspiracy. For when an offence, as bigamy or adultery, requires for its completion the concurrence of two persons, "the Government cannot evade the limitations by indicting as for a conspiracy."

And in *Queen* v. *Tyrrell*, 1 Q. B. 711 (1894), where a girl under 15 years of age was prosecuted for inciting a man to commit adultery with her, one of the judges considered that she could not be found guilty because she was under the age of consent, and the other said that the statute did not apply because "there is no trace in the

statute of any intention to treat the woman or girl as criminal."

Applying these cases, it appears that under the White Slave Traffic Act there must be a woman who is transported and a person who compels or induces her to be transported or who aids her in such transportation. "There is no trace in the statute of any intention to treat the women or girls as criminals" for being transported, nor for agreeing that they will be transported, nor for aiding in the transportation. And if, as said in *Commonwealth* v. *Willard,* 22 Pick. 479, Congress had intended that they should be subject to indictment for conspiracy "*it would have so declared by extending the penal consequences of the prohibited act to all persons aiding, counselling or encouraging the principal offender.* There being no such provision in the statute, there is a strong implication that none such was intended by the legislature."

To this may be added the practical consideration, that any construction making the woman liable for participation in the transportation will not only tend to prevent her from coming forward with her evidence, but in many instances she will be in position to claim her privilege and can refuse to testify on the ground that she might thereby subject herself to prosecution for conspiracy in that she aided in the violation of the law, even though it was intended for the protection of her unfortunate class.

The woman, whether treated as the willing or an unwilling victim of such transportation for such business purpose, cannot be found guilty of the main offence nor punished for the incidental act of conspiring to be enslaved and transported. Indeed, if she could be so punished for conspiring with her slaver, the fundamental idea that makes the act valid would be destroyed. She would cease to be an object of traffic; and instead of being the subject of illegal transportation would—not be transported by a slaver as an object of interstate commerce,

so as to be subject to regulative prohibitions under the Commerce Clause—but would be voluntarily traveling on her own account, and punishable by the laws of the State for prostitution practiced after her arrival.

I am authorized to say that MR. JUSTICE DAY concurs in this dissent.

WILMINGTON TRANSPORTATION COMPANY *v.* RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 369. Argued December 15, 16, 1914.—Decided February 1, 1915.

The mere existence of Federal power does not, while dormant, preclude the reasonable exercise of state authority as to those matters of interstate or foreign commerce which are distinctly local in character in order to meet the needs of suitable local protection until Congress does act.

Congress may regulate interstate transportation by ferry as well as other interstate commercial intercourse; but, until it does, a State may prevent unreasonable charges for ferriage from a point of departure within its borders.

A State may, in the absence of any action by Congress, prevent through proper orders of its Railroad Commission exorbitant charges for transportation having both origin and termination within the State and none of it being within any other State although a part of it may be over the high seas.

166 California, 741, affirmed.

THE facts, which involve the power of the State Railroad Commission of California to regulate rates of trans-

portation between intrastate points where part of the transportation is on the high seas, are stated in the opinion.

Mr. Edward E. Bacon, with whom *Mr. James A. Gibson* was on the brief, for plaintiff in error.

Mr. Max Thelen, with whom *Mr. Douglas Brookman* and *Mr. Allan P. Matthew* were on the brief, for defendant in error.

Mr. Justice Hughes delivered the opinion of the court.

The Wilmington Transportation Company, a corporation organized under the laws of the State of California, is engaged as a common carrier of passengers and goods by sea, between San Pedro, on the mainland, and Avalon, on Santa Catalina Island, both places being within the County of Los Angeles in that State. Merchants at Avalon, insisting that the rates charged for this transportation were unreasonable, presented their complaint to the Railroad Commission of the State of California and asked that reasonable rates be fixed under the Public Utilities Act of 1911. Stats. (Cal.) 1911, Ex. Sess., p. 18. The Transportation Company challenged the authority of the Commission upon the ground that the business was subject exclusively to the regulating power of Congress. The Commission overruled the contention and its authority to prescribe reasonable rates between these ports of the State was sustained on writ of review by the state court. 166 California, 741. The case has been brought here on error.

The vessels of the plaintiff in error, in their direct passage between the ports named, must traverse the high seas for upwards of twenty miles. Adopting the statement of the Commission, the Supreme Court of the State puts the case thus: 'They do not touch at any other port,

either of the United States or of any foreign country. They do not transfer their passengers or freight to any other vessel in their course. They do not on the voyage take on or put off any article of commerce. While a portion of the voyage is on the high seas, the navigation thereof is merely incidental to the real purpose of the voyage, which is to ply between two ports, both of which are located in the same county in this State.'

Relying upon *Lord* v. *Steamship Co.*, 102 U. S. 541, the plaintiff in error contends that transportation over the high seas is 'commerce with foreign nations' in the constitutional sense. (See *Lehigh Valley R. R.* v. *Pennsylvania*, 145 U. S. 192, 203; *The Abby Dodge*, 223 U. S. 166, 176.) But if it be assumed for the present purpose that the power of Congress extends to the subject of this controversy, the fact remains that the power has not been exercised. The provisions of the Federal statutes relating to vessels do not go so far, and the Interstate Commerce Commission has not been authorized to prescribe rates for water transportation unconnected with transportation by railroad. 36 Stat. 539, 545. In this aspect, the question is whether the mere existence of the Federal power, that is, while it is dormant, precludes the exercise of state authority to prevent exorbitant charges with respect to this traffic which has its origin and destination within the limits of the State.

It is urged that the fixing of rates is a regulation of the commerce involved, and hence of necessity is repugnant to the Federal authority, although the latter be unexercised. This proposition, however, as has frequently been pointed out, is too broadly asserted if no regard be had to the differences in the subjects which, by virtue of the Commerce Clause, are within the control of Congress. Thus, vessels engaged in foreign commerce have been compelled to submit to state requirements as to pilotage and quarantine since the foundation of the Gov-

ernment, although it could not be denied that these requirements were regulations which Congress could at any time displace. *Cooley* v. *Board of Wardens*, 12 How. 299, 317, 319; *Ex parte McNiel*, 13 Wall. 236, 240; *Wilson* v. *McNamee*, 102 U. S. 572; *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187, 195; *Morgan S. S. Co.* v. *Louisiana*, 118 U. S. 455, 465; *Compagnie Francaise* v. *Board of Health*, 186 U. S. 380, 387. In these cases, it was apparent that the subject was of a local nature admitting of diversity of treatment according to local necessities, and it could not be supposed that it was the intention to deny to the States the exercise of their protective power, in the absence of Federal action. It is not necessarily determinative that the vessels in the course of the transportation in question pass beyond the boundary of the State. See *The Hamilton*, 207 U. S. 398, 405. In the case of ferries over boundary waters, it has always been recognized that ferriage from the shore of a State is peculiarly a matter of local concern and, while undoubtedly Congress may regulate interstate transportation by ferry as well as other interstate commercial intercourse, still, because of the nature of the transportation and the local exigency, a State in the absence of Federal regulation may prevent unreasonable charges for carriage by ferry from a point of departure within its borders. *Port Richmond Ferry* v. *Hudson County*, 234 U. S. 317, 332; *Sault Ste. Marie* v. *International Transit Co.*, 234 U. S. 333, 342. The rule which the plaintiff in error invokes is not an arbitrary rule, with arbitrary exceptions, but is one that has its basis in a rational construction of the Commerce Clause. As repeatedly stated, it denies authority to the States in all cases where the subject is of such a nature as to demand that, if regulated at all, its regulation should be through a general or national system, and that it should be free from restraint or direct burdens save as it is constitutionally governed by Congress; and on the other hand, as to those matters which

are distinctively local in character although embraced within the Federal authority, the rule recognizes the propriety of the reasonable exercise of the power of the States, in order to meet the needs of suitable local protection, until Congress intervenes. *Cooley* v. *Board of Wardens, supra; Ex parte McNiel, supra; Welton* v. *Missouri,* 91 U. S. 275, 280; *County of Mobile* v. *Kimball,* 102 U. S. 691, 697; *Gloucester Ferry* v. *Pennsylvania,* 114 U. S. 196, 204; *Bowman* v. *Chicago &c. Ry.,* 125 U. S. 465, 481; *Minnesota Rate Cases,* 230 U. S. 352, 399–403; *Port Richmond Ferry* v. *Hudson County, supra.*

It was by the application of these principles that it was decided that a State could not prescribe rates for interstate railroad transportation, even with respect to that portion of the route which was within its own territory. As was said by Mr. Justice Miller, in delivering the opinion of the court upon this question (*Wabash &c. Ry.* v. *Illinois,* 118 U. S. 557, 577), after recognizing the authority of the State to prescribe intrastate rates: "But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said." And the same conclusion has been reached with respect to the fixing of rates for railroad transportation which, while beginning and ending in the same State, passes through the territory of another State. The regulation of such rates cannot be 'split up' according to the jurisdiction of the respective States

over the track; there must be one rate fixed by one authority. *Hanley* v. *Kansas City Southern Ry.*, 187 U. S. 617, 620.

We are not here dealing with the case of property which is in course of continuous transportation to another State or to a foreign country. *The Daniel Ball*, 10 Wall. 557; *Ohio Railroad Commission* v. *Worthington, Receiver*, 225 U. S. 101; *Texas & N. O. R. R.* v. *Sabine Tram Co.*, 227 U. S. 111, 124; *Railroad Commission* v. *Texas & Pacific Ry.*, 229 U. S. 336. It must be assumed upon this record that the State claims the right to exercise its authority only as to transportation between the mainland and the island, and solely with respect to such shipments over this route as are local to the State, both as to the beginning and the end of the transportation. There is no passage through the territory of another State; the transportation, in its entire course, is subject to a single authority—either that of Congress or that of the State—and the latter would yield to the exercise of the former. The sovereignty of no other jurisdiction is encountered. It is plainly of importance to the people of the State that this local traffic should be carried upon reasonable terms; and if, in the case of a ferry, a State may protect its people from extortion although the ferriage is to the shore of another State, there is in our judgment no ground for saying that where the transportation is between two places in the same State it is less a subject for local action, in the absence of Federal interposition, because the voyage is over a stretch of open sea. Congress has not attempted to intervene, and we find no basis for the conclusion that the subject is one which must be deemed to be wholly free from regulation unless Congress deals with it. On the contrary, it is precisely of that local character which permits it to be left appropriately to the care of the State.

A different conclusion was reached at Circuit in *Pacific Coast Steamship Co.* v. *Railroad Commissioners*, 18 Fed.

Rep. 10, but for the reasons stated, we are unable to agree with it. The judgment of the Supreme Court of California is affirmed.

Judgment affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* FUENTES ET AL., CONSTITUTING THE RAILROAD COMMISSION OF LOUISIANA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 423. Argued January 8, 1915.—Decided February 1, 1915.

The switching of empty cars to and from a connection with an interstate railroad to a side track within the terminal of another railroad, for the purpose of being there loaded with goods intended for interstate commerce, constitutes a part of interstate commerce, the regulation of which Congress has undertaken, and any order of a state commission regulating such switching transcends the limits of its power.

When freight actually starts in the course of transportation from one State to another it becomes a part of interstate commerce; and it is the essential nature of the movement and not the form of the bill of lading that determines the character of the commerce involved.

Order 295 of the Louisiana Railroad Commission, relative to switching of cars between connecting carriers and requiring carriers to conform to rates established by the Commission as to cars shipped in or out of the State, *held* unconstitutional as a burden upon, and an attempt to regulate, interstate commerce.

THE facts, which involve the constitutionality under the Commerce Clause of the Federal Constitution of orders made by the State Railroad Commission of Louisiana relative to switching of cars as applied to cars used in interstate commerce, are stated in the opinion.

Mr. Blewett Lee, with whom *Mr. Robert V. Fletcher*, *Mr. Hunter C. Leake* and *Mr. Gustave Lemle* were on the brief, for appellant:

The District Court had jurisdiction.

A switching movement, whereby interstate freight is delivered or an interstate movement is originated, is itself a movement in interstate commerce.

The order, since it deals with interstate commerce, is invalid as encroaching upon the exclusive authority of Congress.

This order cannot be construed as applying only to intrastate commerce, and thereby saved from invalidity.

The order if affecting interstate commerce is invalid not only on Federal grounds but because it violates the Constitution of Louisiana.

The decision of the court below was based on *Grand Trunk Ry.* v. *Michigan R. R. Commission*, 231 U. S. 457.

The effect of the order of the Commission is to deprive the appellant of its property without due process of law.

In support of these contentions, see *Tex. & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Adams* v. *Vicksburg Ry.*, 29 I. C. C. 52; *Allen* v. *Pullman Co.*, 191 U. S. 171; *Chicago, R. I. & P. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Employers' Liability Cases*, 207 U. S. 463; *Goodman* v. *Heilig*, 157 N. Car. 6; *Gulf, C. & S. F. R. R.* v. *Texas*, 204 U. S. 403; *Gulf, C. & S. F. R. R.* v. *Texas*, 72 Texas, 404; *Hampton* v. *St. L., I. M. & S. R.*, 227 U. S. 456; *Ill. Cent. R. R.* v. *McKendree*, 203 U. S. 514; *Leloup* v. *Mobile*, 127 U. S. 640; *Louis. & Nash. R. R.* v. *Central Stock Yards*, 212 U. S. 132; *McNeill* v. *Southern Ry.*, 202 U. S. 545; *Mich. Cent. R. R.* v. *Powers*, 201 U. S. 245; *Minnesota Rate Cases*, 230 U. S. 352; *Ohio R. R. Comm.* v. *Worthington*, 225 U. S. 101; *Oliver* v. *Chi., R. I. & P. R. R.*, 89 Arkansas, 466; *Peoples &c. Co.* v. *Grand Trunk R. R.*, 27 I. C. C. 24; *R. R. Comm.* v. *Tex. & Pac. R. R.*, 229 U. S. 336; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Rhodes* v. *Iowa*, 170 U. S. 412; *Smyth* v. *Ames*, 169 U. S. 466; *Southern Pacific T. Co.* v. *Int. Com. Comm.*,

219 U. S. 498; *State* v. *Mo. Pac. Ry.*, 212 Missouri, 658; *In re Detroit Switching Charges*, 28 I. C. C. 494; *Texas & N. O. R. R.* v. *Sabine Tram Co.*, 227 U. S. 111; *Trade Mark Cases*, 100 U. S. 82; *United States* v. *Ju Toy*, 198 U. S. 253; *United States* v. *Reese*, 92 U. S. 214; *United States* v. *Union Stock Yards*, 226 U. S. 286; *Waverly Oil Works* v. *Penna. R. R.*, 28 I. C. C. 621; *Worden* v. *Cole*, 74 Kansas, 226; *Ex parte Young*, 209 U. S. 123.

Mr. Wylie M. Barrow, with whom *Mr. Ruffin G. Pleasant*, Attorney General of the State of Louisiana, was on the brief, for appellees:

The Railroad Commission of Louisiana has power and authority to adopt Order No. 295. The laws of the State require railroads operating in Louisiana to perform the service.

The order was directed against all railroads operating in the State.

The order does not deprive appellant of its liberty to contract, nor of its property without due process of law, nor does it deny it the equal protection of the laws, in violation of the Fourteenth Amendment.

There is no encroachment upon the Federal exercise of power by the order of the Commission, which prescribes a reasonable regulation in aid of commerce and which prevents unjust discrimination in intracity switching.

The order of the Commission does not require the railroad company to give the use of its terminals to its connections.

The regulating power of the Commission extends over the carrier and all of its appurtenances.

When a railroad company declines a switch for its connections, or for shippers, between points on its terminals, on equal terms, at reasonable rates, it unjustly discriminates.

The order of the Commission, being in aid of com-

merce, does not conflict with the Act to Regulate Commerce.

The Commission's order prevents unjust discrimination in the switching of cars.

Appellant has opened its terminals and switches cars between points in the city of New Orleans for some; it should not be allowed to deny similar service to all who apply.

In support of these contentions, see Act to Regulate Commerce, § 3; *Atchison, T. & S. F. R.* v. *Denver R. R.*, 110 U. S. 701; *Atlantic Coast Line* v. *North Carolina Corp. Com.*, 206 U. S. 1; *Brown* v. *Houston*, 114 U. S. 622; *Chicago, M. & St. P. Ry.* v. *Iowa*, 233 U. S. 334; *Coe* v. *Errol*, 116 U. S. 517; Constitution of the State of Louisiana, Arts. 263–286; *Grand Trunk Ry.* v. *Michigan*, 231 U. S. 457; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82; *Dixon* v. *Central of Ga.*, 110 Georgia, 173; 35 S. E. Rep. 369; *Gulf & Santa Fe Ry.* v. *Texas*, 204 U. S. 403; *Hampton* v. *St. L., I. M. & S. Ry.*, 227 U. S. 456; *Louis. & Nash. R. R.* v. *Higdon*, 234 U. S. 592; *Louis. & Nash. R. R.* v. *Kentucky*, 161 U. S. 677; *McNeil* v. *Southern Ry.*, 202 U. S. 543; *Merchants' Assn.* v. *Penna. R. R.*, 23 I. C. C. 474; *Minnesota Rate Cases*, 230 U. S. 352; *M. L. &c. S. S. Co.* v. *R. R. Comm. of La.*, 109 Louisiana, 247; *Same* v. *Same*, 127 Louisiana, 636; *Mo. Pac. Ry.* v. *Larabee Mills*, 211 U. S. 612; *Mobile County* v. *Kimball*, 102 U. S. 586; *Penna. R. R.* v. *Knight*, 192 U. S. 27; *Pittsburg Coal Co.* v. *Bates*, 156 U. S. 577; *R. R. Comm. of La.* v. *Cumberland Tel. Co.*, 212 U. S. 414; *R. R. Comm. of La.* v. *K. C. S. Ry.*, 111 Louisiana, 33; *Cumberland Tel. Co.* v. *Tex. & Pac. Ry.*, 52 La. Ann. 1850; *Iowa* v. *C., M. & St. P. R.*, 33 Fed. Rep. 391; *St. L., S. &c. R. R.* v. *Peoria &c. Ry.*, 26 I. C. C. 226; *Tex. & Pac. Ry.* v. *R. R. Comm. of La.*, 192 Fed. Rep. 280; *S. C.*, 232 U. S. 338; *Thompson* v. *R. R. Comm. of La.*, 198 Fed. Rep. 691; *Wisconsin* v. *Jacobson*, 179 U. S. 287.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

After a full hearing and investigation the Railroad Commission of Louisiana, on August 8, 1903, promulgated the following, known as Order No. 295:

"No railroad company operating in the State of Louisiana shall refuse or decline to switch cars for any other railroad with which it connects or any shipper, or consignee, at rates approved or established by the Commission, whether such cars are to be loaded with freight to be shipped out of the State, or are loaded with freight shipped into the State. All tariffs for the 'service' of switching cars in the State of Louisiana, shall be filed with the Commission, within thirty days from the date of this order, and all the Commission's rules and orders relative to rates and changes in rates, will also apply to switching charges."

By a proceeding against the members of the commission, commenced in the United States Circuit Court, Eastern District of Louisiana, February 10, 1904, the appellant, a common carrier of freight and passengers operating lines in Louisiana, attacked the validity of this order upon the ground that it is an unlawful attempt to regulate interstate commerce and for other reasons, and prayed that defendants be restrained from enforcing it. Shortly thereafter a temporary injunction was granted to remain effective pending the cause or until otherwise directed; and on October 6, 1904, defendants answered denying all the alleged equities. The record discloses no further action by either party until April, 1913, when a rather meagre and unsatisfactory agreed statement of facts was filed. The trial court dismissed the bill without prejudice —January, 1914,—saying that the questions involved had been indirectly decided by this court in *Grand Trunk Ry.* v. *Michigan Railroad Commission*, 231 U. S. 457.

From this decree a direct appeal was taken and a supersedeas was allowed.

The extraordinary delay in bringing the cause to final hearing is not explained; and in the circumstances we deem it quite sufficient briefly to indicate and decide the controlling question.

With the consent of the proper local authorities appellant constructed and now operates at New Orleans extensive terminals including switch and side tracks, warehouses and yards. These are essential to the proper conduct of its large interstate and foreign business; and when it brings freight there the cars are placed on its various switch tracks to be unloaded by the consignees. At New Orleans physical connections exist between appellant's tracks and the lines of competitive railroads leading therefrom to many States; if Order No. 295 is enforced its switch tracks will be subjected to use by such railroads; more cars will pass over them; and its power to comply with obligations to patrons will be hindered. Together with the various railroads appellant has published and now has in effect terminal tariffs covering switching; these include no rates for transporting freight to or from the city "but simply cover the charges made for switching cars from the depot or yard of one railroad company to points on its terminals." Upon orders of the consignees certain switch movements are made entirely within the switching limits of the city between points one or both of which may be located upon the terminals of the Illinois Central, and for these charges are made varying according to distance with an addition of three dollars per car for rental. When a car loaded with interstate freight arrives at New Orleans the consignee is first notified that the contents are ready for delivery at the carrier's depot or warehouse. After calling and paying the charges he gives to the agent of the railroad transporting the shipment an order directing that the cars be switched and

placed on some terminal or industrial track for delivery. This order is then submitted to the Illinois Central Railroad and in due course is executed by it.

From the foregoing summary of the facts stipulated it fairly appears that obedience to Order No. 295 would require appellant, upon demand of a carrier or shipper and on terms fixed by the State Commission, to switch empty cars from any connection with a competing interstate railroad to a designated side track within its own terminals for the purpose of being loaded there with goods intended for interstate commerce, and when so loaded to move the same back to the competitor's line for continued transportation to another State. Likewise appellant would be required to accept from competing interstate lines at points within the city loaded cars brought from other States and place them on its own side track, although such track was the real destination contemplated at the time of the original shipment. Switching movements of this kind (we do not now inquire as to others) constitute a part of interstate commerce the regulation of which Congress has undertaken, and consequently the order of the State Commission transcends the limits of its powers.

When freight actually starts in the course of transportation from one State to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. And generally when this interstate character has been acquired it continues at least until the load reaches the point where the parties originally intended that the movement should finally end. *McNeill* v. *Southern Railway*, 202 U. S. 543, 559; *Southern Pacific Terminal* v. *Interstate Commerce Commission*, 219 U. S. 498, 527; *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101, 110; *Texas & New Orleans Railroad* v. *Sabine Tram Co.*, 227 U. S. 111, 126; *Louisiana Railroad Commission* v. *Tex. & Pac. Ry.*, 229 U. S. 336, 341.

The contention for appellees that switching cars at junctions and terminals "is only interstate commerce when performed as a part of the interstate movement on a through rate or bill of lading under tariff authority" is contrary to the doctrine established by opinions of this court in the cases cited above. We cannot undertake as suggested to dissect the contested order and point out whether any part of it constitutes "a workable scheme for the regulation of intrastate traffic." Problems relating alone to commerce wholly within the State must be left to the discretion of the State Commission to be exercised upon a view of all existing, relevant facts and circumstances.

The present controversy is not controlled by *Grand Trunk Ry.* v. *Michigan Railroad Commission, supra.* The issues in the two cases are essentially different. There the attack was upon an order of the State Commission "suspensory only of the tariff of the appellants, not a final determination against it or of the conditions which might or might not justify it," and the question was "whether, under the statutes of the State of Michigan, appellants can be compelled to use the tracks it owns and operates in the city of Detroit for the interchange of intrastate traffic." The movement actually regulated was held to be intrastate commerce. It took place within Detroit but between points sufficiently far apart to constitute genuine transportation; and, treating it as a local matter, the Railway Company had applied special tariffs thereto until withdrawn because of disagreement with shippers and commission.

The original bill should have been sustained and a permanent injunction awarded. The decree below is accordingly reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

D. R. WILDER MANUFACTURING COMPANY *v.* CORN PRODUCTS REFINING COMPANY.

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

No. 71. Argued November 9, 1914.—Decided February 23, 1915.

Where the pleading of the plaintiff in error demurred to justified the inference that the transaction alleged to be in violation of the Anti-Trust Act was interstate, the court may assume that such was the case, and, if the decision turns on the construction of the act, a Federal question is involved.

The general rule is that one who has dealt with a corporation as an existing concern having capacity to sell, cannot assert, or escape liability, on the ground that such concern has no legal existence because it is an unlawful combination in violation of the Anti-Trust Act. Such a defense is a mere collateral attack on the organization of the corporation which cannot lawfully be made. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Courts may not refuse to enforce an otherwise legal contract because it might afford some indirect benefit to a wrongdoer.

The contract in this case *held* not to be intrinsically illegal because the seller agreed to give a portion of its profits to the purchaser of goods provided such purchaser dealt exclusively with the seller for a specified period and also bought the goods exclusively for purchaser's own use; and also *held* that such contract was not illegal under the Anti-Trust Act. *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227, distinguished.

The Anti-Trust Act is founded on broad conceptions of public policy and its prohibitions were enacted not only to prevent injury to the individual but harm to the general public, and its prohibitions and the remedies it provides are co-extensive with such conceptions.

Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or remedy given can be only that which the statute prescribes.

The power given by the Anti-Trust Act to the Attorney General to dissolve a corporation or combination as violative of that act is inconsistent with the right of an individual to assert as a defense to a

contract on which he is otherwise legally liable that the other party has no legal existence in contemplation of that act.

In *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227, the contract involved was not held illegal because a party thereto was an illegal combination under the Anti-Trust Act, but upon elements of illegality inhering in the contract itself. In this case, *held* that a party cannot assert as a defense to a suit for money otherwise due under a contract, not inherently illegal, the fact that the party otherwise admittedly entitled to recover is an illegal combination under the Anti-Trust Act.

11 Ga. App. 588, affirmed.

THE facts, which involve the construction of the Federal Anti-Trust Act, and the effect of a profit sharing contract of a corporation and those dealing with it exclusively and the right of the corporation to recover for goods sold, are stated in the opinion.

Mr. Marion Smith for plaintiff in error:

The answer shows defendant in error to be a combination in restraint of interstate trade in violation of the Federal statute; the combination merged into one corporation various firms and corporations which previously had been competitors, for the purpose, and with the effect, of restraining and monopolizing such interstate trade. The creation of a monopoly is sufficient to make the restraint unreasonable. *Am. Tobacco Co.* v. *United States*, 221 U. S. 106; *Standard Oil Co.* v. *United States*, 221 U. S. 1.

The corporate organization of the defendant in error cannot be used as a cloak to cover the fact that it constitutes an illegal combination. *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Am. Tobacco Co.* v. *United States*, and *Standard Oil Co.* v. *United States*, *supra*.

A recovery cannot be had upon an account for goods sold and delivered by such illegal combination when the goods were sold with direct reference to and in execution of agreements which had for their object and which had directly as their effect the accomplishment of the illegal

ends for which the combination was organized. *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227.

It is not necessary to show that the contracts under which the goods were sold are expressly violative of the Federal statute. The illegal intent with which the contracts were made is sufficient to make illegal contracts which appear on their face as no more than ordinary acts of competition. *Nash* v. *United States*, 229 U. S. 373; *Swift* v. *United States*, 196 U. S. 375; *Loewe* v. *Lawlor*, 208 U. S. 274.

A contract of purchase by an illegal combination which together with other similar contracts tends to create a monopoly is void and unenforceable even though the other party to the contract is ignorant of its purpose in this respect. *Brent* v. *Gay*, 149 Kentucky, 615.

A contract, which though apparently harmless in itself, is in reality a part of a general scheme to violate statutes against the restraint of trade, will be held to be illegal. *Continental Wall Paper Co.* v. *Voight, supra; Cravens* v. *Carter*, 92 Fed. Rep. 479; *Pacific Factor Co.* v. *Adler*, 90 California, 110; *Fink* v. *Schneider Granite Co.*, 187 Missouri, 244; *Detroit Salt Co.* v. *National Salt Co.*, 134 Michigan, 120.

A contract is illegal where, though harmless on its face, it is one of many similar contracts which collectively have the direct effect of aiding an illegal purpose of restraining interstate trade. *United Shoe Machinery Co.* v. *LaChapelle*, 212 Massachusetts, 467.

The scheme must be treated as an entirety. *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Swift* v. *United States*, 196 U. S. 375; *Montague* v. *Lowry*, 193 U. S. 38; *Loewe* v. *Lawlor*, 208 U. S. 274.

Illegality may consist in the purpose to accomplish an illegal result though the methods used are not inherently unlawful. *Hanauer* v. *Doane*, 12 Wall. 342; *Kohn* v. *Melcher*, 43 Fed. Rep. 641; *Mogul Steamship Co.* v. *Mc-*

Gregor, L. R. 61; Q. B. Div. 285; [1892] A. C. 25; Clark on Contracts, 478 *et seq.*

Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. *Hall* v. *Coppell*, 7 Wall. 542; *Armstrong* v. *Toler*, 11 Wheat. 258; *Embrey* v. *Jemison*, 131 U. S. 336.

One of the parties cannot maintain an action on the valid part of the contract discarding or omitting to prove the portion that is illegal. *McMullin* v. *Hoffman*, 174 U. S. 639.

Under the *Continental Wall Paper Co. Case* when the sales are made under and with reference to an illegal agreement, and the plaintiff sues on the sales, the defendant may thereupon plead the illegal agreement of which the sales are a part. See also: *Oscanyan* v. *Winchester Arms Co.*, 103 U. S. 261.

The cases relied upon by the defendant in error can be distinguished from the case at bar. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, which is especially stressed by the defendant in error, decided only that an illegal combination was not by reason alone of its illegal character prevented from collecting for goods sold.

If any of the cases urged by the defendant in error go to the extent of holding that this is not sufficient to make the agreement illegal, they are in conflict with the decisions of this court. *Nash* v. *United States*, 229 U. S. 373; *Swift* v. *United States*, 196 U. S. 375; *Loewe* v. *Lawlor*, 208 U. S. 274. *Bank* v. *Glass*, 169 Mo. App. 374, is not in point, nor is *Bessire* v. *Corn Products Co.*, 47 Ind. App. 313.

There is nothing to distinguish this case from the *Continental Wall Paper Co. Case*, and the decision then rendered is controlling.

Mr. James W. Austin and *Mr. Preston Davie*, with whom *Mr. Morgan J. O'Brien*, *Mr. Albert B. Boardman*

and *Mr. Young B. Smith* were on the brief, for defendant in error.

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

We refer to the parties, the one as the Manufacturing, and the other as the Refining Company. Sued by the Refining Company in April, 1909, to recover the amount of the price of two lots of glucose or corn syrup which it had bought in January, 1909, and which it had consumed and not paid for, the Manufacturing Company asserted its non-liability on the following grounds which we summarize:

(a) Because the Refining Company had no legal existence as it was a combination composed of all the manufacturers of glucose or corn syrup in the United States, illegally organized with the object of monopolizing all dealings in such products in violation of the Anti-Trust Act of Congress. That having illegally brought into one organization all the manufacturers of glucose or corn syrup, the corporation had unreasonably advanced the price of the products of its manufacture to the injury of the public. (b) That this end being accomplished, the corporation sought to perpetuate its monopoly by rendering it difficult or impossible for competitors to go into the business of producing glucose or corn syrup by devising a so-called profit-sharing scheme, by which it was proposed to give to all those who purchased from the combination a stipulated percentage upon the amount of the purchases made in one year to be paid at the end of the following year provided that during such time they dealt with no one else but the combination. While the sum of the percentage thus offered, it was alleged, varied from year to year, nevertheless it was charged that in substance the contract or offer remained the same. The tender to

the Manufacturing Company of a right to participate in the scheme, it was alleged, was first made in 1907 relative to the business done in 1906 in the form of a letter which is in the margin [1] and this offer or asserted contract was continued from year to year. It was further alleged that the scheme proved successful in accomplishing its wrongful purpose since, although subsequently independent concerns engaged in the business of manufacturing glucose or corn syrup and offered to sell their products at prices less than those charged by the combination, such concerns were virtually driven out of business because those who desired to purchase the products were deterred from buying from them for fear of losing the percentage which they would receive from the combination if all their purchases

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[1] "26 Broadway, New York, March 9, 1907.

"The D. R. Wilder Mfg. Co., Atlanta, Ga.

"Gentlemen: This company recognizing the fact that its own prosperity, in a great measure, is interwoven with the good will and cooperation of its patrons, has decided to adopt a liberal plan of profit-sharing with you, in case you shall in the future continue to give us your exclusive patronage.

"This company inaugurates such a policy of profit-sharing by announcing that it will set aside out of its profits from the manufacture and sale of glucose and grape sugar for the last six months of 1906, an amount equal to ten cents per hundred pounds on all shipments of glucose and grape sugar (Warner's Anhydre and Bread Sugar excepted) which shall have been made to you by this company from July 1st to December 31, 1906.

"This amount will be paid to you or your successors on December 30, 1907, on condition that for the remainder of the year 1906 and the entire year 1907, you or your successors shall have purchased exclusively from this company or its successors all the glucose and grape sugar required for use in your establishment.

"With the assurance of steadfast coöperation of its customers, given in reciprocation for the benefits conferred upon them, this company confidently anticipates a continuance of such profit-sharing distribution annually to the full extent that its earnings may warrant.

"Yours very truly,

"Corn Products Refining Company."

continued to be made from it alone, and moreover because of the dread felt by purchasers that the independents would not be able to resist the overweening and controlling power of the combination. It was moreover alleged that all purchases made by the manufacturing company "contained the following clause in the contract of purchase: 'The goods herein sold are for your own consumption and not for resale.'"

Charging that the condition which made the payment of the proposed profit-sharing percentage depend upon dealing alone with the combination was void and should be disregarded, the answer asked not only that the prayer for judgment for the purchase price be rejected but that treating the failure of the Manufacturing Company to comply with the condition on which the offer of profit sharing was made as immaterial, there should be a judgment for that company for the percentage of profits on the business for the year 1908.

On motion the answer was stricken out as stating no defense. There was a judgment in the absence of further pleading against the Manufacturing Company for the price of the goods, as sued for, and rejecting its claim for the percentage of profits. This judgment was affirmed by the court below (11 Ga. App. 588) and because of an assumed failure to give effect to the Anti-Trust Act of Congress this writ of error was prosecuted.

As the context of the answer clearly justified the inference that the sale of the glucose was an interstate transaction, the court below was right in assuming that to be the case and therefore we put out of view as devoid of merit the contrary suggestion made by the Refining Company.

Having dealt with the Refining Company as an existing concern possessing the capacity to sell, speaking generally the assertion that it had no legal existence because it was an unlawful combination in violation of the Anti-Trust

Act was irrelevant to the question of the liability of the Manufacturing Company to pay for the goods since such defense was a mere collateral attack on the organization of the corporation which could not be lawfully made.[1] Besides, considered from the point of view of the alleged illegality of the corporation, the attack on its existence was absolutely immaterial because the right to enforce the sale did not involve the question of combination, since conceding the illegal existence of the corporation making the sale, the obligation to pay the price was indubitable, and the duty to enforce it not disputable. This is true because the sale and the obligations which arose from it depended upon a distinct contract with reciprocal considerations moving between the parties,—the receipt of the goods on the one hand and the payment of the price on the other. And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so or some remote aid to the accomplishment of a wrong which might possibly result—doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence, especially in view of the express ruling in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, applying them to the identical general question here involved.

The case therefore reduces itself to the question whether the contract of sale was inherently illegal so as to bring it within the also elementary rule that courts will not exert their powers to enforce illegal contracts or to compel wrong-doing. The only suggestion as to the intrinsic illegality of the sale results from the averments of the

[1] *Finch* v. *Ullman*, 105 Missouri, 255; *Taylor* v. *Portsmouth, &c. St. Ry.*, 91 Maine, 193; *Smith* v. *Mayfield*, 163 Illinois, 447; *Detroit City Ry.* v. *Mills*, 85 Michigan, 634; *Mackall* v. *Chesapeake &c. Canal Co.*, 94 U. S. 308; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

answer as to the offer of a percentage of profits upon the condition of dealing exclusively with the Refining Company for the following year and the clause to the effect that the goods were bought by the Manufacturing Company for its own use and not for resale. But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions. In fact it is not so contended in argument since substantially the proposition which is relied upon is that although such stipulations were intrinsically legal, they become illegal as the result of the duty to consider them from the point of view that one of the parties was an illegal combination interested in inserting such conditions as an efficient means of sustaining its continued wrong-doing and therefore giving power to accomplish the baneful and prohibited results of its illegal organization,—a duty which, it is urged, results from reason, is commanded by the Anti-Trust Act and the obligation to enforce its provisions and is required because of a previous decision of this court enforcing that act (*Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227) unless that decision is to be now qualified or overruled.

In the first place, the contention cannot be sustained consistently with reason. It overthrows the general law. It admits the want of power to assail the existence of a corporate combination as a means of avoiding the duty to pay for goods bought from it and concedes at the same time the legality of the condition in the sale and yet proposes by bringing the two together to produce a new and strange result unsupported in any degree by the elements which are brought together to produce it and conflicting with both.

In the second place, the proposition is repugnant to the Anti-Trust Act. Beyond question reëxpressing what was ancient or existing and embodying that which it was deemed wise to newly enact, the Anti-Trust Act was intended in the most comprehensive way to provide

against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce or attempts to monopolize the same. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106. In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute but the remedies which it provided were co-extensive with such conceptions. Thus the statute expressly cast upon the Attorney-General of the United States the responsibility of enforcing its provisions, making it the duty of the district attorneys of the United States in their respective districts under his authority and direction to act concerning any violations of the law. And in addition, evidently contemplating that the official unity of initiative which was thus created to give effect to the statute required a like unity of judicial authority, the statute in express terms vested the Circuit Court of the United States with "jurisdiction to prevent and restrain violations of this act," and besides expressly conferred the amplest discretion in such courts to join such parties as might be deemed necessary and to exert such remedies as would fully accomplish the purposes intended. Act of July 2, 1890, c. 647, 26 Stat. 209.

It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a two-fold reason: First, because of the familiar doctrine that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy

can be only that which the statute prescribes." *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, 35; *Barnet* v. *National Bank*, 98 U. S. 555; *Oates* v. *National Bank*, 100 U. S. 239; *Stephens* v. *Monongahela Bank*, 111 U. S. 197; *Tenn. Coal Co.* v. *George*, 233 U. S. 354, 359; Second, because of the destruction of the powers conferred by the statute and the frustration of the remedies which it creates which would obviously result from admitting the right of an individual as a means of defense to a suit brought against him on his individual and otherwise inherently legal contract to assert that the corporation or combination suing, had no legal existence in contemplation of the Anti-Trust Act. This is apparent since the power given by the statute to the Attorney-General is inconsistent with the existence of the right of an individual to independently act since the purpose of the statute was where a combination or organization was found to be illegally existing to put an end to such illegal existence for all purposes and thus protect the whole public,—an object incompatible with the thought that such a corporation should be treated as legally existing for the purpose of parting with its property by means of a contract of sale and yet be held to be civilly dead for the purpose of recovering the price of such sale and then by a failure to provide against its future exertion of power be recognized as virtually resurrected and in possession of authority to violate the law. And in a two-fold sense these considerations so clearly demonstrate the conflict between the statute and the right now asserted under it as to render it unnecessary to pursue that subject further. In the first place because they show in addition how completely the right claimed would defeat the jurisdiction conferred by the statute on the courts of the United States,—a jurisdiction evidently given, as we have seen, for the purpose of making the relief to be afforded by a finding of illegal existence as broad as would be the necessities resulting

from such finding. In the second place because the possibility of the wrong to be brought about by allowing the property to be obtained under a contract of sale without enforcing the duty to pay for it, not upon the ground of the illegality of the contract of sale but of the illegal organization of the seller, additionally points to the causes which may have operated to confine the right to question the legal existence of a corporation or combination to public authority sanctioned by the sense of public responsibility and not to leave it to individual action prompted it may be by purely selfish motives.

As from these considerations it results not only that there is no support afforded to the proposition that the Anti-Trust Act authorizes the direct or indirect suggestion of the illegal existence of a corporation as a means of defense to a suit brought by such corporation on an otherwise inherently legal and enforceable contract, but on the contrary that the provisions of the act add cogency to the principles of general law on the subject and therefore make more imperative the duty not directly or indirectly to permit such a defense to a suit to enforce such a contract, we put that subject out of view and come to the only remaining inquiry, the alleged effect of the previous ruling in the *Continental Wall Paper Case*, *supra*.

It is to be observed in considering that contention that the general rule of law which we have stated is not apparently questioned in the argument and the controlling influence of the ruling in the *Connolly Case*, *supra*, if here applicable is not denied, but the contention is that the general law is not applicable and the *Connolly Case* is inapposite because of an exception which was engrafted upon the general law by the ruling in the *Continental Wall Paper Case* under which it is said this case comes. While it clearly appears that this is the contention, it is difficult to precisely fix the ground upon which it is rested. But as the rule of general law which under ordinary cir-

cumstances does not permit the existence of a corporation to be indirectly attacked is not assailed, and as it is not asserted that irrespective of the illegal organization of the corporation, the contract of sale was inherently unlawful, it follows that the proposition is the one which we have already in another aspect disposed of, that is, that the sale and its conditions although inherently legal become illegal by considering the illegal corporation and the aid to be afforded to its wrongful purposes by the conditions which formed a part of the sale. But in substance this only assumes that it was held in the *Continental Wall Paper Case* that that which was inherently legal can be rendered illegal by considering in connection with it something which there is no right to consider at all. But it is apparent on the face of the opinion in the *Continental Wall Paper Case* that it affords no ground for the extreme and contradictory conclusion thus deduced from it since the ruling in that case was based not upon any supposed right to import into a legal and valid contract elements of wrong which there was no right to consider, but was rested exclusively upon elements of illegality inhering in the particular contract of sale in that case which elements of illegality may be thus summarized: (a) the relations of the contracting parties to the goods sold, (b) the want of real ownership in the seller, (c) the peculiar obligations which were imposed upon the buyer, and (d) the fact that to allow the nominal seller to enforce the payment of the price would have been in and of itself directly to sanction and give effect to a violation of the Anti-Trust Act inhering in the sale. It is not necessary to analyze the facts and issues in the case for the purpose of pointing out how completely they are covered by the statement just made because the opinion of the court and the reasons stated by the members of the court who dissented without more make that fact perfectly clear. Indeed not only does this statement make clear the fact

that there is no conflict between the *Connolly Case* and the *Continental Wall Paper Case*, but it also establishes that both cases, the first directly, and the other by a negative pregnant, demonstrate the want of merit in the contentions here insisted upon.

It only remains to say that we think it requires nothing but statement to demonstrate that in view of the facts which we have recited and the legal principles which we have applied to them, no error was committed by the court below in refusing to give to the defendant a judgment for its alleged share of the profits for the year 1908 when it was expressly admitted that the conditions upon which the offer of a right to a participation in the profits was rested, or the contract (if there was a contract to that effect) was based, had not been complied with.

Affirmed.

HEYMAN *v.* HAYS, COUNTY CLERK OF HAMILTON COUNTY, TENNESSEE.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 121. Argued January 14, 1915.—Decided February 23, 1915.

The rulings of this court concerning the operation of the commerce clause of the Federal Constitution rest upon the broad principle of the freedom of commerce between the States, and of the equal right of a citizen of one State to freely contract either to receive merchandise from, or to send merchandise into, another State. *Am. Express Co.* v. *Iowa*, 196 U. S. 133.

The right to engage in interstate commerce is not the gift of a State; it cannot be regulated or restrained by a State, nor can a State exclude from its limits a corporation engaged in such commerce. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229.

The selling of liquor under a strictly mail-order business and the delivery within the State to a carrier for through shipment to another State to fill such orders in interstate commerce, is beyond the control of the State.

Substance, and not form, controls in determining whether a particular transaction is one of interstate commerce; and the mere method of delivery is a negligible circumstance if, in substantial effect, the transaction is such under the facts.

The protection against imposition by the State of direct burdens upon the right to do interstate commerce is practical and substantial, and embraces those acts which are necessary to the complete enjoyment of the right protected.

The mere fact that a concern doing a strictly interstate business has goods on hand within the State capable of being used in intrastate commerce, and to which attention is given, does not take the business out of the protection of the commerce clause and allow the State to impose a privilege tax on such concern.

Delivery to a carrier within the State for the sole purpose of through shipment to another State in fulfillment of a previous order from the latter state, is not, in a practical sense, the doing of business within the State so as to subject the business to a privilege tax; and so *held* as to the privilege tax attempted to be imposed by a county in Tennessee on a concern doing a strictly mail-order business confined to shipments to other States.

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of a privilege tax imposed by state authority on a wholesale liquor business confined exclusively to filling mail orders from points outside the State, are stated in the opinion.

Mr. Carlisle S. Littleton and *Mr. James J. Lynch*, with whom *Mr. Jesse M. Littleton* and *Mr. George D. Lancaster* were on the brief, for plaintiff in error.

Mr. Frank M. Thompson, Attorney General of the State of Tennessee, and *Mr. J. B. Sizer* for defendant in error:

Chapter 479 is not repugnant to the commerce clause of the Federal Constitution.

It should be construed with other constitutional provisions and statutes which are *in pari materia* with it. See Constitution of Tennessee, Art. 1, § 28; Code provisions rendering the business of liquor dealers a privilege; the Four-mile Law, and Manufacturers' bill as construed by

the Supreme Court of the State and the state court decisions construing Chap. 479. *Austin* v. *Shelton*, 122 Tennessee, 637; *Kelly* v. *Dwyer*, 75 Tennessee, 180; *Kelly* v. *State*, 123 Tennessee, 550; *Logan* v. *Brown*, 125 Tennessee, 209; *Motlow* v. *State*, 125 Tennessee, 548; *State* v. *Butler*, 1 Shannon's Cases, 91; *State* v. *Kelly*, 123 Tennessee, 563.

According to the allegations of the bills, the contracts of sale are actually made in Tennessee, as delivery of goods by the seller to a common carrier consigned to the purchaser is a delivery to the purchaser, whose agent the carrier is. 35 Cyc. 193; *United States* v. *Andrews*, 207 U. S. 229, 240; *State* v. *Kelly*, 123 Tennessee, 556, 562.

This court is not bound or precluded by any expression of opinion by the Supreme Court of Tennessee as to whether a particular transaction constitutes interstate or intrastate business. This case does not present the question of the right of the State to tax a mere broker or selling agent, representing only non-resident principals, and selling articles not in the State in which the sales are made, but which by the terms of the contracts are to be shipped from one State into another, as in *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Dozier* v. *Alabama*, 218 U. S. 123; *Stockard* v. *Morgan*, 185 U. S. 30; *Brennan* v. *Titusville*, 153 U. S. 289; *Asher* v. *Texas*, 128 U. S. 129; *Robbins* v. *Taxing District*, 120 U. S. 489, and other cases, and see *Ernest* v. *Missouri*, 156 U. S. 296.

See also *Crutcher* v. *Kentucky*, 141 U. S. 47; *Leloup* v. *Port of Mobile*, 127 U. S. 640; *McCall* v. *California*, 136 U. S. 104; *Osborne* v. *Mobile*, 16 Wall. 479; *Pickard* v. *Pullman Co.*, 117 U. S. 34; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 205; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 204, and *Moran* v. *New Orleans*, 112 U. S. 69, which can all be distinguished, as those cases involved the right of the State to tax a direct instrumentality of interstate commerce or the commerce itself.

A privilege tax on a merchant, levied by the State in which he is domiciled, where his goods and business are located, and where he makes his sales and deliveries, is not a violation of the commerce clause, because the merchant chooses, for reasons satisfactory to himself, to confine his trade to filling mail orders from non-residents of the State. If such a tax affects interstate commerce at all it is not directly, but only remotely and incidentally. *N. Y., L. E. & W. R. R.* v. *Pennsylvania,* 158 U. S. 431, 439; *Louis. & Nash. R. R.* v. *Kentucky,* 183 U. S. 503, 518; *Howe Machine Co.* v. *Gage,* 100 U. S. 296; and see *Browning* v. *Waycross,* 233 U. S. 16.

A merchant is not an instrument of interstate commerce. He may engage in interstate commerce, and while so engaged the States may not tax either the goods actually in transit or any of the instrumentalities used in the interstate transportation, or levy any other tax based on the fact of interstate business. *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 82.

It is only after sales have been made and the goods have been constructively delivered to the purchasers by delivery to the carriers that the interstate transaction begins. *Munn* v. *Illinois,* 94 U. S. 113; *Williams* v. *Fears,* 179 U. S. 270; *Hooper* v. *California,* 155 U. S. 648; *Hopkins* v. *United States,* 171 U. S. 578.

Complainants having taken out a Federal license which authorized them to sell both to non-residents and residents and to carry on generally the business of selling and dealing in liquors in Chattanooga, cannot escape liability for the tax levied by the State on their occupation on the ground that they intend to confine themselves to a branch of the business which they contend involves interstate commerce. *Ficklen* v. *Taxing District,* 145 U. S. 1.

If the business carried on by the complainants involves the transaction of interstate commerce by them at all, yet the State may lawfully require them to pay a privilege

tax for the business done in the State. *Nathan* v. *Louisiana*, 8 How. 80; *Woodruff* v. *Parham*, 8 Wall. 123; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 368; *Pennsylvania Ry.* v. *Knight*, 192 U. S. 21; *Cargill* v. *Minnesota*, 180 U. S. 482.

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

As a prelude we give a mere outline of the relevant laws of Tennessee. In 1909 the manufacture in the State of "intoxicating liquors for the purpose of sale" was prohibited. All liquors were included except alcohol of a stated degree of proof "for chemical, pharmaceutical, medical, and bacteriological purposes." The state court held this act constitutional. *Motlow* v. *State*, 125 Tennessee, 547. In the same year (1909) the sale of liquors as a beverage was forbidden within four miles of any schoolhouse, public or private, whether school was in session or not. This law was held constitutional and it is said in the argument that it was construed as excluding all sales of liquor throughout the State except sales by a druggist under a physician's prescription and sales for mechanical, medicinal, sacramental and other like purposes. *Kelly* v. *State*, 123 Tennessee, 516.

In Tennessee the system of taxation embraces *ad valorem* property taxes, merchants' taxes by a percentage on their capital and privilege taxes for the right to engage in business of a prescribed character. In 1909 a privilege tax was imposed upon wholesale and retail liquor dealers. The prohibitory liquor law (the four-mile law) was held not to embrace a mail order business, that is, orders by mail from other States and the shipment from Tennessee to such other States by carrier, because such business was interstate commerce not within state control. *State* v. *Kelly*, 123 Tennessee, 556.

In 1912 this suit was commenced to enjoin the collection of a county privilege tax for carrying on a wholesale liquor business in 1912 and to recover back the sum of a like tax for the same year which had been collected by the State over protest. It was in substance averred that having on hand in the State a stock of liquors, the complainant firm had found it unprofitable to seek to carry on the business of selling within the State and therefore had prior to that time abstained from all attempts to carry on business in the State by selling any liquor directly or indirectly therein and had confined its activities to a mail order business, that is, the soliciting of orders from persons in other States by mail, the receipt of such orders and the filling of the same by delivering the liquor to a carrier for through transportation out of the State. Averring that such business was purely interstate commerce which the State or county had no right to directly burden, it was alleged that the attempt of the State and county to impose the privilege taxes in question was an unlawful interference with, and a direct burden upon interstate commerce and therefore void. The bill was demurred to as stating no case. The demurrer was overruled and the defendants electing to plead no further, a decree went in favor of the complainants for the repayment of the one tax and enjoining the enforcement of the other. The Supreme Court reversed this judgment and because of the asserted repugnancy of the tax whose validity was thus sustained to the Constitution of the United States, this writ of error was prosecuted.

In *Am. Express Co.* v. *Iowa,* 196 U. S. 133, 143, referring to previous rulings concerning the operation of the Commerce Clause it was said:

"Those cases rested upon the broad principle of the freedom of commerce between the States and of the right of a citizen of one State to freely contract to receive merchandise from another State, and of the equal right of the

citizen of a State to contract to send merchandise into other States."

And again in *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, where the law of a State prohibiting the piping out from the State of natural gas was held to be repugnant to the Commerce Clause, it was observed, page 260:

"At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a State, and that it cannot be regulated or restrained by a State, or that a State cannot exclude from its limits a corporation engaged in such commerce."

Indeed, in the opinion of the court below there was not the slightest intimation of doubt concerning this elementary doctrine nor any suggestion that if the complainant firm did no business in the State and confined its activities exclusively to transactions of interstate commerce there was any power to impose the privilege taxes in controversy. And no doubt was expressed concerning the fact that abstractly and inherently the selling of liquor under a strictly mail order business and the delivery in Tennessee of liquor to a carrier for through shipment to other States to fill such orders was interstate commerce beyond the control of the State, which the court had previously pointed out in *State* v. *Kelly*, *supra*. But the decision was based upon what was deemed to be the legal result of distinctions arising from the mode in which the complainant carried on its business, which the court pointed out as follows:

"But it appears, also, from the bill, not in express terms but by clear inference from other matters stated, that the complainant has a regularly organized business—a business house and employés, &c.—and that he is conducting the business within the State of Tennessee, although he sells all his goods beyond the State.

"We are of the opinion that the case falls directly within *Logan* v. *Brown*, decided by this Court last year

and reported in 141 S. W. Rep. 751 and 125 Tennessee, and the Federal cases therein referred to and relied on, and that there is no substantial distinction between that case and the present one."

We must look, then, to *Logan* v. *Brown* to ascertain the implied conditions which were found to constitute a local business done in Tennessee which made the privilege taxes valid, although, as admitted, no liquor was sold in Tennessee but all of it was exclusively sold under mail orders from other States. Without intimating that if here present it would be material, there existed in *Logan* v. *Brown* an element not found in this case, that is, that the stock of liquor which was held in Tennessee and which was exclusively sold under the mail order system was constantly replenished by the receipt of liquor from other States likewise shipped in as the result of mail orders, and in *Logan* v. *Brown* the receipt of such goods, the breaking of their bulk and the commingling with the existing stock was found to be a business done in Tennessee independent of the shipping of goods to other States under the mail orders. With such considerations removed from view, carefully analyzing the opinion in *Logan* v. *Brown* we find that the only grounds held in that case to establish a business done in the State independent of the sale and shipment of the goods out of the State under the mail order system were the following: (1) The existence of the goods in the State held in a warehouse as stock susceptible of being sold in the State if there was a desire to do so and ready to be shipped in the channels of interstate commerce; (2) The care and attention for the purpose of packing or otherwise which must be given to the goods situated in the State to enable the interstate commerce shipment to be made; (3) The receipt in the State from other States of the orders; (4) The clerical force or assistance which was required in the State to keep an account of the shipments as made to other States and the super-

vision in Tennessee which was required to conduct the exclusive business of shipping into other States and of receiving the price resulting from such shipments.

But we are of opinion that although it be conceded that such facts were clearly to be implied from the allegations of the complaint that no sales were directly or indirectly made in the State and that the business was exclusively confined to soliciting mail orders from other States and the delivery to a carrier in fulfillment of such orders, such assumed facts afford no ground for taking the business out of the protection of the Interstate Commerce Clause and thus conferring upon the State authority to impose a tax on the privilege of carrying it on. We reach this conclusion because we are of opinion that giving the fullest effect to the conditions stated they were but the performance of acts accessory to and inhering in the right to make the interstate commerce shipments and therefore to admit the power because of their existence to burden the right to ship in interstate commerce would necessarily be to recognize the authority to directly burden such right. In the nature of things the protection against the imposition of direct burdens upon the right to do interstate commerce, as often pointed out by this court, is not a mere abstraction affording no real protection, but is practical and substantial and embraces those acts which are necessary to the complete enjoyment of the right protected.

In addition to the foregoing considerations upon which, as we have seen, the conclusion in *Logan* v. *Brown* that local business was done in the State was based, it is now urged in argument by the State that the correctness of such conclusion is in addition demonstrated by the fact that the goods embraced by the orders received from other States were delivered to a carrier in Tennessee, and as such carrier was the agent of the buyer, therefore the sales were completed in Tennessee. But this merely denies the interstate commerce character of the mail order busi-

ness. It directly conflicts with the ruling of the state court in *State* v. *Kelly, supra,* and therefore comes to this: That under the law of the State, such business is interstate commerce for the purpose of allowing it to be done, but when done a privilege tax may be exacted for doing it because it is not such commerce. It is no answer to suggest that the *Kelly Case,* while treating the mail order business as not within the prohibition law because it was interstate commerce, really was but an expression of a broad rule of interpretation giving effect to the spirit and intent of the prohibition law, since delivery in the State of liquor to be transported to another State could not be said to be a sale or delivery as a beverage. But if this rule of interpretation were to be here applied, it would destroy the distinction which it is advanced to sustain, for it would lead to the conclusion that the act of delivery for the sole purpose of through shipment to another State in fulfillment of a previous order was in no practical sense the doing of business within the State. But this is immaterial since it is not open to controversy that substance and not form controls in determining whether a particular transaction is one of interstate commerce and hence that the mere method of delivery is a negligible circumstance if in substantial effect the transaction under the facts of a given case is interstate commerce. *Am. Express Co.* v. *Iowa,* 196 U. S. 133, 144; *Savage* v. *Jones,* 225 U. S. 501, 520.

Some cases [1] are pressed in argument as upholding the privilege tax in question under the circumstances here disclosed but they are inapposite. We do not stop to review them in order to sustain this appreciation of the cases relied on since in our opinion in the nature of things its

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[1] *Nathan* v. *Louisiana,* 8 How. 73, 80; *Woodruff* v. *Parham,* 8 Wall. 123; *Wiggins Ferry* v. *East St. Louis,* 107 U. S. 365, 368; *Pennsylvania Ry.* v. *Knight,* 192 U. S. 21; *Cargill* v. *Minnesota,* 180 U. S. 452.

accuracy is demonstrated by a mere statement of the proposition to which all the contentions here urged are in their essence reducible, which is as follows. Although the shipment of merchandise from one State to another is interstate commerce which the States cannot directly burden, nevertheless the States may directly burden such shipments in every case where there is any merchandise kept in the State to be the subject of interstate commerce shipment or when any of those steps which are essentially prerequisite to the initiation of an interstate commerce shipment are taken by the owner of the merchandise.

Reversed.

SOUTHERN OPERATING COMPANY *v.* HAYS, COUNTY CLERK OF HAMILTON COUNTY, TENNESSEE.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 122. Argued January 14, 1915.—Decided February 23, 1915.

Decided on the authority of *Heyman* v. *Hays*, *ante*, p. 178.

THE facts are stated in the opinion.

Mr. Carlisle S. Littleton and *Mr. James J. Lynch*, with whom *Mr. Jesse M. Littleton* and *Mr. George D. Lancaster* were on the brief, for plaintiff in error.

Mr. Frank M. Thompson, Attorney General of the State of Tennessee, and *Mr. J. B. Sizer*, for defendant in error.

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

This case was brought to enjoin the collection of a State and County Privilege Tax upon the same facts as those which were involved in the case just decided. The two cases in both the trial and the court below were heard together and they were here argued at the same time. The court below in disposing of this case with one exception placed its conclusion upon the same grounds upon which it decided the previous case. The one exception referred to was a declaration that the trial court erred in granting the injunction so far as the state tax was concerned because there was no authority to enjoin the collection of such a tax and the only right was to pay under protest and sue to recover. Whatever difference between the two cases would otherwise result from that point of view need not be considered since the Attorney General of the State in the argument at bar in express terms states that that question is not insisted upon. It being thus removed from consideration, a complete identity between the two cases results and for the reasons given in the previous case the judgment in this case must also be reversed.

Reversed.

WASHINGTON, ALEXANDRIA AND MT. VERNON RAILWAY COMPANY *v.* DOWNEY.

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

No. 144. Argued January 21, 1915.—Decided February 23, 1915.

The expression "law of the United States," referred to in clause 6 of § 250, Judicial Code, regulating appeals from and writs of error to the Court of Appeals of the District of Columbia, embraces only laws of the United States not local in their application to the District of Columbia.

A statute of the United States, general in its application, but which has been declared unconstitutional except as it relates to the District of Columbia and to Territories of the United States, is not a law of the United States within the meaning of clause 6 of § 250, Judicial Code.

Where jurisdiction to review the judgment of the Court of Appeals of the District of Columbia is sought under clause 6 of § 250, Judicial Code, the test of jurisdiction is the character of the statute and not the character of the act to which the statute applies.

In an action brought under the original Employers' Liability Act of 1906, which was declared unconstitutional as to the States but not as to the Territories, although the transit of the train involved was interstate, if the accident occurred within the confines of the District of Columbia, the statute became applicable concerning it as a local statute, in the absence of any general legislation by Congress, and not as a general law of the United States; and this court cannot review the judgment of the Court of Appeals of the District of Columbia on writ of error under clause 6 of § 250, Judicial Code.

The fact that a local statute is applicable to a given situation solely because there is no general law to control, does not make the local statute a general one.

Writ of error to review 40 App. D. C. 147, dismissed.

THE facts, which involve the jurisdiction of this court of writs of error to review judgments of the Court of

Appeals of the District of Columbia, are stated in the opinion.

Mr. John S. Barbour, with whom *Mr. John C. Gittings*, *Mr. Basil D. Boteler* and *Mr. Douglass S. Mackall* were on the brief, for plaintiff in error.

Mr. Edmund Burke, with whom *Mr. Leo P. Harlow* was on the brief, for defendant in error.

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

The plaintiff in error, a Virginia corporation whom we shall speak of as the Company, operates a trolley line from Washington to Mt. Vernon in Virginia. The defendant in error, Downey, was employed by the Company as a trolley man and on November 29, 1907, was working on a train of two cars, a motor car and a trailer car, moving from Mt. Vernon to Washington. Downey was on the rear platform of the motor car and his duty was to hold the rope connecting with the overhead trolley wheel to keep it from getting off the wire and thus breaking the electrical connection. While in the District of Columbia, on the bridge crossing the Potomac, Downey was thrown from the platform and injured and the company prosecutes this writ of error to a judgment of the court below (40 App. D. C. 147), affirming one of the Supreme Court of the District, rendered on a verdict against it and in favor of Downey, upon the finding that his injury was caused by the actionable negligence of the Company or of its servants.

Various errors are assigned relating to the operation and meaning of the act of Congress (Employers' Liability Act) of June 11, 1906, 34 Stat. 232, c. 3073, by which the case is governed and the rulings of the trial court admitting

or excluding testimony and instructions given or refused. But before we consider them, whether we have jurisdiction to do so arises, and therefore we primarily consider that question. It depends upon the sixth clause of § 250 of the Judicial Code, and it is not open to controversy that the "law of the United States" therein referred to "embraced only laws of the United States of general operation" and does not therefore include "laws of the United States local in their application to the District of Columbia." *McGowan* v. *Parish*, 228 U. S. 312, 317; *American Security Co.* v. *Dist. of Columbia*, 224 U. S. 491; *District of Columbia* v. *Philadelphia, Balt. & Wash. R. R.*, 232 U. S. 716.

The law here involved, as we have said, is the Employers' Liability Act of 1906. Undoubtedly that law as enacted was in form one of general application, but it was held to be unconstitutional as such a law in *The Employers' Liability Cases*, 207 U. S. 463. Notwithstanding that ruling, however, the provisions of the statute, so far as they apply to the District of Columbia, have been decided to be within the power of Congress to enact because of its plenary authority as the local legislature of the District, and because the intention to make the provisions of the law applicable to the District locally was manifest and separable from the purpose to enact a statute which would be applicable generally throughout the United States. *El Paso & N. E. Ry.* v. *Gutierrez*, 215 U. S. 87, 97–98; *Philadelphia, Balt. & Wash. R. R.* v. *Schubert*, 224 U. S. 603, 610; *Santa Fe Central Ry.* v. *Friday*, 232 U. S. 694, 698; and see *Butts* v. *Merchants Transportation Co.*, 230 U. S. 126, 137. Under this condition there is no ground to maintain the proposition that the statute as applicable to the District of Columbia was adopted as one of a general character, and that therefore we have power to review the questions involved.

But it is said, the trolley cars were in transit from the State of Virginia to the District and therefore were en-

gaged in a movement from State to Territory not purely local in its character and hence there is jurisdiction. But this rests upon the mistaken assumption that the test of jurisdiction is the character of the act to which the statute applies, and not the nature of the statute itself, that is, whether it is general or local to the District. And this difficulty is not answered by the argument that because the statute was made controlling concerning acts not purely local, therefore as the effect cannot be greater than the cause, the statute must itself be said to be for the purposes of jurisdiction not of a local character. But again the proposition rests upon an erroneous assumption. The test of whether the statute is general or local depends not upon the particular question to which it may be exceptionally applied in a given case, but upon the exertion of legislative power which the statute manifests and its general operation, that is to say, whether it was enacted as a statute of general application under the general legislative power or whether it took being as the result of the exercise of the purely local power of Congress to govern the District of Columbia, and was as a general rule intended to be so applicable.

The error of the argument could not be better illustrated than by saying that if the proposition were admitted, it would necessitate deciding that a statute which has been held to be beyond the constitutional power of Congress to enact so far as it embodied anything but the exertion of local power may yet be enforced and applied as a general statute. The want of foundation for the contention is besides made plainer by looking at the subject from another point of view. While the transit in which the train was engaged was not purely local, the accident complained of occurred within the confines of the District of Columbia and the statute became applicable concerning it because as a local statute it governed in the absence of legislation by Congress of a general

character governing the subject. *Chicago, M. & St. P. Ry.* v. *Solan*, 169 U. S. 133; *Pennsylvania R. R.* v. *Hughes*, 191 U. S. 477; *Martin* v. *Pittsburgh & Lake Erie R. R.*, 203 U. S. 284. To take jurisdiction, therefore, we would be compelled to decide that a purely local statute which would be void if it were general in character was yet operative in such aspect, and that because a local law was applicable to a given situation solely for the reason that there was no general law to control, the local law was a general one.

Dismissed for want of jurisdiction.

UNITED STATES *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *v.* UNITED STATES.

EVENS & HOWARD FIRE BRICK COMPANY, PETITIONER.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI. PETITION FOR LEAVE TO INTERVENE.

Nos. 452, 572,—Original. Argued October 20, 1914. Petition submitted October 13, 1914.—Decided February 23, 1915.

Even though persons seeking to intervene on the settlement of a decree were not parties and therefore cannot intervene in the court below, they may be entitled to be heard in this court concerning the decree in so far as it may operate prejudicially to their rights.

Where both parties have appealed, one from the decree entered on the mandate of this court and the other from denial of a motion to

modify such decree, as the whole decree is before this court the dismissal of the latter appeal would not limit its power and duty to pass on the questions raised by it; the proper practice is to consolidate the appeals.

The decision and mandate of this court in regard to a combination declared illegal under the Anti-Trust Act should not be interpreted as safeguarding one public interest by destroying another, or as making the movement of transportation freer in some channels by obstructing its flow in others.

The decision of this court in 224 U. S. 383, explained, and the decree entered by the court below on the mandate modified so as to recognize the right of the Terminal Company as an accessory to its strictly terminal business to carry on business exclusively originating on its lines, exclusively moving thereon, and exclusively intended for delivery on the same.

THE facts, which involve the construction of the mandate and decision in *United States* v. *St. Louis Terminal Association* as reported in 224 U. S. 383, and the effect to be given to such mandate and the further directions of this court in regard thereto, are stated in the opinion.

Mr. Edward C. Crow for the United States.

Mr. H. S. Priest and *Mr. T. M. Pierce* for St. Louis Terminal.

Mr. George M. Block, with whom *Mr. John F. Lee* was on the brief, for intervenors.

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

This case was decided April 22, 1912 (224 U. S. 383), and the question now is, Was due effect given to the mandate of this court? A clear understanding will come by the merest outline of some of the legal proceedings preceding and following that decision. The decree which was reversed was entered by a circuit court composed of four judges in accordance with the Expedition Act. The cir-

cuit courts having been abolished when the decision of this court was rendered, the mandate was directed to the appropriate district court. There the United States filed the mandate and asked an interlocutory decree giving the time fixed by this court to take the steps which were decided to be necessary to make the organization of the defendants a legal one under the Anti-Trust Act. The defendants presented a statement of what was proposed by them to be done in compliance with the decree of this court to accomplish the result stated, and over some objection on the part of the United States an interlocutory decree was entered which in many respects accepted as sufficient what was proposed to be done by the defendants. On the taking of those steps and after a full hearing of the parties the court announced its purpose to enter a final decree not following in some respects a proposed form of final decree suggested by the United States. Thereupon the United States by petition for prohibition filed in this court asserted the entire want of jurisdiction in the court as constituted to entertain the enforcement of the mandate, as that could only be done by a court composed like the one which had rendered the judgment, that is, one composed under the Expedition Act. The prohibition was granted (226 U. S. 420), and jurisdiction to enforce the mandate was assumed by a court of three circuit judges sitting in the district court in pursuance of the Expedition Act. In that court after a hearing as to a proposed interlocutory decree and as the result of steps taken by the defendants to comply with the decision of this court which were deemed sufficient for that purpose, a final decree was entered on March 2, 1914. This decree was objected to by the United States because of the insufficiency, at least in form, of the steps taken by the defendants for the purpose of complying with the decree of this court and of the failure by the court below to insert in the decree various clauses suggested by the United

States and which it was insisted were necessary to give effect to the mandate of this court. For these reasons the United States on March 27, 1914, appealed and such appeal is now before us and constitutes No. 452 referred to in the caption.

The day after this appeal (March 28) the defendants moved to modify the decree by striking out the first paragraph on two grounds: First, because it referred to the Terminal Company as illegally organized in violation of the Anti-Trust Act, although under the supervision and approval of the court such steps had been taken as were directed by this court to remove all objection to the organization of the Company. Second, because the restrictions imposed on the business which the Terminal Company might lawfully do, were susceptible of being construed as forbidding the Company to carry on as ancillary to its strictly terminal work a transportation business originating upon one part of its line and destined exclusively to other points on such line. And the necessity of not prohibiting the Company from doing such work, the petition to modify asserted, was shown by the fact that "on account of the necessary extent of its tracks, covering an area of seventy-five to one hundred square miles, it is frequently called upon to take traffic from one point on its line to another point on its line, completing the entire movement on its own tracks." In addition the petition to modify alleged as follows:

"As an illustration: The Terminal Association operates in the early morning and late in the afternoon some trains to transport laborers engaged in industrial factories from Granite City, Illinois, to the different stations on its line in St. Louis, Missouri. This it is prohibited from doing under the decree.

"Another illustration: Many factories are located upon the Terminal Association's tracks on both sides of the Mississippi river. Under this order the defendant, Ter-

minal Association, would be restrained from accepting either raw material or finished products shipped from one such factory to another, although it could, with great convenience to the public, render such service."

At about the same date petitions to be allowed to intervene were filed on behalf of the Evens & Howard Fire Brick Company, Union Sand and Material Company and fifty-three others, all based upon the ground that the petitioners would suffer great injury by the serious loss occasioned to their business or the destruction thereof which would arise from forbidding the Terminal Company to engage in transportation moving exclusively from one point on its line to another point on its line. Some of these petitions alleged that the raw material was prepared at one point and the manufactured product made by using the raw material at another and that consequently an impossibility of continuing business would result from the inability to transport from one place to another. All these petitions prayed a modification of the order so as to make it clear that it did not forbid the Terminal Company as an incident to its purely terminal business to carry on the business in question. On June 20 the petition of the Terminal Company to modify and the petitions of the various parties to be allowed to intervene and praying a modification came on for hearing, the United States opposing the allowance of all. In support of its petition affidavits were filed by the Terminal Company showing the movement of many thousands of cars annually in the business referred to and giving the names of very many of those concerned in the movement. The prayer of the Terminal Company for a modification was refused without passing on its merits, the court expressly holding that it had no jurisdiction to do so, as the previous appeal taken by the United States from the final decree had transferred the case to this court. The petitions of intervention of the other parties over the objection of the United States

were permitted to be filed, but after filing, the prayer to modify was also in each of said cases denied on the ground that the court was without jurisdiction because of the appeal taken by the United States. From this decree all the defendants to the original suit appealed and the record referred to in the caption as No. 572 is the one embracing such appeal.

In this court the Evens and Howard Fire Brick Company and the Union Sand & Material Company have filed a petition praying leave to be allowed here to intervene to ask a modification of the decree so as to make it clear that it does not forbid the Terminal Company from engaging as an incident to its terminal business in transportation movements beginning and terminating exclusively on its own lines, the prayer being supported by statements concerning the situation and the alleged injury which would be suffered by prohibiting such business as set out in the petitions to intervene and modify filed in the court below.

The challenge by the United States of the right to hear the intervening petitioners is without merit, since even although the petitioners were not parties, they are entitled to be originally heard concerning the settlement of the decree in so far as it might operate prejudicially to their rights.

A motion made by the United States to dismiss the appeal taken by the defendants in No. 572 is also without merit. The duty of the court below was but to execute the mandate of this court, and every controversy between the parties concerning the discharge by the court below of its duty was open for this court to examine either originally, if essential, or as the result of an appeal by one of the parties, or by way of assertions of right made by the other party as an appellee even in the absence of a cross-appeal,—a result inevitably arising from the fact that both parties, so far as the settlement of the decree

of this court was concerned, were in this court and endowed with the capacity to invoke its action for the proper shaping and execution of the decree, either by original proceeding or in any other appropriate form. *Perkins* v. *Fourniquet*, 14 How. 328; *Re Sanford Fork & Tool Co.*, 160 U. S. 247; *In re Potts*, 166 U. S. 263. As under these conditions the dismissal of the appeal would in no way limit the power and duty to pass upon the questions raised on the appeal, we think the motion to dismiss ought not to prevail and that the better practice is to consolidate the appeal of the defendants in No. 572 with the appeal taken by the United States in No. 452 and treat the cases as one for the purposes of settling the questions raised by both parties. In doing this we shall also dispose of the contentions arising on the petition of intervention, since the right to modify the decree which the intervenors assert is precisely coterminous with the claim made by the defendants to modify. In saying this we do not overlook a contention of the defendants with which the intervenors are not concerned as to error committed in qualifying the defendants as an illegal combination although by complying with the requirements exacted by the decision of this court they were no longer subject to be so qualified. But we treat that subject as not in controversy because we are of the opinion that the contention concerning it rests upon a wholly unwarranted criticism of a mere form of expression in the decree, unwarranted because on its face the decree unmistakably demonstrates the contention to be absolutely devoid of all merit.

The errors of which the United States complains are stated in ten propositions, but if consideration of the subject embraced in the ninth be postponed to be disposed of in connection with the complaint of the defendants as to the right to a modification of the first paragraph of the decree because of the influence which the reasoning applicable to the one will have on the other, we think every

possible contention embraced in the assignments may be briefly disposed of by a few general considerations common to them all.

To afford an opportunity for the making of the necessary agreements and contracts curing the vices which the decisions of this court found to exist in the organization of the Terminal Company and to the end that when so made clean the Company might continue its existence and operations subject to the safeguards provided in the opinion of this court, it was commanded by the mandate that the case be "remanded to the District Court, with directions that a decree be there entered directing the parties to submit to the court, within ninety days after receipt of mandate, a plan for the reorganization of the contract between the fourteen defendant railroad companies and the Terminal Company, which we have pointed out as bringing the combination within the inhibition of the statute"; this being followed by a statement of what was required embraced under seven general headings which are in the margin,[1] followed by the direction that "Upon

[1] "First. By providing for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies.

"Second. Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

"Third. By eliminating from the present agreement between the Terminal Company and the proprietary companies any provision which restricts any such company to the use of the facilities of the Terminal Company.

"Fourth. By providing for the complete abolition of the existing practice of billing to East St. Louis, or other junction points,

failure of the parties to come to an agreement which is in substantial accord with this opinion and decree, the court will, after hearing the parties . . ." dissolve the combination. The contention of the United States which is fundamental in the sense that it is involved in or at least gives color to all the propositions insisted upon, is that the court below should have directly proceeded to apply the sanction stated in the mandate in disregard of all its other directions because the combination had so failed to comply with such other requirements as not to be entitled to the benefits which would have arisen from complying with them and therefore had subjected itself to immediate dissolution as an illegal combination. The premise is that the word "parties" in the mandate embraced not solely the parties to the combination but the parties to the suit and therefore included the United States. From this the argument proceeds that as below neither for the purposes of the interlocutory decree nor in any other step was the United States invited to become

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and then rebilling traffic destined to St. Louis, or to points beyond.

"Fifth. By providing for the abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called one hundred mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

"Sixth. By providing that any disagreement between any company applying to become a joint owner or user as herein provided for and the Terminal or proprietary companies which shall arise after a final decree in this cause, may be submitted to the District Court, upon a petition filed in this cause, subject to review by appeal in the usual manner.

"Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission."

one of the parties entering into contracts or agreements for the purpose of curing the defects, therefore there was a disregard of the condition precedent to the right to remove the defects, and the duty to apply the penalty of dissolution automatically arose. But this argument even upon the assumption of ambiguity in the text assumes that this court recognized that there was a right to cure the defects but deprived of all power to do so by subjecting the exercise of the right to a condition wholly beyond the will of the parties to the combination. There is, however, not the slightest ambiguity in the mandate giving support to the consequences deduced from it, as the parties referred to plainly embrace only the parties to the agreement from which the combination resulted and directed them to become parties to the new agreement required to make the combination legal by removing the illegal clauses. That this was the purpose of the decision so plainly results from the opinion and mandate as to leave no room for dispute to the contrary. But if there were any opening for controversy, the meaning of the mandate has been previously so explicitly pointed out in this case as to conclude the question. Thus in passing upon the application for prohibition made by the United States to restrain the conduct of the proceedings to enforce the mandate in a district court presided over by a district judge the nature of the duty involved in enforcing the mandate arose for decision, and it was said:

"While it is true that the mandate of this court gave certain specific directions as to the scope and character of the decree to be entered, it afforded an opportunity to the defendants to submit a plan in order to carry out the decree and gave to the United States an opportunity to be heard in opposition to that plan, and left to the court a serious and important duty to be discharged in any event and especially in case of controversy on the subject." (226 U. S., *supra*, p. 425.)

The want of foundation for the proposition relied upon disposes of all the assigned errors except the one the consideration of which we previously postponed because they all in a greater or less degree depend upon such proposition and to the extent that they do not, they are devoid of all merit for the following reasons: (a) Because the interlocutory decree was in strict compliance with the mandate; (b) because the contracts and agreements executed by the parties to remove the causes of illegality and which were approved by the court were adequate for that purpose; (c) because when the conception that the Government was a party upon whom rested the responsibility of agreeing to contracts modifying the terms of the combination is put out of view, we are of opinion there is no merit in the contention that certain forms of proposed contracts submitted for approval by the Government should have been sanctioned by the court, as such contracts were wholly unnecessary in view of the sufficiency of those executed by the parties and which were approved; (d) because after a careful scrutiny of the record we are of the opinion that in every material step taken by the court below concerning both the interlocutory and final decree ample opportunity was afforded to all the parties to be heard, careful consideration was evidently given to the matters to be decided and a full compliance both in form and substance with the mandate resulted from the final decree unless error inheres in the two propositions, urged one by the defendants and the other by the United States, which we now come to dispose of.

It may not be disputed that the clause of the first paragraph of the decree which is in the margin [1] pointing

[1] "1. The Terminal Railroad Association of St. Louis is an unlawful combination contrary to the Anti-Trust Act of July 2, 1890 (26 Stat. 209), when it and the various bridge and terminal companies composing it are operated as railroad transportation companies. The combination may, however, exist and continue as a lawful unification of ter-

out the character of the business which the Terminal Company as reorganized was authorized to pursue is susceptible of the construction that the right was excluded to do anything but a terminal business in the narrow sense and therefore did not permit the company to carry on as ancillary to its terminal business a transportation business even although originating and terminating on its lines. This being true, we are of opinion, despite the contentions of the United States to the contrary, that the provision in the decree on that subject did not give proper effect to the mandate of this court and should be qualified so as to recognize the right to do in connection with the terminal business proper such transportation business as originates and terminates on the lines of the Terminal Company for the following reasons: Because not to so decide would lead inevitably to the conclusion that the decision of this court contemplated safeguarding one public interest by destroying another and in effect proposed making the movement of transportation freer in some channels by absolutely obstructing all possibility of its flow in others; and moreover because it assumes that the decision proposed to cure the defects in the organization of the combination which caused it to be in conflict with

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minal facilities upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storage and the like, and modifying its contracts as herein specified.

"An election having been made to continue the combination for terminal purposes the defendants are therefore perpetually enjoined from in any wise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered."

the Anti-Trust Act by commanding the abstention from the prosecution of business which otherwise under the law there would have been a duty to carry on, thus virtually seeking to remove one cause of illegality in a combination by substituting another. The contention that the Terminal Company and the combination which it embodied was not dissolved and was permitted to continue in business solely because if allowed to continue it would be obliged to confine itself to terminal business in the strict sense and therefore should not be permitted to now do other than purely terminal work rests upon a misapprehension of the conditions. The suit to dissolve was largely defended upon the ground that the combination was formed for terminal purposes and that to combine for the purpose of obtaining facilities of that character was not in conflict with the Anti-Trust Act. In disposing of the case the correctness of this contention in the abstract was conceded but as it was found that the geographical situation, the area over which the Terminal Company operated and the business which it carried on, in other words its general environment, took it out of the conceded abstract general rule, it was decided that the combination if it wished to continue in business must execute certain agreements for the benefit of the public modifying the terms under which it was organized. The proposition therefore now is that although the duty to execute agreements arose and its performance was compelled because the Terminal Company was not to be dealt with in the light, abstractly speaking, of a strictly terminal organization, nevertheless upon the execution of the agreements its rights are to be measured upon the contrary assumption. As these considerations in our opinion demonstrate that the decree should be modified by permitting the carrying on by the company as incidental to its terminal business of a transportation business originating exclusively on its own line moving thereon and terminating

thereon, a direction to modify the decree in that respect must necessarily follow.

The subject of the ninth assignment of errors, upon which the United States most relies, relates to the fifth clause in the mandate containing a direction for the "abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called 100-mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area."

As the court below on this subject did nothing more than embody in its decree the provision of the mandate, the contention is that error was committed because the decree failed to expound the language of the mandate. Indeed in the argument it was insisted that to properly give effect to the mandate there should have been inserted in the decree an express provision absolutely controlling or regulating for the future charges which the Terminal Company might make. But to have given effect to this view would have caused the decree to be plainly repugnant to the provisions of the Act to Regulate Commerce and contrary to the exercise by the state authorities of their power over charges of the Terminal Company in so far as the jurisdiction of such authorities may have extended. The flagrant repugnancy to the Act to Regulate Commerce which would have resulted if the decree as asked had been granted will become more manifest when it is considered that the insistence was, as pointed out by the court below in its opinion, that there should have been a provision in substance so fixing and perpetuating for the future rates on traffic coming into East St. Louis from the zone mentioned in the mandate as to compel the commodities transported to East St. Louis to be carried from there across the river to their point of destination in St. Louis without any transportation charge whatever,—a direction which it is apparent would have

involved, if given, a disregard not only of all the regulations concerning rates established under the Act to Regulate Commerce, but also, it may be, the prohibitions of that act concerning preference and discrimination. This condition is not escaped by the suggestion that such limitations if imposed would not have been in substance repugnant to the Act to Regulate Commerce since, as the rate from which the repugnancy would arise would only apply to business done by the combination and as the combination would have to be dissolved because of the repugnancy, therefore the repugnancy would cease to exist from the very fact that it arose. But this argument only restates the contention concerning another aspect of the case which we have previously disposed of and serves to emphasize the view that it is impossible to conceive that the decision of this court recognized the right of the Terminal Company to continue to exist provided certain features in its organization which were in conflict with the Anti-trust Act were removed, and yet at the same time provided that when such features were removed the right to continue should be lost by the fact of its exercise. The particular expression of disapproval of the form of rate stated in the clause relied upon could only have been based upon one of two conceptions: First, the intention if such a charge was attempted to be exacted under the future operation of the company which was permitted, to lay down a rule forbidding such a charge in the future by the Terminal Company and thereby expressing an opinion upon and controlling a subject plainly beyond the primary sphere of the judicial power and exclusively within the original cognizance of the Interstate Commerce Commission under the terms of the Act to Regulate Commerce; or second, as there was contention in the record as to whether such a form of rate was charged, and if it was, as to its legality, the expressions on that subject were used only to exclude all inference that the

judicial recognition of the right of the Terminal Company to continue in business on compliance with exactions which were required carried with it an implication of approval also to continue to exact the rate in question if it was being exacted, thus excluding all room for the contention that the provisions of the Act to Regulate Commerce were in any way interfered with. That the expressions relied upon did not have the first meaning and therefore solely had the second, so clearly results from the context of the mandate, that is, from its seventh paragraph, as to need no further consideration of the subject. The clause is as follows:

"Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the terminal company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission."

Comprehensively considering and once again weighing all the contentions pressed upon us by the United States, we are of the opinion they all in last analysis rest upon the following contradictory assumptions: (a) that the decision of this court destroyed one set of public rights upon the theory of protecting another set; (b) that it proposed to correct an abuse of one statute by conferring authority to violate another; (c) that while exerting the authority of enforcing one statute the power was assumed of setting aside the provisions of another statute. On the contrary, when the confusion upon which these views rest is disregarded we are of the opinion that the decision involved none of these contrarieties or conflicts since in the public interest and to open wide the avenues of commerce and make them free to the enjoyment of all, it commanded the correction of conditions impeding that result and

which were in conflict with the Anti-Trust Act, thus bringing the assailed combination under the law of the land and leaving it to be controlled by such law.

It follows from what we have said that the decree below giving effect to the mandate of this court will be modified so as to recognize the right of the Terminal Company as an accessory to its strictly terminal business to carry on transportation as to business exclusively originating on its lines, exclusively moving thereon and exclusively intended for delivery on the same and in other respects the decree will be affirmed.

Modified and affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE MCREYNOLDS took no part in the decision of this case.

EVENS AND HOWARD FIRE BRICK COMPANY *v.* UNITED STATES.

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

No. 567. Argued October 20, 1914.—Decided February 23, 1915.

The court below, in settling the decree on the mandate of this court has no power to allow persons who were not parties to the action to intervene. This court, however, can take action on an original petition for intervention in this court. (See pp. 194, 199, *ante*.)

THE facts are stated in the opinion.

Mr. George M. Block, with whom *Mr. John F. Lee* was on the brief, for appellants.

Mr. Edward C. Crow, with whom *The Solicitor General* was on the brief, for the United States.

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

This appeal was taken from the order of the court refusing to allow an intervention on the ground that there was no jurisdiction to do so because as the result of a previous final decree and an appeal taken therefrom by the United States, the authority of the court over the subject-matter was ended. In effect the relief which was sought to be accomplished by the intervention below has been obtained as the result of an original petition for intervention here and our action this day taken thereon. As those applying to intervene were not parties to the record, we are of opinion that the court below had no power to allow them to intervene under the circumstances which existed and its judgment refusing their application was therefore right and is

Affirmed.

OLYMPIA MINING & MILLING COMPANY, LIMITED, *v.* KERNS.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 495. Motion to dismiss or affirm submitted January 25, 1915.—Decided February 23, 1915.

This court has no jurisdiction under § 237, Judicial Code, to review the judgment of a state court, sustaining a demurrer to the complaint on the ground of statutory limitations, unless the Federal questions asserted as a basis for such jurisdiction were presented or suggested to the court below. *Appleby* v. *Buffalo*, 221 U. S. 524.

Even if the judgment of dismissal of the complaint was the result of sustaining a demurrer thereto, an express statement in the demurrer that it was based on the statute of limitation affords an opportunity for the plaintiff to assert that a Federal right would be impaired by applying the statute.

Writ of error to review 24 Idaho, 481, dismissed.

THE facts, which involve the jurisdiction of this court on writ of error under § 237, Judicial Code, to review judgment of the state court sustaining demurrer to and denying complaint, are stated in the opinion.

Mr. James H. Forney for defendant in error, in support of the motion.

Mr. Charles E. Miller for plaintiff in error, in opposition to the motion:

In denying the plaintiff in error, while under legal disability, the same rights the state law gives to minors, insane persons, criminals and married women, the plaintiff in error is deprived of its property without due process of law and is denied the equal protection of the laws. *Barbier* v. *Connelly*, 113 U. S. 27.

Under the construction of the Idaho Supreme Court in tolling the statutes of limitations against the plaintiff in error, while under legal disability (minority we might say), these statutes in their operation deprive it of its property without due process of law and deny to it the equal protection of the laws. *Tregea* v. *Modesto Irr. Dist.*, 164 U. S. 179.

If a statute is so construed as to deprive one of his property without due process of law, it violates the constitutional provision and presents a Federal question. *Castillo* v. *McConnico*, 168 U. S. 674.

Where there is an abuse of law, amounting to confiscation of property or a deprivation of personal rights, the

Federal courts will interfere. *Norwood* v. *Baker*, 172 U. S. 269.

A refusal to consider a Federal question which is controlling in a case is equivalent to a decision against the Federal right involved therein, and gives the Supreme Court jurisdiction to review. *Des Moines Nav. Co.* v. *Iowa Co.*, 123 U. S. 552.

The objection to a tax that it is taking property without due process of law and denies to the taxpayers the equal protection of the laws raises a question under the Constitution of the United States; and where the question was necessarily involved in the final decision of the case, the writ of error cannot be dismissed. *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232.

The court will not grant the motion if consideration of the merits is required. *Hecker* v. *Fowler*, 1 Black, 95.

To say that there is no error in this judgment, and affirm it for that reason, would be to decide the whole legal merits of the case and this cannot be done on a motion to dismiss. See also *Sparrow* v. *Strong*, 3 Wall. 97; *Minor* v. *Tillotson*, 1 How. 288.

When the question of jurisdiction is so involved with the other questions decided in the case that the Supreme Court cannot eliminate it without the examination of a voluminous record and passing on the whole merits of the case, it will reserve the question of jurisdiction until the case is heard on the final agreement on the merits. *Semple* v. *Hagar*, 4 Wall. 431.

Where the record suggests many points which cannot be considered upon a motion to dismiss, the court will refuse the motion, but will allow it to be again brought to the notice of the court when the case shall be argued upon its merits. *Day* v. *Washburn*, 23 How. 309; *Hecker* v. *Fowler*, 1 Black, 95; *Semple* v. *Hagar*, 4 Wall. 431; *Lynch* v. *De Bernal*, 131 U. S. 94.

On motion merely to dismiss, the merits of the case

cannot be considered. *Bohanau* v. *Nebraska*, 118 U. S. 231; *Hill* v. *Chicago & Erie R. R.*, 129 U. S. 170; *Chicago Co.* v. *Needles*, 113 U. S. 574.

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

Concerned now only with a motion to dismiss, we limit our statement to that which is essential to decide such issue. In 1912 the Olympia Mining & Milling Company, Limited, the plaintiff in error, brought this suit to enforce a trust agreement between Kerns, the defendant in error, and one Cunningham by which it was alleged Kerns had obliged himself in 1901 to transfer to Cunningham certain property then owned or to be acquired by him for a designated consideration, Cunningham to put the title to the property when transferred in the name of a corporation to be by him organized of which Kerns was to have a stated proportion of the stock. The bill was generally demurred to and state statutes creating terms of limitation of three, four and five years were expressly set out in the demurrer as barring all right to the relief sought. In reviewing the action of the trial court in sustaining the demurrer the court below held that the statutes of limitations were decisive. (24 Idaho, 481.) From the averments of the bill and facts disclosed in its previous records concerning the controversy, the time when the term of the statutes commenced to run was determined by the court to be August, 1904, because on that date Kerns made a sale of a portion of the property embraced by the trust agreement and at the same time had bound himself to sell it all,—obligations which were held to be a repudiation by him of the trust agreement and in fact constituted a disclaimer of all obligation under it. It was held that by a suit brought in 1905, by which Cunningham was bound, it was judicially admitted that at that time there was a

default in carrying out the trust agreement on the part of Cunningham or those holding with or under him and a knowledge on their part of the disclaimer of all obligation by Kerns,—conclusions which caused the statutes to be operative since from the date of the starting point, 1904, to the date of the bringing of the present suit, in 1912, more than the statutory periods had elapsed.

Briefly stated, two propositions are relied upon, first, that causing the term of the statutes to commence to run from the year 1904 was a violation of the due process clause of the Fourteenth Amendment because at that date the corporation was not in existence and hence was without capacity to take and hold the property embraced by the trust agreement. Second, as the state statutes of limitations, generally speaking, did not run against minors or incapacitated persons, to cause the term to commence to run against the corporation before it came into existence and had capacity to take the property was a denial of the equal protection of the laws under the Fourteenth Amendment. But without in the remotest degree admitting that these propositions afford the slightest ground for converting such a purely state question as the operation of statutes of limitations upon real property situated in a State into Federal questions giving rise to jurisdiction of this court to review, there is obviously in any event no jurisdiction because in no manner and at no time were the alleged Federal questions, be they real or imaginary, presented or even remotely suggested to the court below. *Appleby* v. *Buffalo*, 221 U. S. 524, 529. In the argument this is admitted, but it is said the propositions ought now to be treated as adequate to confer jurisdiction because there was no opportunity to urge or suggest them in the courts below. Again, without conceding the merit of the suggestion if founded in fact, it is here plainly not so founded since the statutes of limitations which were upheld by the court below were in express terms stated in the

demurrer filed in the trial court and yet the record is silent as to any suggestion of assumed Federal right until after the decision below when the assignments of error were made for the purpose of a review by this court.

Dismissed for want of jurisdiction.

BROLAN *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 645. Submitted January 5, 1915.—Decided February 23, 1915.

In a case from the District Court, if the power to review attaches because of a constitutional question, that authority gives rise to the duty of determining all the questions involved, including those that otherwise are within the exclusive jurisdiction of the District Court, but if the constitutional question asserted as the basis for jurisdiction of this court is frivolous, this court has no power to review it or any of the other questions involved. The writ of error must be dismissed.

The absolute power expressly conferred upon Congress to regulate foreign commerce involves the existence of power to prohibit importations and to punish the act of knowingly concealing or moving merchandise which has been imported in successful violation of such prohibition. *Keller* v. *United States*, 213 U. S. 138, distinguished.

The contention in this case that § 2 of the Act of February 9, 1909, c. 100, 35 Stat. 614, regulating the importation of opium, is unconstitutional as beyond the power of Congress, has been so foreclosed by prior decisions of this court that it is frivolous and affords no basis for jurisdiction of this court under § 238, Judicial Code.

THE facts, which involve the jurisdiction of this court under § 238, Judicial Code, are stated in the opinion.

Mr. Edward M. Cleary, Mr. John L. McNab, Mr. Bert Schlesinger, Mr. S. C. Wright and *Mr. P. S. Ehrlich,* for plaintiffs in error.

Mr. Assistant Attorney General Warren for the United States.

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

The indictment against the plaintiffs in error contained two counts: The first charged a conspiracy to wrongfully import opium into the United States in violation of the first portion of § 2 of the act of February 9, 1909, c. 100, 35 Stat. 614. The second charged a conspiracy to unlawfully receive, conceal and facilitate the transportation of opium which had been wrongfully imported into the United States with knowledge of such previous, illegal importation in violation of the latter part of the section referred to. The first count was quashed on the ground that the overt acts alleged occurred after the illegal importation or smuggling which was counted on. On the second count there was a conviction and sentence and this direct writ of error to the trial court is prosecuted to reverse the same. The right to a reversal rests upon two propositions: the one, that the clause of the section upon which the second count was based is repugnant to the Constitution of the United States because beyond the legislative power of Congress to enact and because moreover its provisions intrinsically constitute a usurpation of the powers reserved to the States by the Constitution; and the other, the insistence that various material errors were committed by the trial court during the progress of the case aside from the constitutionality of the statute.

Our jurisdiction to directly review depends upon the constitutional question since the other matters relied upon are as a general rule within the exclusive jurisdiction of the Circuit Court of Appeals of the Ninth Circuit, although if power to review attaches to the case because of the constitutional question, that authority gives rise to the

duty to determine all the questions involved. *Burton* v. *United States*, 196 U. S. 283; *Williamson* v. *United States*, 207 U. S. 425, 432; *Billings* v. *United States*, 232 U. S. 261, 276. Under these circumstances to prevent a disregard of the distribution of appellate power made by the Judicial Code and to see to it that there is something on which our jurisdiction to review can rest, it behooves us in this as in all other cases to see whether the question upon which our power depends is really presented, and if not, because although in form arising it is in substance so wholly wanting in merit as to be frivolous, to decline the exercise of jurisdiction. *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Hendricks* v. *United States*, 223 U. S. 178.

Coming to that subject the entire absence of all ground for the assertion that there was a want of power in Congress for any reason to adopt the provision in question is so conclusively foreclosed by previous decisions as to leave no room for doubt as to the wholly unsubstantial and frivolous character of the constitutional question based upon such contention. In *Buttfield* v. *Stranahan*, 192 U. S. 470, in stating the previously settled doctrine on the subject it was said, p. 492:

"The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. *Lottery Case*, 188 U. S. 321, 353–356; *Leisy* v. *Hardin*, 135 U. S. 100, 108. Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes,

but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than fifty years, regulating the degree of strength of drugs, medicines, and chemicals entitled to admission into the United States and excluding such as did not equal the standards adopted. 9 Stat. 237, chap. 70; Rev. Stat., § 2933, U. S. Comp. Stat. 1901, p. 1936." And see *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 334, 335; *The Abby Dodge*, 223 U. S. 166, 176.

Nor is there any ground upon which to rest the contention that although under this settled doctrine it is frivolous to question the power of Congress to prohibit importations and punish a violation of such prohibition, it is open to controversy and therefore not frivolous to contend that there is a want of power to prohibit and punish the act of knowingly concealing or moving merchandise which has been successfully imported from a foreign country in violation of the prohibitions against such importations. This conclusion is inevitable since it is obvious that to concede that the wrongful and successful evasion of the prohibition against bringing in imported merchandise or of knowingly, in violation of a further prohibition, dealing with such merchandise was beyond the scope of the complete power to prohibit importation, would be in substance to deny any power whatever. Indeed, it is evident that a power to prohibit which is operative and effective only as long as its prohibitions are not disobeyed is not an absolute power but is scarcely worthy of being denominated a relative one. But the authority being absolute, it follows that the right to assert it must endure and reach beyond the mere capacity of persons to evade its com-

mands to the control of those things which are essential to make the power existing and operative,—a conclusion, the truth of which cannot be escaped in the light of the doctrine on that subject, so luminously stated in *Gibbons* v. *Ogden*, 9 Wheat. 1, and which has been the guide by which the Constitution has been successfully interpreted and applied from that day to this.

While these considerations demonstrate that the attempted distinction is but a denial of the existence of a power which it is conceded it would be frivolous to deny, we briefly refer to the legislative history from the beginning for the purpose of showing that the authority which it is now insisted was not included in the right to prohibit importation has at all times been considered to be and treated as within the scope of such authority. Thus in 1799 the Customs Act of that year (March 2, 1799, § 69, chap. 22, 1 Stat. 627, 678) contained a provision for a seizure and forfeiture of merchandise imported in violation of its terms and imposed penalties upon any person who should "conceal or buy any goods, wares or merchandise, knowing them to be liable to seizure by this act." And by the act of March 3, 1823 (chap. 58, 3 Stat. 781), amending the act of March 2, 1821 (chap. 14, 3 Stat. 616) a like authority was asserted and penalties and forfeitures were imposed for violations. Again in 1866 in an act to prevent smuggling (§ 4, act of July 18, chap. 201, 14 Stat. 178, 179) the identical provisions found in the section here in question were made applicable generally to all importations and were sanctioned by making violations thereof criminal. And these provisions passed into the Revised Statutes (§ 3082), and are in force today, the particular provision here involved concerning opium being part of the act of 1909 prohibiting the importation of that article. In the face of this unbroken legislative interpretation of the extent of the power to prohibit covering a period of more than one hundred and

fifteen years, of the constant exertion of administrative authority under such legislation and of the assumption that such power undoubtedly obtained, manifested by a multitude of judicial decisions too numerous to refer to although many of them are cited in the argument of the Government, we can discover no possible ground upon which the contention to the contrary here relied upon can rest, and therefore the conclusion that it is wholly unsubstantial and frivolous cannot possibly be escaped.

In the argument it is however suggested that some support for the view relied upon results from the ruling in *Keller* v. *United States*, 213 U. S. 138, wherein a provision of the act known as the White Slave Act (Feb. 20, 1907, chap. 1134, 34 Stat. 898) was held to be beyond the power of Congress to enact. In fact the provisions of that statute are printed in a parallel column with the statute here assailed and the conclusion is drawn that the identity between them is perfect and therefore, despite the considerations involved in the review which we have made, it has come to pass not only that the assertion of the want of power in Congress here relied upon is not frivolous, but that it is well founded and must be upheld if the *Keller Case* is not to be overruled. But the contention is itself frivolous since it is based upon a mere failure to observe the broad line which separates the ruling in the *Keller Case* from the question here involved. Nothing can make this plainer than the mere statement that while in the *Keller Case* it is true there was a prohibition against the importation for immoral purposes of the persons whom the statute enumerated, the act punished not the harboring of persons for immoral purposes who had been brought into the United States in violation of the prohibition against importation, but its provisions also embraced the harboring of persons for immoral purposes if they were aliens even although they had come into the United States lawfully. The basis upon which the *Keller Case* proceeded

was so manifest that Congress amended the act by making the penal clause which was held unconstitutional, applicable only to those immoral aliens who had come into the United States in violation of the prohibitions of the act (March 26, 1910, § 2, c. 128, 36 Stat. 263, 264).

In the argument reference is made to decisions of this court dealing with the subject of the power of Congress to regulate interstate commerce, but the very postulate upon which the authority of Congress to absolutely prohibit foreign importations as expounded by the decisions of this court rests is the broad distinction which exists between the two powers and therefore the cases cited and many more which might be cited announcing the principles which they uphold have obviously no relation to the question in hand. In fact it is true to say of the citation of these cases as well as of the reference to the *Keller Case* that a proposition which is so wholly devoid of merit as to be frivolous is not given a substantial character by an attempt to support it by contentions which are themselves wholly devoid of all merit and frivolous.

There being no possible ground upon which to attribute even semblance of foundation for the constitutional question relied upon, it follows that it affords no basis for our jurisdiction to directly review and the writ of error is

Dismissed for want of jurisdiction.

TRUSKETT *v.* CLOSSER.

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

No. 160. Argued January 28, 1915.—Decided February 23, 1915.

The qualification "except as otherwise specifically provided by law," as used in § 6 of the act of May 27, 1908, 35 Stat. 312, removing restrictions upon alienation of allotments to members of the Five Civilized Tribes, means Federal, not state, law.

The act of May 27, 1908, expressly provides that the Probate Courts of the State of Oklahoma shall have jurisdiction in regard to the disposition of property of minors of the Five Civilized Tribes and that such jurisdiction shall be subject to the rules and regulations to be promulgated by the Secretary of the Interior.

The fact that the laws of the Territory of Oklahoma gave power to the courts to confer upon minors the rights of majority, and that the Enabling Act continued such laws, did not preclude Congress from enacting the provisions of the act of May 27, 1908, in regard to the disposition of allotments of members of the Five Civilized Tribes who were minors. *Tiger* v. *Western Investment Co.*, 221 U. S. 286.

Courts in Oklahoma, both state and Federal, having found that the provisions of the act of May 27, 1908, in regard to disposition of allotments of minors of the Five Civilized Tribes dominated the provisions of state law in that respect, that construction has become a rule of property in the State, and this court would be disposed to adopt it as such even if it doubted the construction placed by those courts upon that act; and *held* that the title under a lease made by a minor's guardian pursuant thereto was superior to that under a lease made by the minor during minority but after removal of disabilities by the state court.

198 Fed. Rep. 835, affirmed.

THE facts, which involve the construction of the act of May 27, 1908, defining restrictions on alienation of allotments by members of the Five Civilized Tribes, and the validity of gas and mining leases made by a member of the Cherokee Tribe, are stated in the opinion.

Mr. James A. Veasey, with whom *Mr. Lloyd A. Rowland* was on the brief, for appellants:

The act of May 27, 1908, removed all restrictions against the alienation of allotments of mixed-blood Indians having less than half Indian blood, including minors; Goodman was a minor Cherokee Indian of less than half Indian blood, and, accordingly, all restrictions against the alienation of his land were removed by said act. See Oklahoma Enabling Act; § 2, Schedule Constitution Oklahoma; §§ 73, 74, 75, 733, Wilson's Digest; *Brown* v. *Wheelock* (Tex.), 12 S. W. Rep. 111; *Tiger* v. *West. Invest. Co.*, 221 U. S. 286; § 14, Cherokee Treaty, Act of July 1, 1902, 32 Stat. 716; *Bowling* v. *United States*, 233 U. S. 528; *United States* v. *Nichols Lumber Co.*, 234 U. S. 245; § 4, Original Creek Agreement, 31 Stat. 861; Act of April 21, 1904, 33 Stat. 189; § 22, Act of April 26, 1906, 34 Stat. 137. *Jefferson* v. *Winkler*, 26 Oklahoma, 653, distinguished.

Mr. G. T. Stanford and *Mr. Eugene Mackey*, with whom *Mr. T. H. Stanford* and *Mr. John H. Brennan* were on the brief, for appellee.

Mr. Justice McKenna delivered the opinion of the court.

Conflict of oil and gas mining leases derived from the same lessor, one Robert F. Goodman, a member of the Cherokee Tribe of Indians.

Appellee brought suit in the District Court for the Eastern District of Oklahoma to quiet title to his lease against that of appellants covering the same premises. The bill set up the full title of appellee and the full title of appellants, to which appellants demurred. The demurrer was overruled and, appellants declining to plead further a decree was entered quieting the title of appellee

and decreeing the cancellation of the lease of appellants. The decree was affirmed by the Circuit Court of Appeals, 198 Fed. Rep. 835.

The lands in controversy were part of the common domain of the Cherokee Tribe of Indians, and on March 31, 1909, were conveyed to Goodman, a member of the Tribe, by patent of the Cherokee Nation, duly approved by the Secretary of the Interior as his, Goodman's, allotment, fifty acres being his so-called "surplus" allotment and the remaining thirty acres being his homestead allotment.

Goodman was one-eighth Indian blood and seven-eighths white blood and did not attain the full age of twenty-one years until September 25, 1910. Before that date, to wit, on October 12, 1909, in a proceeding brought by his next friend, the District Court of Washington County, Oklahoma, by a decree duly entered, removed from Goodman the disability of minority and conferred upon him the rights of majority concerning contracts and "authorized and empowered him to transact business in general with the same effect as if such business were transacted by a person over the age of twenty-one years." In pursuance of this decree Goodman granted to one Overfield a lease for oil and gas mining purposes covering his entire allotment for the term of fifteen years from its date and as long thereafter as oil or gas should be found in paying quantities. The lease passed to appellants by assignment and constitutes the basis of their title.

On September 14, 1910, that is, subsequent to the decree conferring majority rights upon Goodman and subsequent to the lease under which appellants hold, the legal guardian of Goodman granted a lease in behalf of Goodman to appellee covering the same lands. This lease was both authorized and confirmed by the order of the County Court for Nowata County, Oklahoma, that court then having probate jurisdiction of the person and estate

of Goodman, and Goodman at that time being a minor. This lease is the ground of title of appellee.

The question in the case then is, Of the two leases which constitutes the better title? And a decision of this question, appellants contend, depends upon the construction of the act of Congress of May 27, 1908, c. 199, 35 Stat. 312, special stress being put upon §§ 1 and 4. These sections are as follows: "Section 1. That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restriction. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degree of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April 26, 1931, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

"Section 4. That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: Provided, That allotted lands shall not be subjected or

held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law."

At the time this act was passed Goodman was a minor of one-eighth Indian blood, and it is hence contended that Goodman having less than one-half Indian blood, his entire allotment was free from all restrictions and was therefore subject to the laws of Oklahoma. And this notwithstanding §§ 2 and 6 of the act, which read respectively as follows: "Section 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper Probate Court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: Provided, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And Provided Further, that the jurisdiction of the Probate Courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.

"Section 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. . . ."

These sections are circumstantial and contain the elements of decision. Section 2 defines minors, male and

female, and provides for the disposition of their property under, as stated, rules and regulations provided by the Secretary of the Interior and declares that the jurisdiction of the Probate Courts of the State shall be subject to its provisions. And § 6 declares to what courts the property of minors so defined shall be subject. Explicitly such property is made "subject to the jurisdiction of the probate courts of the State of Oklahoma." The qualification "except as otherwise specifically provided by law" means, as said by the Circuit Court of Appeals, "Federal law, not state law."

Counsel, however, resist that conclusion and contend that the jurisdiction which was made subject to the provisions of the section is yet to be regarded independently of them and subject to the provisions of the local statutes. The reasoning by which this is attempted to be supported is somewhat involved and is difficult to represent succinctly. It is that the enabling act of the State, except as modified, and the constitution of the State continued the laws in force in the Territory at the time of its admission into the Union until they expired or were altered or repealed, and that by those laws minors were defined (§ 733, Wilson's Digest) and other laws gave power to confer upon them the rights of majority. (Sections 73, 74 and 75, Wilson's Digest.) But this did not preclude the exercise of the power of Congress as exhibited in the act of May 27, 1908. *Tiger* v. *Western Investment Co.*, 221 U. S. 286. And the courts, both state and Federal, have found no difficulty in determining its meaning or its dominance over the provisions of the state law. *Priddy* v. *Thompson*, 204 Fed. Rep. 955; *Jefferson* v. *Winkler*, 26 Oklahoma, 653. And we think it is clear that sections 1 and 4 are not to be construed independently of the other sections of the act.

In *Jefferson* v. *Winkler* an Indian girl married when she was under eighteen, and while under that age conveyed

her allotment. It was held that under the general law of Oklahoma the marriage emancipated her but that, notwithstanding, her conveyance was void, the act of May 27, 1908, prevailing over the state law. The reasoning of the court is directly antagonistic to that of appellants in the case at bar, the same contentions being urged in that case as in this. In other words, it was contended that § 1 of that act was absolute and was not modified by § 2, and the court, considering all of the provisions of the act, was of opinion that the legislative intention was to provide that the allotted lands of freedmen and mixed-blood Indians of less than half Indian blood, under the age of eighteen if a female, and under the age of twenty-one if a male, might be sold under the supervision and jurisdiction of the probate courts of the State and not otherwise. The court, therefore, decided, upon a consideration of the act of May 27, 1908, and of the laws of the State, that the latter removing the disability of minority do not extend to Indian minors as defined by the act of Congress.

The decision has been followed in *Tirey* v. *Darneal*, 37 Oklahoma, 606. Also *Tirey* v. *Darneal*, 37 Oklahoma, 611.

The construction has become a rule of property in the State and we should be disposed to accept it as such, even if we had doubts of the construction of the act of May 27, 1908. *Reynolds* v. *Fewell*, *ante*, p. 58.

The other contentions of appellants which have been argued are but phases of those we have reviewed or are determined by the same considerations.

Decree affirmed.

MUTUAL FILM CORPORATION *v.* INDUSTRIAL COMMISSION OF OHIO.

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

No. 456. Argued January 6, 7, 1915.—Decided February 23, 1915.

Where provisions for censorship of moving pictures relate only to films intended for exhibition within the State and they are distributed to persons within the State for exhibition, there is no burden imposed on interstate commerce.

The doctrine of original package does not extend to moving picture films transported, delivered and used as shown in the record in this case, although manufactured in, and brought from, another State.

Moving picture films brought from another State to be rented or sold by the consignee to exhibitors, are in consumption and mingled as much as from their nature they can be with other property of the State and subject to its otherwise valid police regulation, even before the consignee delivers to the exhibitor.

The judicial sense, supporting the common sense of this country, sustains the exercise of the police power of regulation of moving picture exhibitions.

The exhibition of moving pictures is a business, pure and simple, originated and conducted for profit like other spectacles, and not to be regarded as part of the press of the country or as organs of public opinion within the meaning of freedom of speech and publication guaranteed by the constitution of Ohio.

This court will not anticipate the decision of the state court as to the application of a police statute of the State to a state of facts not involved in the record of the case before it. *Quære*, whether moving pictures exhibited in places other than places of amusement should fall within the provisions of the censorship statute of Ohio.

While administration and legislation are distinct powers and the line that separates their exercise is not easily defined, the legislature must declare the policy of the law and fix the legal principles to control in given cases, and an administrative body may be clothed with power to ascertain facts and conditions to which such policy and principles apply.

It is impossible to exactly specify such application in every instance, and the general terms of censorship, while furnishing no exact standard

of requirements may get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct.

Whether provisions in a state statute clothing a board or Congress composed of officers from that and other States with power, amount to such delegation of legislative power as to render the provisions unconstitutional, will not be determined by this court in a case in which it appears that such Congress is still non-existent.

The moving picture censorship act of Ohio of 1913 is not in violation of the Federal Constitution or the constitution of the State of Ohio, either as depriving the owners of moving pictures of their property without due process of law or as a burden on interstate commerce, or as abridging freedom and liberty of speech and opinion, or as delegating legislative authority to administrative officers.

215 Fed. Rep. 138, affirmed.

APPEAL from an order denying appellant, herein designated complainant, an interlocutory injunction sought to restrain the enforcement of an act of the General Assembly of Ohio passed April 16, 1913 (103 Ohio Laws, 399), creating under the authority and superintendence of the Industrial Commission of the State a board of censors of motion picture films. The motion was presented to three judges, upon the bill, supporting affidavits and some oral testimony.

The bill is quite voluminous. It makes the following attacks upon the Ohio statute: (1) The statute is in violation of §§ 5, 16 and 19 of article 1 of the constitution of the State in that it deprives complainant of a remedy by due process of law by placing it in the power of the board of censors to determine from standards fixed by itself what films conform to the statute, and thereby deprives complainant of a judicial determination of a violation of the law. (2) The statute is in violation of articles 1 and 14 of the amendments to the Constitution of the United States, and of § 11 of article 1 of the constitution of Ohio in that it restrains complainant and other persons from freely writing and publishing their sentiments. (3) It attempts to give the board of censors legislative power,

which is vested only in the General Assembly of the State, subject to a referendum vote of the people, in that it gives to the board the power to determine the application of the statute without fixing any standard by which the board shall be guided in its determination, and places it in the power of the board, acting with similar boards in other States, to reject, upon any whim or caprice, any film which may be presented, and power to determine the legal status of the foreign board or boards, in conjunction with which it is empowered to act.

The business of the complainant and the description, use, object and effect of motion pictures and other films contained in the bill, stated narratively, are as follows: Complainant is engaged in the business of purchasing, selling and leasing films, the films being produced in other States than Ohio, and in European and other foreign countries. The film consists of a series of instantaneous photographs or positive prints of action upon the stage or in the open. By being projected upon a screen with great rapidity there appears to the eye an illusion of motion. They depict dramatizations of standard novels, exhibiting many subjects of scientific interest, the properties of matter, the growth of the various forms of animal and plant life, and explorations and travels; also events of historical and current interest—the same events which are described in words and by photographs in newspapers, weekly periodicals, magazines and other publications, of which photographs are promptly secured a few days after the events which they depict happen; thus regularly furnishing and publishing news through the medium of motion pictures under the name of "Mutual Weekly." Nothing is depicted of a harmful or immoral character.

The complainant is selling and has sold during the past year for exhibition in Ohio an average of fifty-six positive prints of films per week to film exchanges doing business in that State, the average value thereof being the sum of

$100, aggregating $6,000 per week or $300,000 per annum.

In addition to selling films in Ohio complainant has a film exchange in Detroit, Michigan, from which it rents or leases large quantities to exhibitors in the latter State and in Ohio. The business of that exchange and those in Ohio is to purchase films from complainant and other manufacturers of films and rent them to exhibitors for short periods at stated weekly rentals. The amount of rentals depends upon the number of reels rented, the frequency of the changes of subject, and the age or novelty of the reels rented. The frequency of exhibition is described. It is the custom of the business, observed by all manufacturers, that a subject shall be released or published in all theaters on the same day, which is known as release day, and the age or novelty of the film depends upon the proximity of the day of exhibition to such release day. Films so shown have never been shown in public, and the public to whom they appeal is therefore unlimited. Such public becomes more and more limited by each additional exhibition of the reel.

The amount of business in renting or leasing from the Detroit exchange for exhibition in Ohio aggregates the sum of $1,000 per week.

Complainant has on hand at its Detroit exchange at least 2,500 reels of films which it intends to and will exhibit in Ohio and which it will be impossible to exhibit unless the same shall have been approved by the board of censors. Other exchanges have films, duplicate prints of a large part of complainant's films, for the purpose of selling and leasing to parties residing in Ohio, and the statute of the State will require their examination and the payment of a fee therefor. The amounts of complainant's purchases are stated, and that complainant will be compelled to bear the expense of having them censored because its customers will not purchase or hire uncensored films.

The business of selling and leasing films from its offices

outside of the State of Ohio to purchasers and exhibitors within the State is interstate commerce, which will be seriously burdened by the exaction of the fee for censorship, which is not properly an inspection tax and the proceeds of which will be largely in excess of the cost of enforcing the statute, and will in no event be paid to the Treasury of the United States.

The board has demanded of complainant that it submit its films to censorship and threatens, unless complainant complies with the demand, to arrest any and all persons who seek to place on exhibition any film not so censored or approved by the censor congress on and after November 4, 1913, the date to which the act was extended. It is physically impossible to comply with such demand and physically impossible for the board to censor the films with such rapidity as to enable complainant to proceed with its business, and the delay consequent upon such examination would cause great and irreparable injury to such business and would involve a multiplicity of suits.

There were affidavits filed in support of the bill and some testimony taken orally. One of the affidavits showed the manner of shipping and distributing the films and was as follows:

"The films are shipped by the manufacturers to the film exchanges enclosed in circular metal boxes, each of which metal boxes is in turn enclosed in a fibre or wooden container. The film is in most cases wrapped around a spool or core in a circle within the metal case. Sometimes the film is received by the film exchange wound on a reel, which consists of a cylindrical core with circular flanges to prevent the film from slipping off the core, and when so wound on the reel is also received in metal boxes, as above described. When the film is not received on a reel, it is, upon receipt, taken from the metal box, wound on a reel and then replaced in the metal box. So wound and so enclosed in metal boxes, the films are shipped by the film

exchanges to their customers. The customers take the film as it is wound on the reel from the metal box and exhibit the pictures in their projecting machines, which are so arranged as to permit of the unwinding of the film from the reel on which it is shipped. During exhibition, the reel of film is unwound from one reel and rewound in reverse order on a second reel. After exhibition, it must be again unwound from the second reel from its reverse position and replaced on the original reel in its proper position. After the exhibitions for the day are over, the film is replaced in the metal box and returned to the film exchange, and this process is followed from day to day during the life of the film.

"All shipments of films from manufacturers to film exchanges, from film exchanges to exhibitors, and from exhibitors back to film exchanges, are made in accordance with regulations of the Interstate Commerce Commission, one of which provides as follows:

"'Moving picture films must be placed in metal cases, packed in strong and tight wooden boxes or fibrewood pails.'"

Another of the affidavits divided the business as follows:

"The motion-picture business is conducted in three branches; that is to say, by manufacturers, distributors, and exhibitors, the distributors being known as film exchanges. . . . Film is manufactured and produced in lengths of about one thousand feet, which are placed on reels, and the market price per reel of film of a thousand feet in length is at the rate of ten cents per foot, or one hundred dollars. Manufacturers do not sell their film direct to exhibitors, but sell to film exchanges, and the film exchanges do not resell the film to exhibitors, but rent it out to them."

After stating the popularity of motion pictures and the demand of the public for new ones and the great expense their purchase would be to exhibitors, the affidavit proceeds as follows:

"For that reason film exchanges came into existence, and film exchanges such as the Mutual Film Corporation are like clearing houses or circulating libraries, in that they purchase the film and rent it out to different exhibitors. One reel of film being made to-day serves in many theatres from day to day until it is worn out. The film exchange, in renting out the films, supervises their circulation."

An affidavit was filed made by the "general secretary of the national board of censorship of motion pictures, whose office is at No. 50 Madison Avenue, New York City." The "national board," it is averred, "is an organization maintained by voluntary contributions, whose object is to improve the moral quality of motion pictures." Attached to the affidavit was a list of subjects submitted to the board which are "classified according to the nature of said subjects into scenic, geographic, historical, classic, educational and propagandistic."

Mr. William B. Sanders and *Mr. Walter N. Seligsberg*, with whom *Mr. Harold T. Clark* was on the brief, for appellants:

The Federal courts have jurisdiction to decide all the constitutional questions, whether Federal or state, presented by the records. *Ohio R. & W. R. R.* v. *Dittey*, 232 U. S. 578; *Siler* v. *Louis. & Nash. R. R.*, 213 U. S. 175, 191.

Appellants are entitled to invoke the protection of the constitutional guaranties of freedom of publication and liberty of the press as fully as any person with whom they do business could do. *Savage* v. *Jones*, 225 U. S. 501, at pp. 519–521; *Collins* v. *New Hampshire*, 171 U. S. 30; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Crenshaw* v. *Arkansas*, 227 U. S. 389, 397; *Kahn* v. *Cincinnati Times Star*, 10 Oh. Dec. 599, aff'd 52 Oh. St. 662.

Appellants' motion pictures are publications and entitled as such to the protection afforded by the freedom

of publication guaranty contained in § 11, Art. I of the Ohio constitution. *Kalem* v. *Harper Bros.*, 222 U. S. 55, 60; *Harper Bros.* v. *Kalem*, 169 Fed. Rep. 61; *Daly* v. *Webster*, 56 Fed. Rep. 483; *Dailey* v. *San Francisco Superior Court*, 112 California, 94; *United States* v. *Williams*, 3 Fed. Rep. 484; *United States* v. *Loftis*, 12 Fed. Rep. 671; *LeRoy* v. *Jamison*, 15 Fed. Cas. 373.

Appellants' motion pictures constitute part of "the press" of Ohio within the comprehensive meaning of that term. They play an increasingly important part in the spreading of knowledge and the molding of public opinion upon every kind of political, educational, religious, economic and social question. The regular publication of new films under the name of "Mutual Weekly" is clearly a press enterprise.

See § 11, Art I, Ohio constitution, providing that "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.

The Censorship Law violates § 11 in that it imposes a previous restraint upon freedom of publication, which applies to all publications whether made through the medium of speech, writing, acting on the stage, motion pictures, or through any other mode of expression now known or which may hereafter be discovered or invented, and upon the liberty of the press. *Dopp* v. *Doll*, 9 O. Dec. Rep. 428; *Judson* v. *Zurhorst*, 10 O. C. C. (N. S.) 289; *S. C.*, aff'd, 78 O. S. 446; Cooley's Const. Law, 3d ed., Ch. XIV, § V, especially 309; Story on the Constitution, 5th ed., § 1182; Black's Const. Law, 3d ed., 658; Paterson on Liberty of Press, pp. 10 and 41; Cooley's Blackstone, 4th ed., p. 1326; *Patterson* v. *Colorado*, 205 U. S. 454, 462; *Dailey* v. *Superior Court*, 112 California, 94; *Ex parte Neil*, 32 Texas Criminal Court, 275; *Cowan* v. *Fairbrother* (N. C.), 32 L. R. A. 829, 836; *Ulster Square Dealer*

v. *Fowler*, 111 N. Y. Supp. 16; *Life Association* v. *Boogher*, 3 Mo. App. 173; *Clothing Co.* v. *Watson*, 168 Missouri, 153; *Atchison &c. Ry.* v. *Brown*, 80 Kansas, 312; Rawle on Constitution, 2d ed., pp. 123, 124; *Levert* v. *Daily States Pub. Co.*, 123 Louisiana, 594; *Sweeney* v. *Baker*, 13 W. Va. 182; *Williams Printing Co.* v. *Saunders*, 113 Virginia, 156; *Williams* v. *Black*, 24 S. Dak. 501.

The constitutional guaranties are not limited to forms of publication known at the time the Constitution was adopted. *Hurtado* v. *California*, 110 U. S. 516, 530; *Boyd* v. *United States*, 116 U. S. 746, 752; *Holden* v. *Hardy*, 169 U. S. 366, 385; *In re Debs*, 158 U. S. 164, 591.

The censorship law is not sustainable as a plan for the regulating of theatres by a system of granting or withholding licenses, because appellants' films are exhibited in churches, libraries, factories, store windows, before open air gatherings, etc. Moreover, even as to theaters, the surrender of the constitutional guaranty of freedom of publication could not be required as a condition precedent to the granting of a license. *Dist. of Col.* v. *Saville*, 8 D. C. App. 581; *People* v. *Steele*, 231 Illinois, 340; *Chicago* v. *Weber*, 246 Illinois, 304; *Indianapolis* v. *Miller*, 168 Indiana, 285; *William Fox Co.* v. *McClellan*, 62 Misc. 100; *Ex parte Quarg*, 84 Pac. Rep. 766; *Empire City Trotting Club* v. *State Racing Commission*, 190 N. Y. 31.

The censorship law cannot be sustained as a proper exercise of the police power, because it directly contravenes the constitutional guaranties of freedom of publication and liberty of the press. *Board of Health* v. *Greenville*, 86 Oh. St. 1, 21; *Lawton* v. *Steele*, 152 U. S. 133, 137; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Sperry ex rel.* v. *Sperry & Hutchinson*, 94 Nebraska, 785.

The Ohio Motion Picture Censorship violates the provisions of § 11, Art. I of the constitution of Ohio, in that it attempts to delegate legislative power. *Harmon* v. *State*, 66 O. S. 249; *Toledo* v. *Winters*, 21 O. Dec. 171;

Ex parte Sam Lewis, 14 O. N. P. (N. S.) 609; *Noel* v. *People*, 187 Illinois, 591; *Kerr* v. *Ross*, 5 App. D. C. 441; *State* v. *Burdge* (Wis.), 37 L. R. A. 157, 161; *Mathews* v. *Murphy*, 63 S. W. Rep. 785.

Mr. Robert M. Morgan, with whom *Mr. Timothy S. Hogan*, Attorney General of the State of Ohio, *Mr. James I. Boulger* and *Mr. Clarence D. Laylin* were on the brief, for appellees.

See brief on behalf of State of Kansas in No. 597, *post*, p. 253.

By leave of court, *Mr. Waldo G. Morse* and *Mr. Jacob Schechter* filed a brief as *amici curiæ* in behalf of the Universal Film Manufacturing Company.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court.

Complainant directs its argument to three propositions: (1) The statute in controversy imposes an unlawful burden on interstate commerce; (2) it violates the freedom of speech and publication guaranteed by § 11, art. 1, of the constitution of the State of Ohio; [1] and (3) it attempts to delegate legislative power to censors and to other boards to determine whether the statute offends in the particulars designated.

It is necessary to consider only §§ 3, 4 and 5. Section 3 makes it the duty of the board to examine and censor motion picture films to be publicly exhibited and displayed

[1] "Section 11. Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

in the State of Ohio. The films are required to be exhibited to the board before they are delivered to the exhibitor for exhibition, for which a fee is charged.

Section 4. "Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board." The films are required to be stamped or designated in a proper manner.

Section 5. The board may work in conjunction with censor boards of other States as a censor congress, and the action of such congress in approving or rejecting films shall be considered as the action of the state board, and all films passed, approved, stamped and numbered by such congress, when the fees therefor are paid shall be considered approved by the board.

By § 7 a penalty is imposed for each exhibition of films without the approval of the board, and by § 8 any person dissatisfied with the order of the board is given the same rights and remedies for hearing and reviewing, amendment or vacation of the order "as is provided in the case of persons dissatisfied with the orders of the industrial commission."

The censorship, therefore, is only of films intended for exhibition in Ohio, and we can immediately put to one side the contention that it imposes a burden on interstate commerce. It is true that according to the allegations of the bill some of the films of complainant are shipped from Detroit, Michigan, but they are distributed to exhibitors, purchasers, renters and lessors in Ohio, for exhibition in Ohio, and this determines the application of the statute. In other words, it is only films which are "to be publicly exhibited and displayed in the State of Ohio" which are required to be examined and censored. It would be straining the doctrine of original packages to say that the films retain that form and composition even when unrolling and exhibiting to audiences, or, being ready for

renting for the purpose of exhibition within the State, could not be disclosed to the state officers. If this be so, whatever the power of the State to prevent the exhibition of films not approved—and for the purpose of this contention we must assume the power is otherwise plenary—films brought from another State, and only because so brought, would be exempt from the power, and films made in the State would be subject to it. There must be some time when the films are subject to the law of the State, and necessarily when they are in the hands of the exchanges ready to be rented to exhibitors or have passed to the latter, they are in consumption, and mingled as much as from their nature they can be with other property of the State.

It is true that the statute requires them to be submitted to the board before they are delivered to the exhibitor, but we have seen that the films are shipped to "exchanges" and by them rented to exhibitors, and the "exchanges" are described as "nothing more or less than circulating libraries or clearing houses." And one film "serves in many theatres from day to day until it is worn out."

The next contention is that the statute violates the freedom of speech and publication guaranteed by the Ohio constitution. In its discussion counsel have gone into a very elaborate description of moving picture exhibitions and their many useful purposes as graphic expressions of opinion and sentiments, as exponents of policies, as teachers of science and history, as useful, interesting, amusing, educational and moral. And a list of the "campaigns," as counsel call them, which may be carried on is given. We may concede the praise. It is not questioned by the Ohio statute and under its comprehensive description, "campaigns" of an infinite variety may be conducted. Films of a "moral, educational or amusing and harmless character shall be passed and approved" are the words of the statute. No exhibition, therefore, or "campaign"

of complainant will be prevented if its pictures have those qualities. Therefore, however missionary of opinion films are or may become, however educational or entertaining, there is no impediment to their value or effect in the Ohio statute. But they may be used for evil, and against that possibility the statute was enacted. Their power of amusement and, it may be, education, the audiences they assemble, not of women alone nor of men alone, but together, not of adults only, but of children, make them the more insidious in corruption by a pretense of worthy purpose or if they should degenerate from worthy purpose. Indeed, we may go beyond that possibility. They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to. Besides, there are some things which should not have pictorial representation in public places and to all audiences. And not only the State of Ohio but other States have considered it to be in the interest of the public morals and welfare to supervise moving picture exhibitions. We would have to shut our eyes to the facts of the world to regard the precaution unreasonable or the legislation to effect it a mere wanton interference with personal liberty.

We do not understand that a possibility of an evil employment of films is denied, but a freedom from the censorship of the law and a precedent right of exhibition are asserted, subsequent responsibility only, it is contended, being incurred for abuse. In other words, as we have seen, the constitution of Ohio is invoked and an exhibition of films is assimilated to the freedom of speech, writing and publication assured by that instrument and for the abuse of which only is there responsibility, and, it is insisted, that as no law may be passed "to restrain the liberty of speech or of the press," no law may be passed to subject moving pictures to censorship before their exhibition.

We need not pause to dilate upon the freedom of opinion and its expression, and whether by speech, writing or printing. They are too certain to need discussion—of such conceded value as to need no supporting praise. Nor can there be any doubt of their breadth nor that their underlying safeguard is, to use the words of another, "that opinion is free and that conduct alone is amenable to the law."

Are moving pictures within the principle, as it is contended they are? They, indeed, may be mediums of thought, but so are many things. So is the theatre, the circus, and all other shows and spectacles, and their performances may be thus brought by the like reasoning under the same immunity from repression or supervision as the public press,—made the same agencies of civil liberty.

Counsel have not shrunk from this extension of their contention and cite a case in this court where the title of drama was accorded to pantomime;[1] and such and other spectacles are said by counsel to be publications of ideas, satisfying the definition of the dictionaries,—that is, and we quote counsel, a means of making or announcing publicly something that otherwise might have remained private or unknown,—and this being peculiarly the purpose and effect of moving pictures they come directly, it is contended, under the protection of the Ohio constitution.

The first impulse of the mind is to reject the contention. We immediately feel that the argument is wrong or strained which extends the guaranties of free opinion and speech to the multitudinous shows which are advertised on the bill-boards of our cities and towns and which regards them as emblems of public safety, to use the words of Lord Camden, quoted by counsel, and which seeks to

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[1] *Kalem* v. *Harper Bros.*, 222 U. S. 55.

bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion.

The judicial sense supporting the common sense of the country is against the contention. As pointed out by the District Court, the police power is familiarly exercised in granting or withholding licenses for theatrical performances as a means of their regulation. The court cited the following cases: *Marmet* v. *State*, 45 Ohio, 63, 72, 73; *Baker* v. *Cincinnati*, 11 Ohio St. 534; *Commonwealth* v. *McGann*, 213 Massachusetts, 213, 215; *People* v. *Steele*, 231 Illinois, 340, 344, 345.

The exercise of the power upon moving picture exhibitions has been sustained. *Greenberg* v. *Western Turf Ass'n*, 148 California, 126; *Laurelle* v. *Bush*, 17 Cal. App. 409; *State* v. *Loden*, 117 Maryland, 373; *Block* v. *Chicago*, 239 Illinois, 251; *Higgins* v. *Lacroix*, 119 Minnesota, 145. See also *State* v. *Morris*, 76 Atl. Rep. 479; *People* v. *Gaynor*, 137 N. Y. S. 196, 199; *McKenzie* v. *McClellan*, 116 N. Y. S. 645, 646.

It seems not to have occurred to anybody in the cited cases that freedom of opinion was repressed in the exertion of the power which was illustrated. The rights of property were only considered as involved. It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition. It was this capability and power, and it may be in experience of them, that induced the State of Ohio, in addition to prescribing penalties for immoral exhibitions, as it does in its Criminal

Code, to require censorship before exhibition, as it does by the act under review. We cannot regard this as beyond the power of government.

It does not militate against the strength of these considerations that motion pictures may be used to amuse and instruct in other places than theatres—in churches, for instance, and in Sunday schools and public schools. Nor are we called upon to say on this record whether such exceptions would be within the provisions of the statute nor to anticipate that it will be so declared by the state courts or so enforced by the state officers.

The next contention of complainant is that the Ohio statute is a delegation of legislative power and void for that if not for the other reasons charged against it, which we have discussed. While administration and legislation are quite distinct powers, the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations. Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution.

The objection to the statute is that it furnishes no standard of what is educational, moral, amusing or harmless, and hence leaves decision to arbitrary judgment, whim and caprice; or, aside from those extremes, leaving it to the different views which might be entertained of the effect of the pictures, permitting the "personal equation" to enter, resulting "in unjust discrimination against some propagandist film," while others might be approved without question. But the statute by its provisions guards against such variant judgments, and its terms, like other

general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies. This has many analogies and direct examples in cases, and we may cite *Gundling* v. *Chicago*, 177 U. S. 183; *Red "C" Oil Manufacturing Co.* v. *North Carolina*, 222 U. S. 380; *Bridge Co.* v. *United States*, 216 U. S. 177; *Buttfield* v. *Stranahan*, 192 U. S. 470. See also *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86. If this were not so, the many administrative agencies created by the state and National governments would be denuded of their utility and government in some of its most important exercises become impossible.

To sustain the attack upon the statute as a delegation of legislative power, complainant cites *Harmon* v. *State*, 66 Ohio St. 249. In that case a statute of the State committing to a certain officer the duty of issuing a license to one desiring to act as an engineer if "found trustworthy and competent," was declared invalid because, as the court said, no standard was furnished by the General Assembly as to qualification, and no specification as to wherein the applicant should be trustworthy and competent, but all was "left to the opinion, finding and caprice of the examiner." The case can be distinguished. Besides, later cases have recognized the difficulty of exact separation of the powers of government, and announced the principle that legislative power is completely exercised where the law "is perfect, final and decisive in all of its parts, and the discretion given only relates to its execution." Cases are cited in illustration. And the principle finds further illustration in the decisions of the courts of lesser authority but which exhibit the juridical sense of the State as to the delegation of powers.

Section 5 of the statute, which provides for a censor

congress of the censor board and the boards of other States, is referred to in emphasis of complainant's objection that the statute delegates legislative power. But, as complainant says, such congress is "at present nonexistent and nebulous," and we are, therefore, not called upon to anticipate its action or pass upon the validity of § 5.

We may close this topic with a quotation of the very apt comment of the District Court upon the statute. After remarking that the language of the statute "might have been extended by descriptive and illustrative words," but doubting that it would have been the more intelligible and that probably by being more restrictive might be more easily thwarted, the court said: "In view of the range of subjects which complainants claim to have already compassed, not to speak of the natural development that will ensue, it would be next to impossible to devise language that would be at once comprehensive and automatic."

In conclusion we may observe that the Ohio statute gives a review by the courts of the State of the decision of the board of censors.

Decree affirmed.

MUTUAL FILM COMPANY *v.* INDUSTRIAL COMMISSION OF OHIO.

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

No. 457. Argued January 6, 7, 1915.—Decided February 23, 1915.

Decided on authority of *Mutual Film Corporation* v. *Industrial Comm. of Ohio, ante,* p. 230.

THE facts are stated in the opinion.

Argued simultaneously with No. 456 by the same counsel on the same briefs.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case was submitted with No. 456, just decided. In the latter case the complainant in the court below and appellant here was a corporation of Virginia. The appellant in the pending case is a corporation of Ohio, and counsel say "although there are some differences in the way in which their business is conducted, yet the questions involved are the same, the records in both cases are nearly identical, and the court below treated them together, rendering the one opinion to cover both." And counsel have submitted them on the same argument.

On the authority, therefore, of the opinion in No. 456, the decree is

Affirmed.

MUTUAL FILM CORPORATION OF MISSOURI *v.* HODGES, GOVERNOR OF THE STATE OF KANSAS.

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

No. 597. Argued January 6, 7, 1915.—Decided February 23, 1915.

Mutual Film Corporation v. *Ohio Industrial Board, ante*, p. 230, followed to the effect that state statutes imposing censorship on moving pictures, such as those of Ohio and Kansas of 1913, are valid exercises of the police power of those States, respectively, and do not interfere with interstate commerce, abridge the liberty of opinion, or delegate legislative power to administrative officers.

One who is not within the class specified in a state police statute as liable to penalties for violation thereof has no standing to attack the statute as unconstitutional.

One who simply imports moving pictures into a State and does not exhibit them has no standing to attack a statute subjecting only exhibitors or those permitting exhibitions to its penalties; nor can he, by asserting constitutional rights, enlarge the character of the statute and make it an interference with interstate commerce when it is a mere exercise of the police power of the State upon things already within it. *Savage* v. *Jones*, 225 U. S. 501, distinguished.

The fact that an exchange for moving pictures can more conveniently subject the films to censorship than the exhibitors can, does not give the non-exhibiting owner of an exchange a standing to attack the statute as to matters which affect only exhibitors.

APPELLANT, which we shall call complainant, it being such in the court below, is a Delaware corporation and the defendants are officers of the State of Kansas.

The bill attacks the validity of a law of Kansas censoring moving picture films and prays an injunction against its enforcement. The relief was denied and the bill dismissed. This appeal was then allowed.

The bill alleges that complainant is engaged in local and interstate commerce in the renting, leasing, selling and delivery of "'films'" in the State of Kansas and other States, which films have been and now are being used in the motion picture show business in Kansas, as well as elsewhere.

It is alleged that a film "may be a Scenario of an original story, or theatrical production, conceived by a writer or author. This is a sketch of a plot, or chief incidents of a libretto or play, a drama, a prose or poetical composition, depicting human life and conduct on a stage. It may be also a reproduction of animated objects, scenery, picturesque views or animals, and is descriptive, educational, instructive, as well as amusing."

The manner of the production of a film is stated, and that there are in the State about five hundred moving

picture theaters using the films and each theater uses an average of three films a day.

That a revenue in the shape of a tax of $2.00 is attempted to be imposed upon each film censored, which means a tax of $6.00 per day on the films sold, rented or used in each show, approximating $3,000 per day on the picture show business in the State, and making a total revenue of $40,000 for the first three months from the beginning of the enforcement of the act and thereafter a revenue of thousands of dollars to be imposed as a tax upon films printed and produced in Kansas.

That the act places a tax of about $300 a week on the films rented, hired and shipped into the State for the period of three months and about $6,000 for the first year and means thereafter a tax on the interstate commerce business of complainant, a similar tax to be imposed on all films produced and printed and sent into Kansas.

That upon the films brought into the State the duty of censorship is imposed upon the State Superintendent of Public Instruction, thereby attempting to place in him the exclusive power of censorship of all films sent into the State for use in the State and the power to review and stamp with his approval the films used, shipped or rented or sent into the State; and the act provides that no film shall be exempt until a fee of $2.00 be paid and that all fees shall be paid into the state treasury and credited to the general fund of the State. That on account of the way the business is conducted, complainant and other film exchanges must necessarily bear the expense of censorship, otherwise the amount of the charges therefor would be necessarily doubled or trebled.

The bill attacks the law for various reasons, having foundation, it is alleged, in the provisions of the Federal and state constitutions, which may be summarized as follows: The prohibition upon the State to lay an import or export duty; or to abridge the privileges and immunities

of citizens of the United States, the statute of the State offending in this as it places an embargo and prohibition upon citizens of other States in transacting a lawful business in Kansas. The statute violates the bill of rights of the United States and of the State of Kansas as it deprives of life, liberty and property without due process of law, and particularly of the freedom to say, write, or publish whatever one will on any subject, "being only responsible for all abuse of that liberty," and that there can be no abuse until it is judicially determined.

It is alleged that the Attorney General of the State threatens to enforce the act, although it seems to be charged that he is without the means to do so, and arrests have been made on information filed in one of the courts of the State.

The answer of defendants asserts in elaborate allegations the necessity of the act and of the censorship of films; that it is not primarily a revenue measure but is an exercise in good faith of the police power of the State for the protection of the public morals and that "the Legislature in its unimpeachable wisdom believed that uncensored pictures were detrimental to the morals and perversive of true education." In denial of any grievance of complainant under the act the answer alleges the following: "Answering still further defendants allege that this complainant has no interest in the act of the Kansas Legislature complained of nor does the complainant exhibit pictures to the people of Kansas in moving picture shows, or elsewhere, nor does the complainant come directly under the provisions of said act, nor can the complainant, as a Delaware corporation licensed to do business in the State of Missouri, transact interstate business within the State of Kansas either with or without the payment of an inspection fee under the act complained of, nor is the complainant liable to any criminal prosecution under the act complained of, but only the persons,

firms, partnerships, companies and corporations which actually do exhibit pictures uncensored within the State of Kansas in violation of the act. And defendants further allege that upon its own showing this complainant has brought only mere moot questions into this Honorable Court."

A hearing upon an interlocutory or temporary injunction was waived and the case heard upon its merits, one judge only sitting, the parties agreeing thereto.

Affidavits in support of the bill were filed. One of them was by an exhibitor of films within the State and showed the number of theaters owned by him, the number of films received by him and the price paid therefor and that they were manufactured elsewhere than in Kansas. It affirmed that he never exhibited nor has he ever seen exhibited indecent, immoral, obscene or sacrilegious pictures or films; that among the films exhibited by him is a film known as the "Mutual Weekly," which consists of photographs of events of current interest throughout the world. A list of the subjects represented is given.

An affidavit of one of the managers of the complainant was also filed giving an account of the production of the films and their distribution. After a detail of this by complainant and by other "film exchanges" renting out films in the State and which operate independently of complainant, it is said:

"In my opinion the only possible method of continuing the rental of film in the State of Kansas, if the proposed censorship law were to go into effect, would be for the film exchanges to procure the approval required by statute. There are a large number of motion picture exhibitors in the State of Kansas,—about five hundred (500). I do not believe it would be in any wise practicable for the exhibitors themselves to procure the approval of the different films. In the first place, the same subjects are rented from different film exchanges and are shown in

different theaters concurrently. No exhibitor would be in a position to know whether the subject had been approved or not, without submitting the same to the Superintendent of Public Instruction. The result would be that in almost every case each reel of film received by an exhibitor on rental for exhibit would have to be sent to Topeka for approval, because the exhibitor would not, at his peril, exhibit the same.

"The film exchange, on the other hand, could with less difficulty than the exhibitor ascertain whether a film had been approved or not, because the film exchange itself handles large quantities of films, and at least as to its own produce could keep track of the approval or non-approval thereof, therefore, making it absolutely necessary for this complainant, or the other film exchanges, to submit before renting out their films to their patrons in Kansas the films for approval.

"In the second place, in my opinion, no exhibitor would consent to pay the censoring charge on any particular reel, or reels of film, because he would insist that the film be rented out to some other exhibitor in Kansas before him so that some one else should pay the tax."

Mr. William B. Sanders and *Mr. Walter N. Seligsberg*, with whom *Mr. Harold T. Clark*, *Mr. Eugene Batavia* and *Mr. Jackson H. Ralston* were on the brief, for appellant.

See brief for appellants in No. 456, *ante*, p. 236.

Mr. John S. Dawson, Attorney General of the State of Kansas, and *Mr. Frank P. Lindsay*, for appellees, submitted:

The act in question is not violative of the Constitution of the United States or that of the State of Kansas. *Atkins* v. *Kansas*, 191 U. S. 207; *Adams* v. *Milwaukee*, 228 U. S. 572; *Bank* v. *Haskell*, 219 U. S. 104; *Barbier* v. *Connelly*, 113 U. S. 27; *Crowley* v. *Christiensen*, 137 U. S. 86;

Dent v. *West Virginia*, 129 U. S. 114; *Home Tel. Co.* v. *Los Angeles*, 211 U. S. 265; *In re Rahrer*, 140 U. S. 545; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Kidd* v. *Pearson*, 120 U. S. 1; *Lawton* v. *Steele*, 152 U. S. 135; *Leisey* v. *Harding*, 135 U. S. 100; *Lindsay* v. *Commissioners*, 2 Bay (S. Car.), 61; *Meffert* v. *Medical Board*, 66 Kansas, 710; *Meffert* v. *Packer &c.*, 195 U. S. 625; *Mugler* v. *Kansas*, 123 U. S. 623; *People* v. *King*, 110 N. Y. 418; *Purity Extract Co.* v. *Lynch*, 226 U. S. 193; *State* v. *Board of Med. Ex.*, 34 Minnesota, 387; *State* v. *Nelson*, 52 Oh. St. 578; *Schmidinger* v. *Chicago*, 226 U. S. 578; *Sentell* v. *New Orleans &c. R. R.*, 166 U. S. 698; *United States* v. *D. & R. G. R. R.*, 213 U. S. 366.

The inspection fee provided for in ch. 294, Kansas, 1913, is not violative of § 10, art. I of the Federal Constitution as laying an impost or duty on picture films and reels imported into Kansas for exhibition purposes. *American Steel Co.* v. *Speed*, 192 U. S. 500; *Austin* v. *Tennessee*, 179 U. S. 343; *Brown* v. *Huston*, 114 U. S. 622; *Dooley* v. *United States*, 183 U. S. 151; *McLean* v. *D. & R. G. R. R.*, 203 U. S. 38; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345; *Pittsburg Coal Co.* v. *Louisiana*, 156 U. S. 343; *Woodruff* v. *Parham*, 8 Wall. 123.

The fee provided for in said act is not an unreasonable censor or inspection charge against such picture films or reels. *Chi., B. & Q. R. R.* v. *Cram*, 228 U. S. 70; *Commonwealth* v. *Herr*, 78 Atl. Rep. 68.

The picture films or reels are proper subjects of censor or inspection by a State before they can be exhibited to the public in such State. *Bloch* v. *Chicago*, 239 Illinois, 251; *Chicago* v. *Brownell*, 146 Illinois, 64; *Chicago* v. *Bowman Dairy Co.*, 234 Illinois, 340; *Peoria* v. *Calhoun*, 29 Illinois, 317; *Commonwealth* v. *McGunn*, 100 N. E. Rep. 337; *Gundling* v. *Chicago*, 176 Illinois, 340; *Hawthorn* v. *People*, 109 Illinois, 303; *Harrison* v. *People*, 222 Illinois, 150; *Knopf* v. *People*, 185 Illinois, 20; *Leisey* v. *Hardin*, 135 U. S. 100; *Meffert* v. *Medical Board*, 66 Kansas, 710;

Meffert v. *Packer &c.*, 195 U. S. 625; *People* v. *Creiger*, 138 Illinois, 401; *People* v. *Cooper*, 83 Illinois, 585; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Spiegler* v. *Chicago*, 216 Illinois, 114; *State* v. *State Board*, 34 Minnesota, 387; *State ex rel.* v. *Webster*, 150 Indiana, 607; *State* v. *Hathaway*, 115 Missouri, 36; *State Board* v. *Roy*, 22 R. I. 538; *Wilkins* v. *The State*, 113 Indiana, 514.

The act in question is not a revenue measure for the general fund of the State, nor is it a tax on interstate commerce in violation of § 8, Art. I of the Federal Constitution. *American Steel Co.* v. *Speed*, 192 U. S. 500; *Austin* v. *Tennessee*, 179 U. S. 351; *May* v. *New Orleans*, 178 U. S. 502; *McLean* v. *D. & R. G. R. R.*, 203 U. S. 38; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Red "C" Oil Co.* v. *North Carolina*, 222 U. S. 380; *Savage* v. *Jones*, 225 U. S. 501; *Standard Co.* v. *Wright*, 225 U. S. 540; *United States* v. *Knight*, 156 U. S. 1.

The act in question is not in contravention of § 1 of the due process clause of the Fourteenth Amendment, by imposing a fee of $2.00 per film or reel inspected under the provisions of said act. *Met. Board of Health* v. *Heister*, 37 N. Y. 661; *Cincinnati* v. *Steincamp*, 54 Oh. St. 284; *Ex parte White*, 67 California, 102; *Fire Dept.* v. *Chapman*, 10 Daly, 377; *Fire Dept.* v. *Wendell*, 37 Daly, 427; *Grant* v. *Slater M. & P. Co.*, 14 R. I. 380; *Hennessy* v. *St. Paul*, 37 Fed. Rep. 565; *Hubbard* v. *Paterson*, 45 N. J. L. 310; *In re Rahrer*, 140 U. S. 546; *Lawton* v. *Steele*, 152 U. S. 133; *Meffert* v. *Medical Board*, 66 Kansas, 710; *Mugler* v. *Kansas*, 123 U. S. 623; P. & W. Public H. & S., § 15; *Philadelphia* v. *Coulston*, 12 Phila. 182; *People* v. *King*, 110 N. Y. 418; *People* v. *D'Oench*, 111 N. Y. 359; *State* v. *Cramer*, 85 Oh. St. 349; *State* v. *Moore*, 104 N. Car. 714; *St. Paul* v. *Dow*, 37 Minnesota, 20; *Wood* v. *The State*, 42 Oh. St. 186; *Woodruff* v. *Railroad Co.*, 59 Connecticut, 63.

The act in question is not violative of § 1 of the Four-

teenth Amendment in the matter of free speech and free press, or by § 11 of the bill of rights of the constitution of Kansas. *Adams* v. *Milwaukee*, 228 U. S. 572; *Bartmeyer* v. *Iowa*, 85 U. S. 133; *Costello* v. *New Orleans*, 142 U. S. 88; *Gundling* v. *Chicago*, 177 U. S. 183; *In re Rapier*, 143 U. S. 132; *In re Horner*, 143 U. S. 570; *In re Banks*, 56 Kansas, 242; *Mahone* v. *Justice*, 127 U. S. 700; *Murphey* v. *California*, 225 U. S. 623; *New York* v. *Carr*, 199 U. S. 557; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 561; *Rosenthal* v. *New York*, 226 U. S. 260; *Robertson* v. *Baldwin*, 165 U. S. 275; *Selover* v. *Walsh*, 226 U. S. 112; *Taylor* v. *Judges*, 179 U. S. 410.

The expense for approval of films would not be $39,000 for the first three months, or $25,000 for the remainder of the year; nor would the total expense to the State exceed $6,000 for the first year, or more than $3,000 per annum thereafter. *Gundling* v. *Chicago*, 177 U. S. 189; *McLean* v. *D. & R. G. R. R.*, 203 U. S. 38; *Woodruff* v. *Parham*, 75 U. S. 123.

Appellees do not admit that the films or reels contain nothing immoral, sacrilegious, or impure. *Northwestern Life Ins. Co.* v. *Riggs*, 203 U. S. 243; *Western Turf Ass'n* v. *Greensburg*, 204 U. S. 359.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court.

Necessarily the first factor to be considered is the law of the State. It is entitled "An Act regulating the exhibiting or using of moving picture films or reels; providing and regulating the examination and approval of moving picture films and reels, and fixing penalties for the violation of this act, and making an appropriation for clerical help to carry this act into effect."

The following are its provisions: On and after April 1, 1913, it shall be unlawful to exhibit or use any moving picture film or reel unless the same shall have been ex-

amined and approved by the Superintendent of Public Instruction. Films used in institutions of learning are exempt from the provisions of the act. It is made the duty of such officer to examine the films or reels intended for exhibition and approve such as he shall find to be moral and instructive and to withhold his approval from such as tend to debase or corrupt the morals. His approval is to be stamped in writing upon the films or reels approved. He is to keep a record of examinations made by him, noting those approved and those not approved, stating the reasons for the latter. A charge of $2.00 is to be made for each examination. He is given the power and authority to supervise and regulate the display of all moving picture films or reels in all places of amusement or elsewhere within the State, to inquire and investigate, and to have displayed for his benefit to aid him in his investigation, those which are intended to be displayed, and shall approve such as shall be moral and proper and disapprove such as are sacrilegious, obscene, indecent or immoral, or such as tend to corrupt the morals. His disapproval of any film or reel may be reviewed by a commission consisting of the Governor, Attorney General, and Secretary of State, and if they or a majority of them find the film or reel fit for exhibition it shall be approved. It is the duty of every person exhibiting or permitting to be exhibited any film or reel within the State to furnish the Superintendent of Instruction, if he require it, a description of such film or reel and a description of its scenes and purposes and to exhibit and display it for his examination and approval. Any person exhibiting or permitting to be exhibited any unapproved film or reel shall be guilty of a misdemeanor, and each liable to suit and separate fines.

It will be observed that the law makes only exhibitors or those permitting exhibitions of unapproved films liable to the penalties of the act, and, as we have seen, it is alleged by the defendants that as complainant is in neither

class, it has no standing to attack the statute. To this complainant replies that its sales are interfered with, and invokes, as sustaining its right to complain, *Savage* v. *Jones*, 225 U. S. 501. This may be; but complainant, by asserting such right, cannot enlarge the character of the statute or give to it an operation which it does not have,—cannot, for instance, make the importation of films into the State an offense under it, and not their exhibition, which only it punishes—cannot, therefore, make the act an interference with interstate commerce instead of what it is—an exercise of the police power of the State upon things within the State. Nor can it make any difference that the "exchanges can more conveniently submit the films for approval than exhibitors can."

The opinion in No. 456 becomes applicable here. Indeed, this case was argued conjointly with that and submitted on the same briefs. It is here contended that the Kansas statute has the same invalidity and for the same reasons as it was contended there that the statute of Ohio had. We need not, therefore, repeat the reasoning. It establishes that both statutes are valid exercises of the police power of the States and are not amenable to the objections urged against them—that is, do not interfere with interstate commerce nor abridge the liberty of opinion; nor are they delegations of legislative power to administrative officers.

Decree affirmed.

UNITED STATES *v.* ERIE RAILROAD COMPANY.

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

Nos. 493, 494. Argued January 11, 12, 1915.—Decided February 23, 1915.

A ruling of the Interstate Commerce Commission which was never enforced—the custom of the carriers being uniformly the other way—cannot have the weight ordinarily accorded to the contemporaneous construction of a statute by the officers upon whom is imposed the duty of administering it.

While the Act to Regulate Commerce controls the relations of carriers subject to the act with each other, such carriers may have relations with other carriers who are not subject to the act, and permission to exchange passes with other carriers subject to the act can reasonably extend to other carriers who are not subject thereto, the same business reasons existing in both cases.

A comparison of possibilities under different constructions of a statute, which is but a comparison of excesses that are possible but not likely to be practiced, is not a fair argument.

The practice of carriers exchanging passes with other carriers has its justification in a strictly business policy, and, instead of being a burden upon their resources, is an aid.

The permission in the proviso of § 1 of the Act to Regulate Commerce, as amended by the act of June 29, 1906, for the interchange of passes by common carriers, includes the interchange of passes with carriers not subject to the provisions of the act as well as those who are subject thereto.

THE facts, which involve the provisions of the Act to Regulate Commerce regulating the giving and exchange of passes by carriers, are stated in the opinion.

Mr. Assistant Attorney General Todd, with whom *Mr. Thurlow M. Gordon* was on the brief, for the United States:

The construction of the disputed exception in the Anti-Pass Provisions of § 1 of the Act to Regulate Commerce

for which the government contends is the construction which has been adopted by the Interstate Commerce Commission, the administrative body charged with the enforcement of that act.

With the Commission's construction of the disputed exception before it, Congress, in reënacting in 1910 the Anti-Pass Provision, made no change whatever in the language of the exception. Annual Report, I. C. C. 1907; Conference Rulings, I. C. C. Nos. 95-g, 196, 216; *In re Free Transportation*, 12 I. C. C. 39; *United States* v. *Falk*, 204 U. S. 143; *United States* v. *Hermanos*, 209 U. S. 337; *Valk* v. *United States*, 28 Ct. Cls. 241.

The construction of a statute by the administrative body charged with its enforcement is always entitled to great weight, and when, as here, Congress has reënacted the statute without altering the part construed, the administrative construction, unless plainly erroneous, must be taken as impliedly ratified by Congress, and therefore as binding upon the courts. *B. & M. R. Co.* v. *Hooker*, 233 U. S. 97; *Edwards* v. *Darby*, 12 Wheat. 207; *Greenwald* v. *Weir*, 130 App. Div. N. Y. 696; *Illinois Surety Co.* v. *United States*, 215 Fed. Rep. 334; *Inter. Com. Comm.* v. *C., N. O. & T. P. R. Co.*, 64 Fed. Rep. 981; *Jacobs* v. *Prichard*, 223 U. S. 200; *Komada* v. *United States*, 215 U. S. 392; *Latimer* v. *United States*, 223 U. S. 501; *N. Y., N. H. & H. R. Co.* v. *I. C. C.*, 200 U. S. 361; *Schell's Ex'rs* v. *Fauche*, 138 U. S. 562; *United States* v. *Alabama R. R.*, 142 U. S. 615; *United States* v. *Baruch*, 223 U. S. 191; *United States* v. *Hammers*, 221 U. S. 220; *United States* v. *Moore*, 95 U. S. 760; *United States* v. *Philbrick*, 128 U. S. 52.

The Commission's construction is in accord with the sense in which the disputed words are generally used in the statute.

The Commission's construction is in accord with the context of the particular provision.

The Commission's construction is in accord with the

purpose and spirit of the legislation. *Alexander* v. *Alexandria*, 5 Cranch, 1; *American Express Co.* v. *United States*, 212 U. S. 522; Annual Report, I. C. C. 1889; *Atkins* v. *The Disintegrating Co.*, 18 Wall. 272; *Brewer* v. *Blougher*, 14 Pet. 178; *Brown* v. *Duchesne*, 19 How. 183; *Charleston &c. Ry. Co.* v. *Thompson*, 234 U. S. 576; *Church of the Holy Trinity* v. *United States*, 143 U. S. 457; *Colorado Free Pass Investigation*, 26 I. C. C. 491; Congressional Record, 2097, Vol. 40; *Davies* v. *Boston*, 190 Massachusetts, 194; *Edwards* v. *Darby*, 12 Wheat. 207; *Five Per Cent Increase Case*, 31 I. C. C. 351; *In re Financial Relations of L. & N. R. R.*, 31 I. C. C. 261; *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467; *Lovell-McConnell Mfg. Co.* v. *Automobile Supply Co.*, 235 U. S. 383; *McKee* v. *United States*, 164 U. S. 287; *Montana Pass Situation*, 29 I. C. C. 411; *N. Y., N. H. & H. R.* v. *I. C. C.*, 200 U. S. 361; *Nor. Pac. Ry.* v. *Adams*, 192 U. S. 440; *Party Rate Case*, 145 U. S. 263; *Pollard* v. *Bailey*, 20 Wall. 520; *Tap Line Cases*, 23 I. C. C. 277; *Townsend* v. *Boston*, 187 Massachusetts, 283; *United States* v. *Chavez*, 228 U. S. 525; *United States* v. *Freeman*, 3 How. 556.

The exception contained in § 22 can have no broader operation than the exception contained in the Anti-Pass Provision of § 1. *Alexander* v. *Alexandria*, 5 Cranch, 1; Congressional Record, 2097, Vol. 40; *Cook County National Bank* v. *United States*, 107 U. S. 445; *District of Columbia* v. *Hutton*, 143 U. S. 18; *King* v. *Cornell*, 106 U. S. 395; *Murdock* v. *Memphis*, 20 Wall. 590; *Tracey* v. *Tuffley*, 134 U. S. 206; *United States* v. *Tynen*, 11 Wall. 88.

Mr. Joseph W. Folk filed a brief for the Interstate Commerce Commission:

The Federal court has jurisdiction to restrain by injunction the unlawful issuance of passes. See § 3, Act to Regulate Commerce. *United States* v. *Stock Yards*, 226 U. S. 286; *Am. Express Co.* v. *United States*, 212 U. S. 522.

The issuance of free passes except to persons authorized

by law to receive them is a discrimination forbidden by law under §§ 2 and 3 of the act. *In re Grand Jury Charge*, 66 Fed. Rep. 146; *Ex parte Koehler*, 30 Fed. Rep. 867; *In re Carriage of Persons Free*, 3 I. C. C. 717; *Slater* v. *Nor. Pac. Ry.*, 2 I. C. C. 243; *Harvey* v. *Louis. & Nash. R. R.*, 3 I. C. C. 793; *Producers' Ass'n* v. *D., L. & W.*, 7 I. C. C. 92.

It is also a violation of § 3 of the Elkins Act.

The proviso in § 1 permitting the issuance of passes to the employés of common carriers includes only employés of common carriers subject to the act.

The first paragraph of § 1 of the act limits the provision with respect to railroad common carriers to those engaged in interstate transportation.

The proviso did not bring a new class of common carriers under discussion, but simply carved out certain exceptions. *In re Webb*, 24 How. Pr. 247, 249.

It was not the intention of Congress to divide common carriers into two classes, one subject to the act and one not subject to the act. 40 Cong. Record, p. 7922. The use of the word "interchange" in the proviso indicates so; otherwise the supervisory power of the Commission over issuance of passes would be destroyed to this extent.

There can no more be free railroad transportation than there can be free taxes. The greater the number who escape payment of transportation taxes the greater the burden on those who do pay.

One of the main purposes of the Act to Regulate Commerce was to put an end to passes and discrimination which had grown up in the practice of interstate carriers: see *Louis. & Nash. R. R.* v. *Mottley*, 219 U. S. 468.

The Interstate Commerce Commission has uniformly so held. *In re Exchange of Free Transportation*, 12 I. C. C. 39, 47; Conference Rulings, 95-g, 196, 216; *Carey* v. *Eureka Springs Ry.*, 7 I. C. C. 286, 311; *Wylie* v. *Nor. Pac. Ry.*, 11 I. C. C. 145, 154.

These holdings of the Commission agree with the pur-

poses of Congress expressed in the act and best serve the remedial features of the legislation, and unless there is some controlling reason to the contrary, the courts will not discredit or disparage the conclusions of the Commission.

This contemporaneous construction by those having in charge the enforcement of the act should have great weight. *New Haven Case*, 200 U. S. 361, 401; *United States* v. *Hermanos*, 209 U. S. 337, 339; *United States* v. *Philbrick*, 120 U. S. 52, 59; *Tifft* v. *Southern Ry.*, 158 Fed. Rep. 1021; *I. C. C.* v. *Cincinnati, N. O. & T. P. Ry.*, 64 Fed. Rep. 931; *Ill. Cent. R. R.* v. *I. C. C.*, 206 U. S. 441; *United States* v. *Moore*, 95 U. S. 760.

The free-pass provision should be construed in harmony with the purpose of its enactment. *N. Y., N. H. & H. Ry.* v. *Int. Com. Comm.*, 200 U. S. 361; *Lau Ow* v. *United States*, 114 U. S. 47; *Hopkins* v. *United States*, 171 U. S. 578; *United States* v. *Traffic Ass'n*, 171 U. S. 550.

Section 1 of the act specifically provides to what common carriers the act shall apply. The carriers in controversy—that is, the ocean steamship line and the English railroad—do not come within the terms of the act.

This is emphasized by the amendment inserted in the anti-pass proviso in 1910.

The provisions in § 22 allowing passes to be given to the employés of other railroads are modified by § 1, as amended in 1906. The original provision in § 22 was enacted in 1887.

Even if the provisions in § 22 were not repealed, the expression contained therein that passes may be issued to employés of other railroads includes only employés of the railroad companies subject to the act.

The Erie Railroad is a carrier subject to the act and bound by it, and the court may issue an injunction broad enough to cover any future issuance of interstate passes to the agents or employés of carriers not subject to the jurisdiction of the Commission, under the act.

The contention of the defendant would practically nullify the anti-pass section through enlarging by many millions the number of those entitled to receive these bounties at the expense of the public.

In the absence of legislative authority railways should have no more right to carry anyone free than a tax collector to remit taxes. Such privileges should be strictly construed and not enlarged by construction. The railroad pass has been one of the most corrupting influences in American public life. An awakening of public conscience brought about the amendment of 1906 to correct it.

If the defendant's contention is sustained it would practically nullify the salutary provisions of § 1 and fan into flame a wrong that has been smothered to a degree compared to what it was before the amendment of 1906.

Any change should be in the direction of further restriction rather than enlargement of this privilege.

Abuses would surely follow the overruling of the Commission's interpretation of § 1.

"Mutual back scratching" with railroad passes, unless authorized by law, is no more lawful than "mutual back scratching" with any other character of public taxes.

See also *Bitterman* v. *L. & N. R. R.*, 207 U. S. 205; *Cook County National Bank* v. *United States*, 107 U. S. 445, 451; *Cosmopolitan Shipping Co.* v. *Hamburg-American Packet Co.*, 13 I. C. C. 266; *Edwards* v. *Darby*, 12 Wheat. 210; *In the Matter of Jurisdiction over Water Carriers*, 15 I. C. C. 205; *Robertson* v. *Downing*, 127 U. S. 607; *Ryan* v. *Carter*, 93 U. S. 78; *Slater* v. *Gunn*, 170 Massachusetts, 509; *Tracey* v. *Tuffly*, 134 U. S. 206; *United States* v. *Healey*, 160 U. S. 136; *United States* v. *MacDaniel*, 7 Pet. 1; *United States* v. *State Bank*, 6 Pet. 29; *United States* v. *Tynen*, 11 Wall. 88, 92, 95.

Mr. George F. Brownell, with whom *Mr. M. B. Pierce* was on the brief, for appellee:

The language of the proviso in the anti-pass provision of § 1 of the Act to Regulate Commerce as amended in 1906 is unambiguous, and clearly authorizes the continuance of the long-established and well-known practice and custom, which has existed ever since long before the passage of the act, of interchanging passes between common carriers subject to the act and other common carriers for their respective officers and employés. *Alexander* v. *Worthington*, 5 Maryland, 485; *American Express Co.* v. *United States*, 212 U. S. 522; *Baggaley* v. *Pittsburgh & Lake Superior Iron Co.*, 9 Fed. Rep. 638; *C. & P. Telephone Co.* v. *Manning*, 186 U. S. 238; *Gardner* v. *Collins*, 2 Pet. 93; *Georgia Banking Co.* v. *Smith*, 128 U. S. 174; *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Int. Com. Comm.* v. *Baird*, 194 U. S. 25; *In the Matter of Exchange of Free Transportation*, 12 I. C. C. 40; *Kohlsaat* v. *Murphy*, 96 U. S. 160; *Maillard* v. *Lawrence*, 16 How. 256; *Thornley* v. *United States*, 113 U. S. 310; *United States* v. *Fisher*, 109 U. S. 143; *United States* v. *Goldberg*, 168 U. S. 95; *Yerke* v. *United States*, 173 U. S. 439.

To give the construction contended for by the Government the court would have to interpolate the words "subject to the provisions of this Act" in the provisos of §§ 1 and 22 under consideration. This would be legislation and not construction, and is not permissible. *American Express Co.* v. *United States*, 212 U. S. 522; *Andrews* v. *United States*, 2 Story, 202; *Ashby* v. *State*, 139 S. W. Rep. 872; *Beley* v. *Naphtaly*, 169 U. S. 353; *Day* v. *Ogdensburg & Lake Champlain R. R.*, 107 N. Y. 129; *Denn* v. *Reid*, 10 Pet. 524; *Employers' Liability Cases*, 207 U. S. 463; *Ex parte Brown*, 114 N. W. Rep. 303; *Hillburn* v. *St. Paul &c., R. R.*, 23 Montana, 229; *Johnson* v. *Burnham*, 99 Virginia, 305; *Hohlsaat* v. *Murphy*, 96 U. S. 160; *Pipe Line Cases*, 204 Fed. Rep. 798; *S. C.*, 234 U. S. 458; *Sturges* v. *Crowninshield*, 4 Wheat. 202; *United States* v. *Chase*, 135 U. S. 255; *United States* v. *Fisher*, 2 Cranch, 358; *United States* v.

Goldberg, 168 U. S. 95; *United States* v. *Harris*, 177 U. S. 305.

The language of the proviso in § 22 of the Act to Regulate Commerce is unambiguous, and clearly authorizes the continuance of the well-known custom and practice which has existed ever since long before the passage of the act, of interchanging passes between railroad companies subject to the Act to Regulate Commerce and foreign and other railroad companies not subject to that act. *Baltimore & Ohio S. W. Ry.* v. *Voight*, 176 U. S. 498; *Charleston & Western Carolina Ry.* v. *Thompson*, 234 U. S. 516; *Int. Com. Comm.* v. *B. & O. R. R.*, 43 Fed. Rep. 37; *Louis. & Nash. R. R.* v. *Mottley*, 219 U. S. 467; *N. Y., N. H. & H. R. R.* v. *Int. Com. Comm.*, 200 U. S. 361; *Northern Pacific Ry.* v. *Adams*, 192 U. S. 440.

The provisions of § 22 as construed by the Supreme Court are illustrative rather than exclusive, and under its provisions railroad companies subject to the Act to Regulate Commerce lawfully could and did interchange passes with other common carriers not subject to the act including trans-Atlantic steamship companies. *Int. Com. Comm.* v. *B. & O. R. R.*, 145 U. S. 263.

The legislative history of the anti-pass provision of the act shows no purpose to prohibit the issuing by common carriers subject to the act of passes to common carriers not subject to the act, but on the contrary, indicates an intent to permit the continuance of the practice of interchanging passes between common carriers subject to the act and other common carriers. *American Express Co.* v. *United States*, 212 U. S. 522; *American Net & T. Co.* v. *Worthington*, 141 U. S. 473; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 200; *County of Schuyler* v. *Thomas*, 98 U. S. 172; *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Jones* v. *Guaranty &c. Co.*, 101 U. S. 626; *Tap Line Cases*, 234 U. S. 27; *United States* v. *Burr*, 159 U. S. 85.

The history of the long-continued and well-recognized custom and practice of railroad companies to issue passes, in interchange with common carriers by rail and by water other than common carriers subject to the act as shown by the established facts in these cases, sustains the construction of the statute contended for by appellee and adopted by the court below. *Chamberlain* v. *Chamberlain*, 43 N. Y. 424; *C., N. O. & T. P. R. R.* v. *Int. Com. Comm.*, 162 U. S. 184; *Int. Com. Comm.* v. *B. Z. & C. R. R.*, 77 Fed. Rep. 942; *Matter of Frontier & Western R. R.*, 156 App. Div. N. Y. 62; *Steamboat New World* v. *King*, 16 How. 469; *United States* v. *Geddes*, 131 Fed. Rep. 452; *United States* v. *Railroad Co.*, 81 Fed. Rep. 783.

The Government's contention that the construction given by the Commission to provisions of the act in *ex parte* administrative rulings, must be taken as impliedly ratified by Congress and as binding upon the courts is not supported by either reason or authority. *Int. Com. Comm.* v. *D., L. & W. R. R.*, 216 U. S. 530; *N. Y., N. H. & H. R. R.* v. *Int. Com. Comm.*, 200 U. S. 361; *Omaha & Council Bluffs St. Ry.* v. *Int. Com. Comm.*, 230 U. S. 324; *United States* v. *B. & O. S. W. R. R.*, 226 U. S. 14.

MR. JUSTICE MCKENNA delivered the opinion of the court.

These are direct appeals from decrees dismissing two bills filed by the United States to enjoin the railroad company from issuing passes to employés of common carriers not subject to the Act to Regulate Commerce.

The action of the railroad company is alleged to be in violation of §§ 2 and 3 of that act, Feb. 4, 1887, c. 104, 24 Stat. 379, and of §§ 1 and 6 as amended June 29, 1906, c. 3591, 34 Stat. 584, 586, prohibiting rebates and preferences.

The bills were filed in pursuance of § 3 of the Act to Further Regulate Commerce, Feb. 19, 1903, c. 708, 32 Stat. 847, 848, which authorizes proceedings in equity to prevent common carriers from departing from their published rates or from committing any discrimination forbidden by law, and the basic contention of the United States is that the giving of passes for free transportation constituted a departure from the carrier's published rates and a discrimination against other passengers. To this the railroad replies that the passes issued by it and which constitute the ground of suit were authorized by the so-called anti-pass provision of § 1 of the Act to Regulate Commerce. The question, therefore, is very direct and is, What does the act authorize or prohibit?

The charge in No. 493 is that the railroad company which is a common carrier subject to the act, in pursuance of a standing practice, issues passes to certain of the officers, agents and employés of various trans-Atlantic steamship lines, such lines not being carriers subject to the act, while other passengers who are transported between the same points are required to pay the published fares, and that the railroad company will continue the practice.

The railroad company admits the charges and avers that it solicits transportation over its lines of freight brought to this country by the steamship lines; that the latter in turn solicit from shippers on the line of the railroad company the transportation of their freight abroad; that large amounts of traffic moving by the steamship lines are transported by the railroad company after arrival in or before departing from the United States, as the case may be, some of it under through bills of lading; that the interchange of passes between the officers and employés of the railroad and such steamship lines to the limited extent alleged is one which as a matter of common knowledge has existed and been openly followed by the railroad

company and other carriers generally for years; that its existence was commonly known long before the passage of the Interstate Commerce Act, by the terms of which its continuance is permitted; that it rests upon the same consideration, including considerations of business policy which have always been recognized as justifying the interchange of passes and is recognized and permitted by the proviso in § 1 of the act as amended and approved June 29, 1906. The provision is as follows:

"No common carrier subject to the provisions of this act, shall, after January 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, . . . provided, that this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employés of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation."

The material facts in No. 494 are the same as in No. 493, with the exception that the passes there in controversy were issued by the railroad company to an employé of the Great Eastern Railway of England, and a defense of the passes is made not only under the proviso of § 1, above quoted, but under § 22 of the act as originally enacted, which reads as follows:

"Nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employés, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employés."

In support of its contention the United States adduces certain rulings of the Interstate Commerce Commission and argues that Congress, having reënacted the statute, adopted the Commission's construction as the proper

one. Counsel invoke a line of cases which decide, it is contended, that a contemporaneous construction of a statute by the officers upon whom is imposed the duty of administering it is entitled to weight, and, unless clearly wrong, to determining weight. The cases are familiar, the doctrine they announce a useful one, and we are brought to the inquiry, Does it apply in the case at bar?

The first of the rulings referred to was made upon petition of Frank Parmelee & Company. That company, which is a transfer company transferring passengers and packages from the railroads to the hotels in Chicago, and the reverse, asked for a ruling as to whether under the exception contained in the proviso of § 1 it had a right to interchange passes with the railroads. The Commission decided that the Parmelee Company was not a carrier subject to the act and that, therefore, an interchange of passes between it and the railroads was not permissible. In subsequent Conference Rulings the Commission decided that the right to issue passes coexisted with the obligation to file tariffs, and when the latter did not exist the former could not be exercised. These rulings received emphasis from the fact that "ocean carriers to non-adjacent foreign countries" were said to be among the carriers not subject to the act and, under the principle announced, not entitled to receive passes.

But these rulings were never enforced and the custom of carriers was uniformly the other way. Against a mere verbal construction, therefore, permitted to languish in inactivity, we have the unopposed practice of the companies. The Commission's action, therefore, cannot have the absolute effect that the Attorney General ascribes to it; but keeping it in mind, let us proceed to a consideration of the statute.

It is not denied that the words "carriers," "common carriers," "railroads" and "railroad companies" are used in the act with and without qualification "subject to the

provisions of the act," and the number of times they are so used is compared. It will do no good to set forth the instances. The act was passed to regulate the conduct and affairs of the carriers of the country, and necessarily they are brought under its provisions and subject to them. It controls their relations, but the carriers subject to the act may have relation with other carriers, and special provisions would naturally be made to govern that relation. And certainly the reasoning is not impressive which justifies an interchange of passes between carriers subject to the act and denies it to those not so subject, the same business reasons existing in both cases.

Counsel for the United States sounds an alarm at such extension and lets imagination loose in portrayal of its consequences and sees included "tap lines and other industrial railroads, street car lines, local traction companies, omnibus transfer companies and herdic lines, hackmen, boatmen, ferrymen, truckmen, lumber flumes, bucket lines for ore, parcel deliveries, district messenger services, carriers of all descriptions, both in this country and abroad"—a formidable enumeration, it must be admitted. And there must be included, too, all their officers, all their employés and their families. There is, however, an opposing picture. It is conceded that carriers subject to the act may interchange passes, the officers and employés of each carrier receiving free transportation, and giving it to every other carrier subject to the act, making an army of the privileged with the same discrimination and the same burden on the passenger service of the railroads as in the illustration of the Government. There is no argument, therefore, in a comparison of the possibilities under one construction rather than the other. At best it is but a comparison of the excesses which may be but are not likely to be practiced. Counsel seem to think that the railroads have an eager desire to distribute passes and burden their transportation service with a crowd of

free passengers. Congress certainly had no such view and gave power to exchange passes, considering that the best safeguard against its abuse was the interest of the carriers. The cases at bar are a typical instance of its exercise. It has its justification in a strictly business policy, and instead of being a burden upon the resources of the companies it is an aid to them. With these examples before us, and in view of the other reasons which we have adduced, we see no reason to disregard the literal terms of the statute. And this view is strengthened, not weakened, by the proviso inserted on June 18, 1910, which is as follows:

"And provided further, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for . . . employés . . . of such telegraph, telephone and cable lines, and the . . . employés . . . of other common carriers subject to the provisions of this act." (36 Stat. 539, 546, c. 309.)

In such case the statute makes a special limitation, as will be observed; in other words, restricts the privilege of exchanging telegraph and telephone franks for employés, etc., of such lines and of other common carriers subject to the act—that is, there are words of explicit limitation.

Decree affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of the case.

FOX *v.* STATE OF WASHINGTON.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 134. Submitted January 19, 1915.—Decided February 23, 1915.

Where the highest court of the State, in overruling a demurrer, affirmed that the Constitution of the United States guaranteed freedom of speech, but held the statute on which the indictment was based valid in that respect and also that it was not bad for uncertainty, citing cases decided by this court as authority, this court may gather that rights under the Federal Constitution were relied on apart from the certificate of the state court to that effect, and there is jurisdiction under § 237, Judicial Code, to review the judgment.

The statute of the State of Washington, Rem. & Bal. Code, § 2564, denouncing the wilful printing, circulation, etc., of matter advocating or encouraging the commission of any crime or breach of the peace or which shall tend to encourage or advocate disrespect for law or any court or courts of justice, *held* not to be unconstitutional as the same has been construed by the highest court of that State and applied in the case of one indicted for publishing an article encouraging and inciting that which the jury found was a breach of state laws against indecent exposure.

Statutes should be construed, so far as they fairly may be, in such a way as to avoid doubtful constitutional questions; and this court presumes that state laws will be so construed by state courts.

If the statute attacked should be construed as going no further than it is necessary to go in order to decide the particular case involved within it, it cannot be condemned for want of definiteness.

Laws of the description of the statute of Washington involved in this action and prohibiting encouragement of crime, are not unfamiliar.

This court has nothing to do with the wisdom of the defendant, the prosecution, or the act. It is concerned only with the question whether the statute and its application infringes the Federal Constitution.

71 Washington, 185, affirmed.

THE facts, which involve the constitutionality under the due process clause of the Fourteenth Amendment of

a statute of the State of Washington preventing the wilful printing and circulation of written matter having tendency to encourage or advocate disrespect for the law, are stated in the opinion.

Mr. Gilbert E. Roe for plaintiff in error:

The constitutional question here presented was sufficiently raised in the state court.

Rev. Stat., § 709; *Columbia Power Co.* v. *Columbia Light Co.*, 172 U. S. 475; *Tyler* v. *Judges*, 179 U. S. 405, 411; *Chi., B. &c. R. R.* v. *Chicago*, 166 U. S. 226; *Missouri Valley Co.* v. *Wiese*, 208 U. S. 234, 244; *Loeb* v. *Columbia Township*, 179 U. S. 472, 483; *Montana* v. *Rice*, 204 U. S. 291.

Section 2564 violates the Fourteenth Amendment because it deprives the accused of liberty and property without due process of law. Black's Law Dictionary, p. 1181; *Hodgson* v. *Vermont*, 168 U. S. 262, 272.

For Federal and state decisions where statutes much more certain than the one here involved have been held void, as not constituting law at all within the meaning of the Fourteenth Amendment, see *Louis. & Nash. R. R.* v. *Tennessee R. R. Comm.*, 19 Fed. Rep. 679, 691; *Chi. & N. W. Ry.* v. *Railway Comrs.*, 35 Fed. Rep. 866, 876; *Tozer* v. *United States*, 52 Fed. Rep. 917; *Waters-Pierce Oil Co.* v. *Texas* (*No. 1*), 212 U. S. 86, 108.

In the last cited case while the statute was upheld, the correctness of the rule of the above cases was admitted. See also, among cases from the state courts, *Ex parte Jackson*, 45 Arkansas, 158; *Czarra* v. *Board*, 25 App. D. C. 443; *United States* v. *Capital Traction Co.*, 34 App. D. C. 592; *Hewitt* v. *Medical Examiners*, 148 California, 590; *Louis. & Nash. R. R.* v. *Kentucky*, 99 Kentucky, 663; *Commission* v. *Louis. & Nash. R. R.*, 20 Ky. Law, 491; *Mathews* v. *Murphy*, 23 Ky. Law Rep. 750; *Hagerstown* v. *Balt. & Ohio Ry.*, 107 Maryland, 178; *Mayor*

v. *Radecke*, 49 Maryland, 217, 230; *Cook* v. *State*, 26 Ind. App. 278.

It does not matter whether the deprivation of liberty or other fundamental rights result from the arbitrary action of a jury, a judge or any other agency of state government. This court under the mandate of the Fourteenth Amendment, when its authority is properly invoked, must interfere to prevent the wrong. And what can be more arbitrary than the verdict of the jury in this case, finding the defendant guilty of the shadowy and uncertain offense of editing the innocent article in question and thereby tending to create a mental attitude on the part of someone which the jurors would describe as "disrespect" for some law, relating to nude bathing. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Dobbins* v. *Los Angeles*, 195 U. S. 233, 240.

See also *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Patterson* v. *Colorado*, 205 U. S. 454, 461.

Mr. W. V. Tanner, Attorney General of the State of Washington, and *Mr. Fred G. Remann*, for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an information for editing printed matter tending to encourage and advocate disrespect for law contrary to a statute of Washington. The statute is as follows: "Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross

misdemeanor"; Rem. & Bal. Code, § 2564. The defendant demurred on the ground that the act was unconstitutional. The demurrer was overruled and the defendant was tried and convicted. 71 Washington, 185. With regard to the jurisdiction of this court it should be observed that the Supreme Court of the State while affirming that the Constitution of the United States guarantees freedom of speech, held not only that the act was valid in that respect but also that it was not bad for uncertainty, citing *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, so that we gather that the Constitution of the United States and especially the Fourteenth Amendment was relied upon, apart from the certificate of the Chief Justice to that effect.

The printed matter in question is an article entitled "The Nude and the Prudes" reciting in its earlier part that "Home is a community of free spirits, who came out into the woods to escape the polluted atmosphere of priest-ridden, conventional society"; that "one of the liberties enjoyed by Homeites was the privilege to bathe in evening dress, or with merely the clothes nature gave them, just as they chose"; but that "eventually a few prudes got into the community and proceeded in the brutal, unneighborly way of the outside world to suppress the people's freedom," and that they had four persons arrested on the charge of indecent exposure, followed in two cases, it seems, by sentences to imprisonment. "And the perpetrators of this vile action wonder why they are being boycotted."—It goes on "The well merited indignation of the people has been aroused. Their liberty has been attacked. The first step in the way of subjecting the community to all the persecution of the outside has been taken. If this was let go without resistance the progress of the prudes would be easy." It then predicts and encourages the boycott of those who thus interfere with the freedom of Home, concluding: "The boycott will be pushed until these invaders will come to see the

brutal mistake of their action and so inform the people." Thus by indirection but unmistakably the article encourages and incites a persistence in what we must assume would be a breach of the state laws against indecent exposure; and the jury so found.

So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407, 408; and it is to be presumed that state laws will be construed in that way by the state courts. We understand the state court by implication at least to have read the statute as confined to encouraging an actual breach of law. Therefore the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail. It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general. In this present case the disrespect for law that was encouraged was disregard of it—an overt breach and technically criminal act. It would be in accord with the usages of English to interpret disrespect as manifested disrespect, as active disregard going beyond the line drawn by the law. That is all that has happened as yet, and we see no reason to believe that the statute will be stretched beyond that point.

If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness. See *Nash* v. *United States*, 229 U. S. 373. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216. It lays hold of encouragements that, apart from statute, if directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanor if not an accomplice or a principal in the crime encouraged, and deals with the publication of them to a wider and less

selected audience. Laws of this description are not unfamiliar. Of course we have nothing to do with the wisdom of the defendant, the prosecution, or the act. All that concerns us is that it cannot be said to infringe the Constitution of the United States.

Judgment affirmed.

GEORGE N. PIERCE COMPANY, PETITIONER, *v.* WELLS, FARGO & COMPANY.

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

No. 14. Argued December 8, 1913. Restored to docket October 26, 1914. Reargued January 7, 1915.—Decided February 23, 1915.

One who deliberately without fraud or imposition accepts a contract of shipment limiting the recovery to a valuation specified in the filed tariff, but who is given the privilege of paying increased rates for increased valuation and liability up to full amount as also specified in the filed tariff, is limited in case of loss to recover the specified amount.

Contracts for limited liability when fairly made do not contravene the settled principles of the common law preventing the carrier from contracting against liability for its own negligence. *Hart* v. *Pennsylvania R. R.*, 112 U. S. 331.

Under the provisions of the Act to Regulate Commerce in regard to filing tariffs and the Carmack Amendment of 1906 to that Act, the amount to which the liability of the carrier is limited and the additional rate for additional liability must be stated in the filed tariff and must be equally applicable to all shippers under like circumstances.

The legality of a contract limiting the carrier's liability to a specified or agreed valuation does not depend upon that valuation having a relation to the value of the shipment, but depends upon acceptance of the parties to the contract and upon the filed tariff and the re-

quirement of the shipper to take notice thereof and to be bound thereby.

If the filed tariff specifies an amount as the carrier's liability which is unreasonable, it is for the Interstate Commerce Commission to correct upon proper proceedings, but it stands until so corrected and all shippers under like circumstances must be treated alike.

While the fifty dollar limit of value of the shipment and of express companies' liability for shipments of undeclared value at regular rates has been modified by the Commission since the shipment in this case, it was then the filed tariff limitation and the shipper was bound to take notice thereof; and to permit a greater recovery than the amount specified in the filed tariff would result in the very favoritism towards him that it is the purpose of the anti-discrimination provisions in the Act to Regulate Commerce to avoid.

The rule that conclusiveness of filed tariff rates does not relate to attempted fraudulent acts or billings, has no application where, as in this case, the transaction was open and above board and the character of the goods was known to both parties and the shipper was competent to agree to the lower valuation in consideration of the lower rate.

A contention as to liability of the carrier for value of wreckage which was not presented on the pleadings nor involved in the disposition of the case by the court below cannot be considered here.

189 Fed. Rep. 561, affirmed.

THE facts, which involve the validity of clauses in express receipts limiting the liability of the carrier to a fixed amount in absence of declared valuation and payment of a higher rate, are stated in the opinion.

Mr. Alfred L. Becker, with whom *Mr. William B. Hoyt*, *Mr. Maurice C. Spratt* and *Mr. John W. Yerkes* were on the brief, for petitioner.

Mr. Charles W. Pierson, with whom *Mr. William W. Green*, *Mr. L. A. Doherty* and *Mr. Charles W. Stockton* were on the brief, for respondent.

MR. JUSTICE DAY delivered the opinion of the court.

This action was begun in the Circuit Court of the United States for the Western District of New York, to recover

$20,000 for the loss of certain automobiles, shipped for the petitioner, hereinafter called the Automobile Company, by the respondent, hereinafter called the Express Company. The automobiles were shipped under circumstances to be detailed later, and the recovery of their value was sought for a breach of the contract to carry safely; failure to deliver according to the contract; for negligence; and for breach of the duty imposed upon the initial carrier by § 20 of the Act to Regulate Commerce, the Carmack Amendment (Act of June 29, 1906, c. 3591, 34 Stat. 584). The automobiles were shipped and receipt was issued in the form usually used by the express companies and containing the clause "Nor in any event shall said Company be held liable beyond the sum of Fifty Dollars, at not exceeding which sum the said property is hereby valued unless a different value is hereinabove stated." The receipt is in the form of the one shown in *Adams Express Co.* v. *Croninger*, 226 U. S. 491, and is identical in form with the one involved in the case of *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469.

At the trial, the tariff-book of the Express Company was marked for identification, but does not appear to have been embodied in the record. Counsel for the petitioner has, since the argument, filed a memorandum in explanation of the tariffs of the Express Company, and giving extracts therefrom, from which it appears that the rate for uncrated automobiles is double the merchandise rate, and that a through rate could be made by combination of rates from the point of shipment to the basing point, thence to destination. The rates filed, according to the memorandum, show merchandise rate from Chicago, as a basing point, to Buffalo, whence the goods were shipped, and shows merchandise rate, California section, page 20, from Chicago to San Francisco, and double the merchandise rate from Chicago to Buffalo, Chicago to San Francisco, would be $26.50 per hundred pounds, or, using

Kansas City as a basing point, taking the rates from Kansas City to Buffalo, Kansas City to San Francisco, the doubled rate would be the same amount per hundred pounds; also a valuation tariff, showing an additional charge for value in excess of $50, on rate of $8 per hundred pounds or over, 20 cents per hundred pounds, and, as the memorandum shows, if the value of the shipment may be taken to be $15,487.06, the rate for that sum in excess of $50.00 would be $31.00.

The Automobile Company was engaged in Buffalo in the manufacture, sale and shipment of automobiles. It had frequently made use of the services of the Express Company, knew its course of business, had a copy of its tariffs and a book of its express receipts and was familiar with the same; that is, it knew of the filed rate based upon weight or volume and the primary statement of value and consequent limitation upon the right to recover, as well as of the existence of a right to declare additional value and secure in case of loss an additional amount of recovery. Indeed, the Automobile Company had frequently resorted to the method of making a declaration of increased value in order to secure an increased amount of recovery under the tariff.

In May, 1907, the Automobile Company requested the Express Company to furnish an express car for the shipment of a carload of automobiles to San Francisco. Negotiations followed between the officers of the two companies and an understanding was reached. An express car was furnished and put as requested by the Automobile Company upon a sidetrack where it could be by that company conveniently loaded. Four automobiles were then moved by their own power to the place of loading and together with an extra automobile body and other automobile parts were loaded in the car by the shipper. When the car was loaded, triplicate receipts on the form usually used by the Express Company were made out and handed

to the agent of the Automobile Company, who read them, observed the absence of declaration of value and the limitation of $50.00, and said they were satisfactory. Before the shipment moved, the agent of the Express Company again called the attention of the agent of the shipper to the absence of declared valuation, inquired whether such declaration had been intentionally omitted and whether the property was insured, and was told that the omission was intentional and that the property was insured. Indeed it was shown beyond dispute that the failure to declare an additional value was the result of a change in the method of shipping its goods which had been shortly before put in practice by the Automobile Company, and that in this particular case the additional value was not declared because the shipment had been ordered from San Francisco, and the primary rate, that is the one shown by the tariff on weight or volume based upon the primary value, had been designated from San Francisco as the rate under which the goods should be carried. The car moved toward its destination but never reached there because while in transit on the rails of the Santa Fe Railway in the State of Missouri it was destroyed by fire.

This suit was then brought by the Automobile Company against the Express Company and the Santa Fe Railway to recover $20,000.00, the alleged value of the automobiles. The suit as to the Santa Fe Railway was dismissed for want of service and the case was tried only against the Express Company. As the case went to the jury, there was no denial of some liability on the part of the Express Company, the issue being whether its responsibility was limited to the sum of $50.00, the value of the automobiles as stated in the shipping receipt, which was in accordance with the published and filed tariff, or embraced the actual value of the things shipped. The trial court sustained the limitation in the receipt and directed a verdict for the $50.00 only, and after the affirmance by the Circuit Court

of Appeals of the Second Circuit of the judgment of the trial court entered on such instructed verdict (189 Fed. Rep. 561), the writ of certiorari which brings the case before us was granted.

The case as made therefore presents the question whether one who has deliberately and purposely, without imposition or fraud, accepted a contract of shipment limiting the amount of recovery to $50.00, which is the sum named in the filed tariffs as the amount of recovery in the absence of declaration of a greater value on the part of the shipper, who is given the privilege of paying an increased rate and having the liability for the full value of the goods, is entitled in case of loss to recover the full value of the property.

That contracts for limited liability, when fairly made, do not contravene the settled principles of the common law preventing the carrier from contracting against its liability for loss by negligence (*Railroad Company* v. *Lockwood*, 17 Wall. 357, 375) was settled by this court in what is known as the *Hart Case* (*Hart* v. *Pennsylvania R. R.*), 112 U. S. 331. In that case a recovery limited to $1,200 for 6 horses, one shown to be worth $15,000 and the others from $3,000 to $3,500 each, was sustained upon the principle that the contract did not relieve against the carrier's negligence, but limited the amount that might be recovered for such negligence, and it was there held that such contracts when fairly made did not contravene public policy. That case has been frequently followed since and its doctrine applied in construing limited liability contracts in connection with the Carmack Amendment to the Interstate Commerce Act, in a series of cases beginning with the *Adams Express Co.* v. *Croninger*, 226 U. S. 491. See in this connection *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469; *Kansas Southern Railway* v. *Carl*, 227 U. S. 639; *M., K. & T. Ry.* v. *Harriman*, 227 U. S. 657; *Chicago, Rock Island & Pacific* v. *Cramer*, 232

U. S. 490; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97; *A., T. & S. F. Ry.* v. *Robinson*, 233 U. S. 173.

The facts detailed show that there was nothing unfair in the contract. It was made between competent parties, dealing at arms' length, and for the purpose, so far as the shipper was concerned, of securing the lower rate, it deliberately took upon itself the risk of lessened recovery in case of loss for the sake of the lower rate.

Since the Act to Regulate Commerce and its amendments have gone into effect, cases of this character must be decided in view of the provisions of the Commerce Act and its requirement that the carrier shall file its tariffs and rates which shall be open to inspection and shall prescribe rates applicable to all shippers alike, thus to effect one of the main purposes of the law often declared by this court, to require like treatment of all shippers and the charging of uniform rates equally applicable to all under like circumstances. As this court said in one of the earlier cases, considering the limited liability contracts in connection with the provisions of the Interstate Commerce Act (*Kansas Southern Railway* v. *Carl*, 227 U. S. 639, 652):

"The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied, must be conclusive in an action to recover for loss or damage a greater sum. . . . To permit such a declared valuation to be overthrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies. The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of

the rate applicable, and actual want of knowledge is no excuse."

But it is said, and this fact was the basis of the dissenting opinion in the Circuit Court of Appeals, that there was no valuation at all in this case, and that the disproportion between the actual value of the automobiles shipped,—about $15,000,—and $50 demonstrates this fact, and it is insisted that what was done was merely an arbitrary and unreasonable limitation in the guise of valuation. This argument overlooks the fact that the legality of the contract does not depend upon a valuation which shall have a relation to the actual worth of the property. None such was attempted in the *Neiman-Marcus Case*, the *Croninger Case*, or the *Hooker Case*. But the contract embodied in the receipt was sustained in the *Express Company Cases*, because of the acceptance of the same by the parties as the basis of shipment, and by force of the statute as to the filed tariff and the requirement of the shipper to take notice of its terms and to be bound thereby. In each of those cases the filed tariff showed an opportunity to the shipper to have a recovery in a greater value than was declared, thus making it optional with the shipper to ship at the lower rate and not to avail himself of the right to greater recovery upon paying the higher rate named in the tariff. As the cases cited have held, so long as the tariff rate remains operative, the alternative rates based on value are deemed to be in force and controlling of the rights of the parties. *Great Northern Ry.* v. *O'Connor*, 232 U. S. 508; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97, 121.

If the rates were unreasonable it is for the Commission to correct them upon proper proceedings. If this were not so, the Interstate Commerce Act would fail to make effectual one of its prime objects, the prevention of discrimination among shippers. So long as the tariffs are adhered to, shippers under the same circumstances are treated alike.

Since the cause of action in this case arose, the Inter-

state Commerce Commission has dealt with this subject, (*The Matter of Express Rates,* 28 I. C. C. 131), and the fifty-dollar limitation and the classification based upon the valuation not exceeding $50 has been made applicable only to shipments weighing not more than 100 pounds. (28 I. C. C. 137, 138.) Under that weight the recovery is still limited to the sum of $50 unless a greater value is declared at the time of shipment, and the declared value in excess of the value specified paid for, or agreed to be paid for, under the schedule of charges for excess value. The limitation in the tariffs of $50 was made in view of the great mass of merchandise of moderate value in shipments received by the Company, and for that reason has been permitted in modified form to remain in the published tariffs by the action of the Interstate Commerce Commission in the matter to which we have referred.

In the *O'Connor Case* (232 U. S. 508) and the *Robinson Case* (233 U. S. 173), above cited, the doctrine of the conclusiveness of the filed rates was said to have no application to attempted fraudulent acts or false billing. We do not perceive how this doctrine can be applicable to the present case. As the statement of facts shows, the transaction was open and above board, the character of the goods was plainly disclosed and known to both parties, and the rate paid was not attempted to be fixed upon actual value alone, but upon a value which the shipper was competent to agree to, in consideration of the lower rate. Indeed, if a recovery for full value was to be permitted in this case, the shipper itself would obtain an undue advantage in recovering such value, when it had purposely and intentionally taken the risk of less responsibility from the carrier, for a lower rate. Such result would bring about the very favoritism which it is the purpose of the Commerce Act to avoid.

The suggestion that there is a wrong to other shippers, who value their goods at their real worth, is answered by

the fact that this tariff was open to all under the same circumstances, and while it remained in force, any shipper who wished to take the risk of a recovery for very much less than the value of his goods might have the benefit of the shipment at the reduced rate. The contention that the carrier should have been held to account for the value of what was left of the automobiles after the wreck and fire does not seem to be presented by the pleadings and was not involved in the disposition of the case ultimately made upon the contract of shipment. We find no error in the court's withholding that issue from the jury in the condition of the record.

Finding no error in the judgment of the Circuit Court of Appeals, it is

Affirmed.

MR. JUSTICE PITNEY dissenting.

GLOBE BANK AND TRUST COMPANY OF PADUCAH, KENTUCKY, *v.* MARTIN, TRUSTEE IN BANKRUPTCY OF ATKINS.

FIRST NATIONAL BANK OF PADUCAH, KENTUCKY, *v.* SAME.

OLD STATE NATIONAL BANK OF EVANSVILLE, INDIANA, *v.* SAME.

MARTIN, TRUSTEE IN BANKRUPTCY OF ATKINS, *v.* GLOBE BANK & TRUST COMPANY OF PADUCAH, KENTUCKY.

APPEALS FROM UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

Nos. 99, 100, 101, argued December 4, 7, 1914, and No. 292, submitted December 4, 1914.—Decided February 23, 1915.

A controversy over the distribution of a fund in the hands of the trustee arising from proceeds of property attached under attachment by a creditor, within four months of the petition, the lien of which has been preserved for the estate, is a controversy arising in bankruptcy proceedings and appealable, as in other cases in equity, under the Circuit Court of Appeals Act, and is not controlled by § 25 of the Bankruptcy Act.

This case being appealable to this court under the Circuit Court of Appeals Act, the petition for writ of certiorari is denied.

The title with which the trustee is vested under § 70-a includes all property transferred by the bankrupt in fraud of creditors and which prior to the bankruptcy might have been levied upon and sold under judicial process against him.

Under § 70-e, the trustee may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided, and the trustee has authority to recover the property in the hands of anyone not a *bona fide* holder for value.

The provisions of the Bankruptcy Act in regard to attachments and liens acquired under state laws are superior to all state laws in virtue of the constitutional authority of Congress to enact a uniform system of bankruptcy.

Even though a fund representing property conveyed in fraud of creditors may be recovered through the state court under an attachment obtained by creditors who, under state law, would alone share in the fund and the lien of which has been preserved under § 67-b, disposition of the fund is determined by the rule of distribution prevailing in the Federal jurisdiction and not by that in the state court in the absence of bankruptcy, and so *held* that a fund so obtained should be distributed between all the creditors as a general asset of the estate and not between those creditors who would alone have shared in the fund had their attachment been obtained more than four months prior to the petition.

The liens on property passing to the trustee to which a preference is given under § 64-b in accordance with state laws are statutory liens such as those for furnishing labor and materials and that section does not prevent the application of § 67-f in the circumstances here shown.

193 Fed. Rep. 841; 201 Fed. Rep. 31, affirmed.

THE facts, which involve the construction of § 67-f of the Bankruptcy Act of 1898, and the application of proceeds resulting from a lien preserved for the estate thereunder, are stated in the opinion.

Mr. D. H. Hughes, with whom *Mr. Alexander Gilchrist*, *Mr. C. K. Wheeler* and *Mr. J. G. Wheeler* were on the brief, for appellants:

The Circuit Court of Appeals erred in refusing to dismiss appeal and petition for review. *In re Mueller*, 135 Fed. Rep. 711; *In re Loving*, 224 U. S. 183; *Coder* v. *Arts*, 213 U. S. 213; Bankruptcy Act, 1898, §§ 25-a and 25-b.

The Circuit Court of Appeals also erred in holding that recovery of property under § 1907, Carroll's Kentucky Statutes, ed. 1909, is for benefit of creditors whose debts were created after voluntary conveyance, as well as those whose debts were created before such conveyance, although

no actual fraud shown. *Atkins* v. *Globe Bank*, 124 S. W. Rep. 879; Bankruptcy Act, 1898, §§ 64-b-(5), 67-f, 70 (4); *In re Bennett*, 153 Fed. Rep. 673; *In re Allen* (D. C.), 96 Fed. Rep. 512; *Merchants Bank* v. *Sexton*, 228 U. S. 634; *In re Laird*, 109 Fed. Rep. 550; *First National Bank* v. *Staake*, 202 U. S. 141; *Miller* v. *New Orleans Fertilizer Co.*, 211 U. S. 496.

Mr. W. F. Bradshaw, Jr., and *Mr. J. D. Mocquot* for appellee, and for petitioner in No. 292:

Kentucky Statutes, §§ 1906, 1907, providing for recovery of property conveyed in fraud of creditors, affords the creditor no lien upon the property except such as is acquired by and arises at the time of the institution of the creditor's action. The statute merely affords a cause of action. The creditor first attaching in such an action acquires a first lien on the property. *Stamper* v. *Hibbs*, 94 Kentucky, 358.

Kentucky Statutes, §§ 2487, 2488, provide for an inchoate lien which exists before the institution of the action. An action brought under those statutes is for the purpose of enforcing a preëxisting lien. *In re Bennett*, 153 Fed. Rep. 673; *Hall* v. *Guthrie*, 103 S. W. Rep. 731; *Winters* v. *Howell*, 109 Kentucky, 163.

An action for the recovery of property fraudulently conveyed by a bankrupt vests exclusively in the trustee under the provisions of §§ 70-a (4) and 70-e of the Bankruptcy Act of 1898. *Anderson* v. *Anderson*, 80 Kentucky, 638; *Annis* v. *Butterfield*, 58 Atl. Rep. 898; *Buffington* v. *Harvey*, 95 U. S. 99; *Bush* v. *Export Storage Company*, 136 Fed. Rep. 918; *Clark* v. *Larremore*, 188 U. S. 486; *In re Downing*, 201 Fed. Rep. 93; *Glenny* v. *Langdon*, 98 U. S. 20; Gray, 3 Am. Bankruptcy, 647; 62 N. Y. Supp. 618; *Hunt* v. *Doyal*, 57 S. E. Rep. 489; *Moyer* v. *Dewey*, 103 U. S. 647; *Ruhl-Koblegard* v. *Gillespie*, 61 W. Va. 584; *Trimble* v. *Woodhead*, 102 U. S. 647; *Williamson* v. *Seldon*, 53 Minnesota, 73.

Although in the absence of bankruptcy only certain creditors could, under the state law, recover the property fraudulently conveyed, when bankruptcy intervenes the property fraudulently conveyed passes as an asset of the estate, recoverable by the trustee for the benefit of the creditors generally. *Annis* v. *Butterfield*, 58 Atl. Rep. 898; *Clark* v. *Larremore*, 188 U. S. 486; *In re Downing*, 201 Fed. Rep. 93; *First National Bank* v. *Staake*, 202 U. S. 141.

A controversy between the trustee representing general creditors on one hand and a class of creditors claiming exclusive right to the fund realized from the recovery of property fraudulently conveyed on the other hand, the property being at the time of the bankruptcy in the adverse possession of the fraudulent vendee, constitutes a controversy arising in a bankruptcy proceeding appealable under § 24-a of the Bankruptcy Act. *Coder* v. *Arts*, 213 U. S. 223; *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545; *In re Loving*, 224 U. S. 183; *In re Mueller*, 135 Fed. Rep. 711; *Security Warehousing Co.* v. *Hand*, 206 U. S. 415; *Thomas* v. *Sugarman*, 218 U. S. 129; *York Mfg. Co.* v. *Cassell*, 201 U. S. 344.

If this controversy is to be regarded as involving only an order of distribution under the claim of the appellants to a lien upon the fund, it may then be held a bankruptcy proceeding reviewable in a revisory proceeding in the Circuit Court of Appeals under § 24-b, and reviewable by this court on writ of certiorari. But even in such event, inasmuch as the appeal involves both questions of law and of fact, and a writ of certiorari only a question of law, this court may retain jurisdiction upon either proceeding and determine the question of law. *Bryan* v. *Bernheimer*, 181 U. S. 188; *Duryea Power Co.* v. *Sternbergh*, 218 U. S. 299; *First National Bank* v. *Chicago Trust Co.*, 198 U. S. 280; *Holden* v. *Stratton*, 191 U. S. 115.

By whatever means the fund representing property conveyed in fraud of creditors may be recovered and

brought into the bankruptcy court, the disposition of the fund in bankruptcy is determined by the rule of distribution prevailing in the Federal jurisdiction, and is not affected by any rule of distribution prevailing in the state court in the absence of bankruptcy. *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 307; *First National Bank* v. *Staake*, 202 U. S. 141; *Miller* v. *New Orleans Fertilizer Co.*, 211 U. S. 496.

In the Supreme Court neither party will be permitted to abandon the issues made by them and considered by the inferior courts and in this court take the position that their rights really rested upon other grounds not at issue. *Tefft* v. *Munsuri*, 222 U. S. 114.

MR. JUSTICE DAY delivered the opinion of the court.

These are appeals from a decree of the United States Circuit Court of Appeals for the Sixth Circuit involving the distribution of a fund in the hands of a Trustee in Bankruptcy. The cases are reported in the Circuit Court of Appeals in 193 Fed. Rep. 841 and 201 Fed. Rep. 31.

One Thomas J. Atkins, upon a petition in involuntary bankruptcy, was, on December 28, 1908, in the United States District Court for the Western District of Kentucky, duly adjudicated a bankrupt. On December 3, 1906, the bankrupt conveyed certain parcels of real estate to his son, Edward L. Atkins, and to the children of said Edward L. Atkins. At the time of the conveyance, the bankrupt was indebted to the Globe Bank and Trust Company of Paducah, Kentucky, the First National Bank of Paducah, Kentucky, and the Old State National Bank of Evansville, Indiana. He also became indebted, subsequently to the delivery of said deed, to certain other creditors in considerable sums. On August 25, 1908, the Globe Bank & Trust Company instituted a suit in the

McCracken Circuit Court of Kentucky, against Atkins and the vendees of said deed, asking a judgment for the amount of the debt, and seeking to set aside the deed of conveyance as fraudulent and void, causing at the same time a writ of attachment to issue, which writ of attachment was levied upon the real estate described in the deed. Similar actions were begun by the First National Bank of Paducah, and the Old State National Bank of Evansville, asking the same relief, and in each of said actions attachments were issued and levied upon the same property. These suits were begun and the attachments issued within four months of the filing of the petition in bankruptcy. Arthur Y. Martin was duly elected trustee in bankruptcy. On January 9, 1909, the Globe Bank & Trust Company filed its petition contesting the jurisdiction of the bankruptcy court, and its right to interfere with the proceedings in the state court for the recovery of the property as aforesaid. On January 20, 1909, the Globe Bank & Trust Company filed a second petition, praying that the attachment lien be preserved under § 67-f of the Bankruptcy Act, and that it be permitted to make the trustee, A. Y. Martin, a defendant in said state court proceeding. On February 18, 1909, the bankruptcy court entered an order, directing that the attachment lien be preserved for the benefit of the bankrupt estate, as provided in § 67-f and the referee, under authority from the court made an order authorizing the trustee to institute an action for the recovery of the property and to intervene in the state court. Thereafter the trustee in bankruptcy instituted an action in the McCracken Circuit Court, praying that said conveyance be set aside as fraudulent and void, as against creditors both before and after the execution and delivery of the deed, and setting up his right as trustee in bankruptcy to be substituted as the real party in interest in the suits then pending in the state court, and further praying that all rights of action and recoveries resulting

therefrom should be decreed to pass to the trustee as assets of the bankrupt estate.

The trustee's action was consolidated with the actions then pending in the McCracken Circuit Court, brought by the creditors, and thereafter judgment was rendered, adjudging that enough of the property be sold to realize the amount of the creditors' debts existing at the time of the conveyance, and adjudging that the conveyance was not actually fraudulent and therefore not voidable as to creditors whose debts were created after the delivery of the deed, and that court appointed the trustee in bankruptcy a special commissioner to sell the property and hold all the proceeds subject to the further order of the court in the further and final distribution of such proceeds, or subject to orders of the District Court of the United States for the Western District of Kentucky in its final distribution of the entire assets of the estate of such bankrupt, and the final adjustment and settlement of its affairs before such court in such proceedings now pending in bankruptcy, "and the rights of all creditors in such bankrupt proceedings in the distribution or disposition of such proceeds by the bankrupt estate are hereby reserved and not determined, but left open for final adjudication among them in such proceedings in bankruptcy."

The trustee, as well as other parties, appealed to the Kentucky Court of Appeals, and that court rendered a judgment which we shall have occasion to consider more at length hereafter.

Subsequently, after the case had gone back to the McCracken Circuit Court from the Court of Appeals, the trustee filed his report of the sale of the property, and asked the court to direct him in the distribution of the proceeds of the sale in his hands. The Globe Bank & Trust Company, the First National Bank, and the Old State National Bank of Evansville, Indiana, claimed the whole of the fund recovered, and afterwards, upon the hearing, the

referee in bankruptcy entered an order, adjudging the three banks named, whose debts were created antecedent to the execution and delivery of the deed, entitled to the entire proceeds of the property, being the sum of $16,146.58, a sum less than the total amount of their debts, leaving nothing for distribution among general creditors.

The District Court affirmed the action of the referee, and an appeal was taken to the Circuit Court of Appeals for the Sixth Circuit. A petition for review was filed at the same time.

It further appears that the Globe Bank & Trust Company, the First National Bank, and the Old State National Bank of Evansville, Indiana, had originally filed proofs of debts, setting up their claims in bankruptcy. Afterwards the Banks filed amended and supplemental petitions and proofs of claims setting up their alleged priority to which pleadings the trustee filed a response and the order appealed from was entered. The Circuit Court of Appeals, treating the case as before it upon appeal (201 Fed. Rep. 31), entered a decree from which the present appeal is taken, reversing the order and decree of the District Court, and finding that the trustee held the fund for distribution among all the creditors of the estate, and not for the exclusive benefit of the banks named as prior creditors.

It is first contended that this court has no jurisdiction because the case, if not properly before the Circuit Court of Appeals by petition for review, should have been taken to that court under § 25 of the Bankruptcy Act, which section limits the time of appeal and requires special findings of fact in bankruptcy proceedings upon claims. We are of opinion, however, that the Circuit Court of Appeals rightly decided (201 Fed. Rep. 31) that the contest over the distribution of this fund in the hands of the trustee was a controversy arising in the bankruptcy proceedings, and hence appealable as other cases in equity

under the Circuit Court of Appeals Act, and the appeals to the Circuit Court of Appeals and this court were properly taken. *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *Coder* v. *Arts*, 213 U. S. 223; *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545; *Matter of Loving*, 224 U. S. 183; *In re Mueller*, 135 Fed. Rep. 711. This view of the jurisdiction of the court results in the denial of the petition for writ of certiorari in No. 292, submitted at the same time with the other cases now under consideration.

We come then to the cases upon their merits. Section 67-f of the Bankruptcy Act (July 1, 1898, c. 541, 30 Stat. 544, 565) provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

Under § 70-a of the Bankruptcy Act the trustee of the estate is vested with the title of the bankrupt, including all property transferred by him in fraud of creditors and

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.

Under § 70-e of the same Act, the Trustee may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided, and he is given authority to recover the property in the hands of anyone not a bona fide holder for value. The authority of the trustee to prosecute such actions does not seem to be questioned, and is ample for the purpose involved in the present suit. *Security Warehousing Co.* v. *Hand*, 206 U. S. 415, 425, 426.

In the cases in the McCracken Circuit Court the property was charged to have been conveyed in fraud of creditors and also involved a consideration of § 1907 of the Laws of Kentucky (Carroll, 1909), which provides that:

"Every gift, conveyance, assignment, transfer or charge made by a debtor, of or upon any of his estate, without valuable consideration therefor, shall be void as to all his then existing liabilities, but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter contracted, nor as to purchasers with notice of the voluntary alienation or charge; and though it be adjudged to be void as to a prior creditor, it shall not therefore be deemed to be void as to such subsequent creditors or purchasers."

It is the contention of the appellants that, as the conveyances were held in the Kentucky courts to be void under that section as to creditors whose debts and demands then existed, and because of the lack of actual fraud were held not to be void as to subsequent creditors or purchasers, they are entitled to priority, because of the Kentucky statute and the judicial determinations of the state court.

The argument of the appellants does not depend upon the attachments alone, but is based upon their right to

subject the property, which right they contend existed long prior to the four months before the institution of the bankruptcy proceedings. But this argument must be considered in the light of the provisions of § 67-f. That section distinctly provides that all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, within four months of the filing of the petition in bankruptcy, shall be deemed null and void, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, as was done in this case, order that the right under the levy, judgment, attachment or other lien be preserved for the benefit of the estate, in which event the same shall pass to and be preserved by the trustee for the benefit of the estate. Except for the attachments, the appellant banks had no specific lien upon the estate.

The attachments were doubtless sued out because under the Kentucky statute the parties were entitled thereby to gain a preference over other intervening creditors. *Stamper* v. *Hibbs*, 94 Kentucky, 358. The creditors had a right, it is true, to bring an action to set aside the conveyance as against existing creditors, but that right was not supported by any preëxisting lien. The suit was instituted to assert the creditors' rights against the property and thus to subject it to the payment of their claims. The banks had a right of action for this purpose, but the property was not subjected to attachment, nor was there any action seeking to enforce rights in the property until the suits were begun and that was within four months of the filing of the bankruptcy petition.

With attachments and liens thus acquired under state laws, the Bankruptcy Act dealt in provisions which were superior to all state laws upon the subject in virtue of the

constitutional authority of Congress to enact a uniform system of bankruptcy. *In re Watts and Sachs*, 190 U. S. 1, 27; *First Nat'l Bank* v. *Staake*, 202 U. S. 141, 148.

The difference, having the provisions of the act in view, between the beginning of a proceeding to assert liens that existed more than four months before the filing of the petition in bankruptcy, and the attempt to create them by attachment and other proceedings within four months, has been recognized in decisions of this court. In *Metcalf* v. *Barker*, 187 U. S. 165, a proceeding to give effect to a prior lien existing more than four months before the filing of the bankruptcy petition was held not within the meaning of § 67-f of the Bankruptcy Act. In *Clarke* v. *Larremore*, 188 U. S. 486, *Metcalf* v. *Barker* was distinguished, and it was held that where a judgment in the state court had gone so far that an execution had been realized by sale of the debtor's property, and the money was yet in the hands of the sheriff, who held it under a restraining order issued in a suit by another creditor, and the time for the return of the execution had not yet elapsed, and a bankruptcy petition was filed, the money did not belong to the judgment creditor, but passed under § 67-f to the Trustee in Bankruptcy.

Section 67-f came again under consideration in *First National Bank* v. *Staake, supra*, in which property of the bankrupt had been seized by attachment within four months of the filing of the petition, and § 67, particularly subdivision f, was given full consideration, and it was held that where the benefit of the attachment was claimed by the trustee in bankruptcy, and the court had ordered the same to be preserved for the benefit of the estate, so much of the value of the property attached as was represented by the attachment passed to the Trustee for the benefit of the entire body of creditors; that the statute recognized the lien of the attachment, but *distributed the lien* among the whole body of creditors. In that case it was contended

that § 67-f referred only to liens upon property which, if such liens were annulled, would pass to the Trustee in Bankruptcy, but this court answered that argument by saying:

"This clause evidently contemplates that attaching creditors may acquire liens upon property which would not pass to the bankrupt, if the liens were absolutely annulled, and therefore recognizes such liens, but extends their operation to the general creditors. Had no proceedings in bankruptcy been taken doubtless this property would have been sold for the benefit of the attaching creditors." And in the *Staake Case* it was held that it made no difference that the diligent creditor was thereby deprived of a preference which would have been entirely legal under the state law. It was also held that the rule that the trustee stands in the shoes of the bankrupt has no application to § 67-f where the trustee is permitted to assert a superior right for the benefit of general creditors.

The section (67-f) was again before this court in *Miller* v. *New Orleans Fertilizer Co.*, 211 U. S. 496. In that case, *First National Bank* v. *Staake*, *supra*, was quoted with approval, and it was held that the right to preserve liens under subdivision f of § 67 extended to causes of action arising under state law, and that while the state court had the right to entertain suits to avoid conveyances under the law of the State, under § 67-f the right to the lien of preference arising from the suit might by authority of the court be preserved for the benefit of the bankrupt estate. In that case it was further held that the proceeding and judgment in the state court did not prejudice the right of the bankruptcy court to determine among what creditors the property should be distributed, and that such questions were exclusively cognizable in the bankruptcy court. See also *Rock Island Plow Co.* v. *Reardon*, 222 U. S. 354.

It is contended, however, by the appellants, that if we

assume that under § 67-f of the Bankruptcy Act, the property or its proceeds must come to the trustee to be distributed by him under the orders of the bankruptcy court for the benefit of the estate, that inasmuch as under the statute of Kentucky creditors existing prior to the making of the deed in question were entitled to be preferred in the distribution of the proceeds, that right is protected by sub-section 5 of § 64-b of the Bankruptcy Act, which provides that the debts to have priority, except as therein provided, and to be paid in full out of bankrupt estates, are, among others, "debts owing to any person who by the laws of the States or the United States is entitled to priority," and it is contended that this subsection, as considered by the Circuit Court of Appeals of the Sixth Circuit in an opinion written by the late Justice Lurton, *In re Bennett*, 153 Fed. Rep. 673, maintains that position. But an examination of that case shows that it dealt with a statutory lien created under § 487 of the Kentucky statutes, giving preferences to persons furnishing materials or supplies to manufacturing companies, and creating a lien upon the property in cases of such companies in case of an assignment for the benefit of creditors, or where the property is distributed among creditors by operation of law or by act of the company. It was held that such statutory lien gave a substantial right in or inchoate lien upon the property from the date of furnishing the material, within the spirit and meaning of § 64-b sub-section 5, of the Bankruptcy Act. That case, and such cases as *In re Laird*, 109 Fed. Rep. 550, which dealt with labor claims, recognize the purpose of Congress in passing § 64-b, to maintain statutory liens and preferences in such cases in the distribution of the bankrupt estate.

We are unable to see that the case has any bearing upon the construction of § 67-f and the cases now under consideration. Under our system of bankruptcy, and in the

administration of assignments under state laws, there are certain persons such as those furnishing material or labor that, in certain specified ways, are given preference in the distribution of insolvent estates. It is a statutory lien of that kind with which the court dealt in *In re Bennett.*

Nor are we able to discover anything excluding the right of the Bankruptcy Court to itself distribute the property in the proceedings had in the Kentucky courts where the trustee intervened on the order of the judge. In his petition filed in the McCracken Circuit Court, Martin, the trustee, alleged that the conveyances made by Atkins were fraudulent and should be set aside and the property adjudged to belong to the trustee of the bankrupt for the benefit of his creditors. He also set up the order which had been made under § 67-f in the Bankruptcy Court. In that case, the McCracken Circuit Court held that the conveyances were not actually fraudulent, but were constructively so as to antecedent creditors. The property was ordered to be sold and the trustee in bankruptcy appointed special commissioner and directed to hold the proceeds of the sale subject to the order of final distribution of the bankruptcy court, as appears in that part of the judgment which we have already quoted. From that judgment the trustee and the grantees under the deed appealed. Upon the trustee's appeal the court in its opinion (124 S. W. Rep. 879) held that the trustee had not been prejudiced by the failure of the court below to allow the action to be prosecuted in his name, nor had the judgment prejudiced his substantial right as trustee for the benefit of all the creditors. The court cited § 70 of the Bankruptcy Act, recognizing the right of the trustee, vested with the title of the bankrupt, to bring proceedings in the bankruptcy court or the state court for its recovery, and his right to be substituted by the court as plaintiff in any suits brought by creditors for the purpose of recover-

ing property fraudulently conveyed by the bankrupt, and in its opinion the court said (p. 881):

"It is true the trustee asked that the conveyance be declared fraudulent as to all creditors both subsequent and antecedent, while the court only adjudged that the conveyance was fraudulent as to antecedent creditors, but we do not understand that the Trustee in bankruptcy is complaining of the judgment in so far as it refused to adjudge the conveyance actually fraudulent. The judgment does not undertake to dispose of the proceeds that may be realized from the sale of the property, but leaves this question open for future determination, and we do not doubt that, when the court comes to make an order concerning the disposition of the proceeds in the hands of the trustee as special commissioner, it will direct that the proceeds be paid over to the trustee in bankruptcy to be administered as a part of the estate of the bankrupt in the bankruptcy court. In anticipation of what we assume the court will do, we may with propriety in this opinion direct that it make such orders. If the court in the judgment had undertaken to divest the trustee of the control of this fund, we would upon this point reverse the judgment with directions to proceed as indicated, but, as the court did not make such an order, we are of the opinion that on the appeal of the trustee the judgment of the lower court should be affirmed."

Therefore it appears that the judgment of the lower court, directing the proceeds to be disposed of in the bankruptcy proceedings, was distinctly affirmed, and the court declared that a contrary holding would have been reversed.

After dealing with the questions brought up by the grantees in the deed, it was held that the court below was wrong in fixing the date of the delivery and acceptance of the deed as of April 20, 1907, instead of December 4, 1906, and the court said (page 882):

"To what extent this will affect the judgment creditors

we are not advised; but only those creditors whose debts were created previous to December 4, 1906, are entitled to participate in the proceeds realized from the sale of the property. If the proceeds amount to more than sufficient to pay such debts, the surplus should be paid to the grantees in the deed."

But we do not think in this part of the opinion the Court of Appeals of Kentucky intended in anywise to depart from its affirmation of the judgment of the Circuit Court upon the trustee's appeal and its explicit recognition of the authority of the Bankruptcy Court to control the disposition of the proceeds of the sale. The court did not consider § 67-f in its opinion, nor did it give, as it had no authority so to do, any specific direction as to the distribution of the fund in the Bankruptcy Court. The McCracken Circuit Court after the mandate came down repeated its order as to the distribution in the Bankruptcy Court by reference to its former judgment, and the trustee applied for an order in that court which was made and subsequently appealed from in the present case.

Under the Bankruptcy Act, when the conveyance was set aside, the lien or attachment being within four months of the bankruptcy proceeding, the bankrupt being then insolvent, of which fact no question is made, and the Bankruptcy Court having ordered that the lien be preserved for the benefit of creditors, it became good under the provisions of the Bankruptcy Act for the benefit of all the creditors of the estate. Under this order the Bankruptcy Court had acquired jurisdiction,—the state court had no possession of the property except such as the attachment gave—and after the conveyance was set aside in the state court, for which purpose the state court is given concurrent jurisdiction by § 70 of the Bankruptcy Act, it had the right to determine for itself the disposition of the fund arising from the property sold. *Miller* v. *New Orleans Fertilizer Co.*, 211 U. S. *supra.*

We find no error in the decree of the Circuit Court of Appeals, directing the distribution of the proceeds of the sale for the benefit of all the creditors of the estate. The decree is accordingly

Affirmed.

MR. JUSTICE PITNEY and MR. JUSTICE MCREYNOLDS dissenting.

IOWA CENTRAL RAILWAY COMPANY *v.* BACON, ADMINISTRATOR OF LOCKHART.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 130. Submitted January 19, 1915.—Decided February 23, 1915.

If the suit be one of which the Circuit Court can rightfully take jurisdiction, the state court loses jurisdiction on the filing of the petition and bond, and subsequent proceedings in that court are void; but if on the face of the record, including the petition for removal, it does not appear that the suit is removable, the state court is not bound to surrender its jurisdiction and may proceed as if no application for removal had been made. *Traction Co.* v. *Mining Co.*, 196 U. S. 239.

Although the petition may allege that plaintiff sustained damages in excess of two thousand dollars, if the prayer for recovery is for less than that sum, the jurisdictional amount is not involved, and the filing of a petition and bond does not effect a removal of the case.

Although the Federal court may have made orders continuing a case in which a petition and bond had been filed, and even dismissed it for want of prosecution, if the question of its authority had never been presented to or decided by it, the state court is not bound to respect such orders as conclusive of the question of jurisdiction; and so *held* in a case which on the face of the record was not removable as the amount claimed was less than $2,000, although the damages were stated in the petition as having exceeded that sum. *Chesapeake & Ohio Ry.* v. *McCabe*, 213 U. S. 207, distinguished.

157 Iowa, 493, affirmed.

THE facts, which involve the jurisdiction of the state and Federal courts and the effect of an attempted re-

moval of the case to the Federal court where the amount in controversy was less than $2,000, are stated in the opinion.

Mr. William H. Bremner and *Mr. F. M. Miner* for plaintiff in error:

After the removal to the United States court the amount in controversy would be for determination by the Federal court under the rules of practice prevailing in that court.

The original notice fixed the amount which would be claimed by the plaintiff at ten thousand dollars.

Under statutes similar to the statutes of Iowa after an answer has been filed the prayer for relief becomes immaterial and the court may give judgment for such an amount as is consistent with the issues made and the proof. *Marquat* v. *Marquat*, 2 Kern. (12 N. Y. 336); 1 Bates' Pleading 315; *Erck* v. *Omaha National Bank* (Nebr.), 62 N. W. Rep. 67.

The prayer for relief forms no part of the petition and the sufficiency and character thereof, as well as the amount involved, must be determined from the facts stated and not from the prayer for relief. *Henry* v. *McKittrick*, 42 Kansas, 485; *Tiffin Glass Co.* v. *Stoehr*, 54 Oh. St. 157.

The Supreme Court of Iowa had, prior to the decision in this case, in various opinions held that the plaintiff was not limited to the relief asked by his petition. *Wilson* v. *Miller*, 16 Iowa, 111; *Marder* v. *Wright*, 70 Iowa, 42; *Johnson* v. *Rider*, 84 Iowa, 50.

The state court was without jurisdiction, the case having been actually removed to the United States Circuit Court and that court having determined it had jurisdiction thereof.

After the filing of the transcript in the United States court the case was continued from term to term.

The fact that no order directing the removal of the case was entered by the state court is immaterial, as such an

order or the failure to make such an order does not affect the question of removal. *Brigham* v. *Thompson*, 55 Fed. Rep. 881; *State* v. *Coosaw Mining Co.*, 45 Fed. Rep. 804–809; *LaPage* v. *Day*, 74 Fed. Rep. 977; *Kern* v. *Huidekoper*, 103 U. S. 485; *Eisemann* v. *Delmar Mining Co.*, 87 Fed. Rep. 248; *Loop* v. *Winter*, 115 Fed. Rep. 362; *Van Horne* v. *Litchfield*, 70 Iowa, 11; *Byson* v. *McPherson*, 71 Iowa, 437; *Ohle* v. *C. & N. W. Ry.*, 64 Iowa, 599; *Chambers* v. *Ill. Cent. Ry.*, 104 Iowa, 238; *Myers* v. *C. & N. W. Ry.*, 118 Iowa, 312, 325; *Turner* v. *Farmers' L. & T. Co.*, 106 U. S. 552; *Marshall* v. *Holmes*, 141 U. S. 589, 595.

The case was actually removed, whether rightfully or not, and the state court lost jurisdiction by such removal and could only recover jurisdiction by remand from the Federal court or the commencement of a new action. *State* v. *Coosaw Mining Co.*, 45 Fed. Rep. 804, 809; *C. & O. Ry.* v. *McCabe*, 213 U. S. 207.

If the Federal court was without jurisdiction because the case was not removable, the remedy of the plaintiff was by moving to remand in the Federal court. *Turner* v. *Farmers' L. & T. Co.*, 106 U. S. 552, 555; *C. & O. Ry.* v. *McCabe*, 213 U. S. 207, 218; *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, 559; *Judge* v. *Arlen*, 71 Iowa, 186.

The cases cited show that as a petition for removal sufficient in all respects and in proper form, with a good and sufficient bond has been filed, the case was removed, and thereafter only the Federal court could determine whether or not it had jurisdiction.

The judgment for costs entered by the United States court in favor of the plaintiff in error is still in full force and effect, never having been set aside or reversed and cannot be treated as a nullity.

The effect of the decision by the Supreme Court of Iowa is to hold that the judgment of the United States court is

a nullity and the action of the state courts amounts to a refusal to give effect to a valid existing judgment of a United States court.

Mr. E. Elmer Mitchell, *Mr. L. T. Shangle*, *Mr. D. C. Waggoner* and *Mr. J. N. McCoy* for defendant in error.

Mr. Justice Day delivered the opinion of the court.

The defendant in error, as Administrator of Martin W. Lockhart, deceased, brought an action on September 22, 1905, in the District Court of Iowa in and for the County of Mahaska, to recover damages for the alleged wrongful killing of his intestate. In the petition it was alleged that the estate had been damaged in the sum of $10,000, but judgment was asked only for the sum of $1,990. On September 30, 1905, the Railway Company filed its answer, and on October 2, 1905, within the time required by law, filed a petition for removal of the cause to the United States Circuit Court in and for the Southern District of Iowa, on the ground of diversity of citizenship, alleging that the amount in controversy exceeded, with interest and costs, the sum of $2,000. The petition was accompanied by a bond.

The District Court of Mahaska County did not enter any order directing the removal of the case, but on March 29, 1906, there was filed in the office of the Clerk of the United States Circuit Court for the Southern District of Iowa a transcript of the proceedings in the case. After the filing of the transcript in the Federal court, the case was continued from term to term, until, on December 5, 1908, an order to notice said case for trial at the next term or show cause why it should not be dismissed was entered, and the Clerk was directed to mail and serve a copy of said order on the parties. On May 11, 1909, the Circuit Court of the United States entered an order dismissing the cause

for want of prosecution at the plaintiff's costs, and the defendant was given judgment for its costs.

Afterwards, on September 19, 1910, the plaintiff filed in the office of the District Court of Mahaska County an amended and substituted petition. On October 6, 1910, the District Court entered an order, denying the application of the defendant for a removal of the cause to the United States court on the ground that the amount in controversy, exclusive of interest and costs, was less than $2,000. The application for removal was the one filed on October 2, 1905. On February 28, 1911, the Railway Company filed a motion to dismiss the case and to strike from the files all pleadings filed subsequent to September 1, 1905, on the ground that the case had been removed to the United States Circuit Court. Attached to the motion was a certified copy of the record in the United States court. This motion was denied and afterwards the case went to trial in the state court, and upon verdict of the jury a judgment was rendered against the Railway Company. The case was taken to the Supreme Court of Iowa and that court affirmed the judgment of the lower court. (157 Iowa, 493.) The case was brought here, and the Federal question presented is whether the state court had lost its jurisdiction by the attempted removal to the United States Circuit Court.

It was of course essential to the removal of the case that the amount in controversy should have been sufficient to give the Federal court jurisdiction; that is to say, $2,000, exclusive of interest and costs. The state court had authority to determine the effect of the prayer to the petition and it decided that, under the petition, no more than the amount prayed for could be recovered in the action, notwithstanding the statement that the estate had suffered damage in the sum of $10,000. It is contended that, nevertheless, the proceedings in this case show that the case was removed to the United States Circuit Court, and in-

asmuch as the state court lost jurisdiction, its subsequent proceedings are null and void.

In *Traction Company* v. *Mining Company*, 196 U. S. 239, this court said, citing many previous cases, that certain principles relating to the removal of causes had been settled by the former adjudications of the court. One is that if the suit be one in which the Circuit Court could rightfully take jurisdiction, then upon the filing of the petition for removal in due time, with sufficient bond, the case is in law removed, and the state court loses jurisdiction to proceed further and all subsequent proceedings therein are void. Furthermore, that if, upon the face of the record, including the petition for removal, the suit does not appear to be removable, then the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made. See also the previous cases in this court cited in the *Traction Company Case*, at pages 244 and 245.

Applying these principles, it is apparent that the case now under consideration was not upon the face of the record a removable one. The prayer for recovery was for $1,990, and consequently the amount required to give jurisdiction to the Federal court was not involved. The filing of the petition and bond did not therefore effect a removal of the case.

But it is contended that this case is governed by *Chesapeake & Ohio Ry.* v. *McCabe*, 213 U. S. 207, because the United States court had determined, as it had authority to, that the case was a removable one, and that so long as that judgment stood, the state court had lost its jurisdiction, and had no power to proceed further in the case. In the *McCabe Case*, where the state court refused to order the removal of the case upon a transcript being filed, the Federal court held that it had jurisdiction in the case and proceeded to render a judgment therein; and when this adjudication was brought to the attention of the state

court, it refused to give it force, and proceeded to adjudge the case upon its own view of jurisdiction. This court held that the state court was bound to give weight to the judgment of the Federal court deciding that it had jurisdiction, and that the judgment, until reversed, was conclusive upon the state court as to the jurisdiction of the Federal court.

But no such case is presented here. The Federal court, it is true, more than once made an order continuing the case, and finally dismissed it for want of prosecution. The question of its authority to take jurisdiction was never presented or decided in the Federal court, and there is nothing in the orders made conclusive of that question in such sense that the state court was bound to respect it.

As the record upon its face made no case for removal the state court was right in retaining its jurisdiction, and proceeding to determine and adjudge the case. The judgment is

Affirmed.

AMERICAN CAR & FOUNDRY COMPANY *v.* KETTELHAKE.

ERROR TO ST. LOUIS COURT OF APPEALS, STATE OF MISSOURI.

No. 138. Argued January 20, 1915.—Decided Febuary 23, 1915.

Where there is a joint cause of action against defendants resident of plaintiff's State and a non-resident defendant, in order to make the case removable as to the latter because of the dismissal as to the former, the discontinuance as to the resident defendants must have been the voluntary act of the plaintiff and have so taken the resident defendants out of the case as to leave the controversy one wholly between the plaintiff and the non-resident defendant.

Under the practice in Missouri, when the court has sustained demurrers by some of the defendants and allowed plaintiff to take an involun-

tary non-suit as against them with leave to set it aside, the case is not then ended as against those defendants, nor is it until after affirmance by the appellate court or the expiration of plaintiff's time to appeal; the controversy does not become one solely between the plaintiff and the other defendants, and even if the latter are non-residents of plaintiff's State the case is not removable as to them. *Powers* v. *Chesapeake & Ohio Ry.*, 169 U. S. 92, distinguished.
171 Mo. App. 528, affirmed.

THE facts, which involve questions regarding removal from the state to the Federal court where the cause of action has been dismissed after trial as to all the defendants, resident of the same State as plaintiff, are stated in the opinion.

Mr. William R. Gentry, with whom *Mr. M. F. Watts* and *Mr. Edwin W. Lee* were on the brief, for plaintiff in error.

Mr. George Safford for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

Agnes Kettelhake was the widow of one Frank Kettelhake, who had been in the employ of the American Car & Foundry Company (hereinafter called the Car Company) at Saint Louis, Missouri. She brought her action to recover for the negligent killing of Kettelhake by the movement of a certain train of cars operated by the Car Company in the yard adjacent to its plant whilst Kettelhake was working under an unfinished car. Her action was brought in the Circuit Court of the City of Saint Louis, and the Car Company, a New Jersey corporation, William W. Eilers and Quincy Martin, citizens of Missouri, as was the plaintiff, were made joint defendants. It is conceded that the action was properly brought jointly against the Car Company and the defendants Eilers and Martin. The negligence charged was in substance that the defend-

ants omitted to instruct and require their employés to so mark cars under and about which other employés were engaged in work that all persons would know whether employés were working under such cars; negligently omitted to notify Kettelhake that defendants were about to move the car under which he was working; negligently omitted to discover that Kettelhake was under and repairing the car; and negligently caused the wheels and trucks of the car under which he was working to run over him.

Answers were filed and issues joined, and the case was called for trial in the Circuit Court of the City of St. Louis; and at the close of the plaintiff's evidence each of the defendants requested the court to give in its behalf a peremptory instruction to find for the defendant. Under the Missouri practice such instructions are usually referred to as demurrers to the evidence. The court sustained the demurrer offered by the defendant Martin and that offered by the defendant Eilers, and overruled the demurrer offered by the defendant Car Company, to which action of the court in sustaining the demurrers offered by Martin and Eilers, plaintiff then and there excepted, and saved her exceptions at the time. Plaintiff asked leave to take an involuntary non-suit as to the defendants Eilers and Martin, with leave to move to set aside the same, and leave to take such non-suit was granted by the court and said involuntary non-suit with leave to move to set aside the same was taken; thereupon the defendant Car Company orally asked the court for time to prepare and file a petition and bond for removal from the state court to the Federal court, which time the court then and there granted. Before said petition for removal and bond were filed, the plaintiff, by leave of court, orally moved the court to set aside the involuntary non-suit which plaintiff had taken as to defendants Martin and Eilers, which motion was then and there overruled. Thereupon the

Car Company filed its petition for removal to the Federal court and bond, which petition for removal was denied, to which denial the Car Company then and there excepted. At the same term, and within four days after the non-suits as to defendants Martin and Eilers were taken, and during the same term that the verdict and judgment were rendered, plaintiff filed separate motions praying the court to overrule the order theretofore made overruling plaintiff's motion to set aside said non-suits and reinstate the cause, and praying the court to grant plaintiff a new trial as to said defendants, which motions were overruled. Thereafter plaintiff filed her application and prayed an appeal as to the defendant Martin to the Supreme Court of Missouri, which appeal by order of the court duly entered of record was allowed, and it is conceded that the matter appealed from is now pending in the Supreme Court of Missouri, and, so far as it appears, is undecided.

A verdict was rendered in favor of the plaintiff against the Car Company, and afterwards the case was taken to the Supreme Court of Missouri, which court held that it had no jurisdiction and that the exclusive jurisdiction was in the St. Louis Circuit Court of Appeals, to which the cause was transferred. That court passed upon other questions to which it is not necessary to refer, and as to the right of removal held that the case was not a removable one. It is to that part of the judgment that this writ of error is taken.

To sustain its contention the plaintiff in error relies upon the case of *Powers* v. *Chesapeake & Ohio Railway*, 169 U. S. 92. In that case it appears that there were two petitions for removal in a case in which an action was brought against a non-resident railroad and two citizens of the same state as the plaintiff. The case was first removed to the Circuit Court of the United States, but upon motion was remanded to the state court, the United States court holding that there was no separable contro-

versy between the Railroad Company and the plaintiff. When the case was called for trial before a jury in the state court, the plaintiff discontinued his action against the individual defendants, and thereupon the Railroad Company filed a second petition for removal. That application was denied by the state court, but was granted by the Circuit Court of the United States, and the question was as to the propriety of the order of removal. It was held when the case was discontinued as to the defendants who were citizens of the same State with the plaintiff, the action became for the first time one against the Railroad Company alone, and therefore properly removable at that time.

In *Kansas City &c. Ry.* v. *Herman*, 187 U. S. 63, it was held that a case was not removable because the court had held that as to a resident defendant there was not sufficient evidence to warrant a verdict, and sustained a demurrer to the evidence. It was held that the ruling was on the merits and *in invitum*, and that there was nothing to show that the original joinder was in bad faith.

In *Fritzlen* v. *Boatmen's Bank*, 212 U. S. 364, the principle of the *Powers Case* was applied, and it was held that an application for removal under the circumstances there shown was within time under the ruling in the *Powers Case*.

In *Lathrop, Shea & Henwood Co.* v. *Interior Construction & Improvement Co.*, 215 U. S. 246, it was held that where the plaintiff insisted on the joint liability of the nonresident and resident defendants, the dismissal of the complaint on the merits as to the defendants who were citizens of the same State with the plaintiff did not make the case then removable, and did not prevent the plaintiff from taking a verdict against the defendants who might have removed the suit had they been sued alone or had there originally been a separable controversy as to them.

Taking these cases together, we think it fairly appears

from them that where there is a joint cause of action against defendants resident of the same State with the plaintiff and a non-resident defendant, it must appear to make the case a removable one as to a non-resident defendant because of dismissal as to resident defendants that the discontinuance as to such defendants was voluntary on the part of the plaintiff, and that such action has taken the resident defendants out of the case, so as to leave a controversy wholly between the plaintiff and the non-resident defendant. We do not think that situation is shown by this record. In other words, as the St. Louis Court of Appeals said, the resident defendants had not "so completely disappeared from the case as to leave the controversy one entirely between the plaintiff and a non-resident corporation." The trial judge recognized this when he overruled the motion to allow the petition for removal. In this connection the judge said:

"Under the evidence in this case Martin is not liable and in pursuance to that ruling you take a non-suit with leave to move to set the same aside; so that in my opinion he is still a party to the suit. Your motion to set aside the non-suit might hereafter be granted, and then we would have a section of the suit in the United States court and a section here."

This conclusion seems to be in conformity with the holdings of the Supreme Court of Missouri as to the effect of such non-suit. In *Chouteau* v. *Rowse*, 90 Missouri, 191, the Supreme Court of Missouri held that when a voluntary non-suit is taken the plaintiff abandons his suit and it is ended; and from the judgment entered upon it there is no appeal; but when a plaintiff is compelled, by the adverse ruling of the court, to take an involuntary non-suit with leave to move to set the same aside, with a view not to abandon the prosecution of the suit, but to test the correctness of the ruling by appeal, the appeal only removes the cause from the Circuit Court to the appellate

court, and, when bond is given, the judgment for non-suit is superseded, and can only become operative and enforceable in the event of its being affirmed by the appellate court. It is only when so affirmed that a plaintiff, in contemplation of the statute of Missouri (R. S., § 3239) can be said to suffer a non-suit. The same practice was recognized in *Nivert* v. *Railroad*, 232 Missouri, 626, and in *Lewis* v. *Mining Co.*, 199 Missouri, 463, 468.

We have examined the cases from the Supreme Court of Missouri, relied upon by the plaintiff in error, and we find nothing in them to militate against the conclusion reached in circumstances like those now presented. The ruling of the court sustaining the demurrer to the evidence interposed by the resident defendants practically determined the question of their liability, and, under the Missouri practice, as we understand it, there was a right to take an involuntary non-suit with leave to move to set it aside, and when that motion was overruled there was a remedy by appeal to the Supreme Court of Missouri, as was done in the present case, and the order is not final until the appellate court passes upon it.

We cannot agree to the contention that upon this record, when the court had sustained the demurrers to the evidence as to Martin and Eilers and plaintiff took the non-suit, the case was so far terminated as between the plaintiff and the resident defendants as to leave a removable controversy wholly between the plaintiff and a non-resident corporation.

The element upon which the decision in the *Powers Case* depended,—the voluntary dismissal and consequent conclusion of the suit in the state court as to the resident defendants,—is not present in this case.

We think the Court of Appeals of the City of St. Louis correctly ruled that the case is not a removable one, and its judgment is

Affirmed.

UNITED STATES, BY McREYNOLDS, ATTORNEY GENERAL, *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY.

ERROR TO AND APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 499. Argued January 5, 6, 1915.—Decided February 23, 1915.

No authority beyond that already conferred on the Interstate Commerce Commission by the Act to Regulate Commerce can be derived by that Commission from a resolution passed by only one branch of Congress; and so *held* that the powers of the Commission in making the investigation required by Senate Resolution No. 153, in regard to inspection of accounts and other papers, are limited to those conferred by the Act to Regulate Commerce and the amendments thereto.

Section 12 of the Act to Regulate Commerce does not make provision for inspection of accounts and correspondence of carriers authorized by the Commission; that feature was added by the Hepburn Act of June 29, 1906, amending § 20 of the Commerce Act.

The Hepburn Act, like other statutes, may be read in the light of the purpose it was intended to subserve, and the history of its origin and the report of the Interstate Commerce Commission submitted to Congress recommending the passage of the Act may be referred to.

As construed in the light of such report, and applying the rule of *noscitur a sociis*, § 20 of the Act to Regulate Commerce does not provide for the compulsory inspection of the correspondence of carriers, but is limited to accounts, including records, documents and memoranda.

Congress is not likely to enact a sweeping provision subjecting all correspondence of carriers to examination, attended with serious consequences in cases of withholding it, without using language adequate to that purpose.

The protection of confidential communications between attorney and client is well known and recognized as a matter of public policy.

The right of inspection of whatever accounts, records, documents and memoranda are included within § 20 of the Act to Regulate Commerce, as amended by the Hepburn Act, is not limited to those kept and made after the passage of the latter Act, but includes those kept and made prior thereto.

Quære, whether compulsory inspection of correspondence and other matters referred to in Senate Resolution No. 153 of Nov. 6, 1913, can be permitted within the constitutional rights of the carrier.

Where the Interstate Commerce Commission has applied for a writ of mandamus broader than the law permits, and no amendment was made narrowing the demand, but the petition was dismissed without prejudice, the proper practice is to affirm the order and not to reverse so as to grant the relief within the limits which the law allows; a new proceeding may be started for that purpose.

212 Fed. Rep. 486, affirmed.

THE facts, which involve the power of the Federal court to require the production of testimony, books and papers by a carrier under the provisions of the Anti-Trust Act in a proceeding started by the Interstate Commerce Commission pursuant to a resolution of the Senate of the United States, are stated in the opinion.

The Solicitor General, with whom *Mr. Theodor Megaarden* was on the brief, for the United States, and *Mr. Joseph W. Folk* for the Interstate Commerce Commission:

The scope and purpose of the pending investigation is within the purview of the Commerce Act and within the power and jurisdiction of the Commission.

Information of the relations existing between carriers is indispensable and necessary for the performance by the Commission of its proper duties.

The preservation of competition is one of the purposes of the Act, and its existence or non-existence bears directly upon the questions of discrimination, reasonableness of rates, and similar matters. *Gerke Brewing Co.* v. *Louis. & Nash. R. R.*, 5 I. C. C. 596, 606; *Int. Com. Comm.* v. *Balt. & Ohio R. R.*, 145 U. S. 263, 276.

It is also important to ascertain whether charges fixed by a carrier are just and reasonable within § 1 of the Act. *Int. Com. Comm.* v. *Chi. Gr. West. Ry.*, 209 U. S. 108, 119.

The matter of competition is also to be considered in applying the provisions of §§ 3 and 4 with reference to

undue or unreasonable preference to persons, etc., and the long and short haul clause. *Int. Com. Comm.* v. *Alabama Midland Ry.*, 168 U. S. 144, 164.

The subject is likewise material in connection with § 5 (pooling section) of the Act. *Central Yellow Pine Ass'n* v. *Ill. Cent. R. R.*, 10 I. C. C. 505; *East Tenn. &c. Ry.* v. *Int. Com. Comm.*, 99 Fed. Rep. 52, 61.

Whether a carrier is subject to the Act at all frequently depends upon the relation between it and other carriers. *Cincinnati &c. Ry.* v. *Int. Com. Comm.*, 162 U. S. 184.

The inquiry of the Commission is proper as a basis for legislative recommendations, for legal prosecutions, and for many other purposes. *Int. Com. Comm.* v. *Brimson*, 154 U. S. 447, 474; *Int. Com. Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194, 208.

The inquisitorial work of the Commission has been the basis of practically all congressional legislation affecting interstate carriers during the past 25 years. Where the persons and subjects under consideration are within the field of the Commission's lawful activities, the courts will not inquire as to the ultimate object of the investigation.

As to the plenary power of the Commission see *Int. Com. Comm.* v. *Brimson, supra.; Int. Com. Comm.* v. *Goodrich Transit Co., supra.; Tex. & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 438.

Even if the investigation should divulge violations of the Anti-Trust Act rather than of the Act to Regulate Commerce, that would not end the Commission's power. *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 93.

In the course of this investigation the Commission was entitled to inspect the accounts, records, and memoranda, including correspondence, of the carrier and no peculiar privilege attends the so-called private and confidential correspondence between its officers and agents. *Grant* v. *United States*, 227 U. S. 74; *Wheeler* v. *United States*, 226 U. S. 478; *Wilson* v. *United States*, 221 U. S.

361. This is shown by the fact (otherwise unnecessary) that Congress makes it an offense for an examiner to divulge any information which may come to him during the course of an examination.

The privilege asserted as to the correspondence between the carrier and its attorneys is no warrant for refusing the writ as to other documents. The proposed examination is not an unreasonable search and seizure, nor does it violate any constitutional right of the carrier.

A corporation is not entitled to plead the immunity of the Fifth Amendment, and it is doubtful whether it can plead the immunity of the Fourth Amendment. *Hale* v. *Henkel*, 201 U. S. 43, 74; *Int. Com. Comm.* v. *Baird*, 194 U. S. 25. A corporation cannot restrict the production of its books and papers on the ground of self-crimination. *Wilson* v. *United States*, 221 U. S. 361, 382.

While an order calling for the production of such a large part of the records of a corporation that their absence will put a stop to the business of the company may constitute an unreasonable search and seizure, *Hale* v. *Henkel*, *supra*, this has no application to the case at bar, since the Commission seeks only to inspect the records of the defendant in error.

Having the power to regulate, Congress must also be held to have the power to determine what means are appropriate for carrying into effect its control. *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 176.

The right to inspect accounts, records, and memoranda, including correspondence, is not limited to those only which have come into being since August 28, 1906, but extends to all those in the possession of the carrier whenever created. This does not make the Act retrospective in a legal sense. *Society* v. *Wheeler*, 2 Gall. 104; *Sturges* v. *Carter*, 114 U. S. 511.

The intent of the Act is to afford access to preëxisting documents. Even if, when so construed, it can properly

be called retrospective, it is none the less within the power of Congress.

There are no constitutional restrictions upon Congress in the matter of retrospective legislation as there are in some of the States. *Satterlee* v. *Matthewson*, 2 Pet. 380; *Sinking-Fund Cases*, 99 U. S. 700.

The main purpose of the Hepburn Act was to provide more adequate means for the enforcement of rights and duties declared to exist, and the Act impairs no existing rights or obligations, but, on the contrary, is a means of their effective enforcement.

Mr. Helm Bruce, with whom *Mr. Henry L. Stone*, *Mr. William A. Colston* and *Mr. Edward S. Jouett* were on the brief, for defendant in error and appellee:

The inquiry directed by the Commission was limited by its terms; and the examiners had no right to go beyond those limits.

The Commission had no authority to make the examination it sought to make. *Traders' Union* v. *Philadelphia R. R.*, 1 I. C. C. 374; *New York Produce Exch.* v. *Balt. & Ohio R. R.*, 7 I. C. C. 658; *Sprigg* v. *Balt. & Ohio R. R.*, 8 I. C. C. 456; *Haines* v. *Chi. & Rock Isl. R. R.*, 13 I. C. C. 214; *Tex. & Pac. Ry.* v. *Int. Com. Comm.*, 162 U. S. 216, 221; *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87; *Harriman* v. *Int Com. Comm.*, 211 U. S. 418.

There are differences in the purposes of the Act to Regulate Commerce and the Anti-Trust Act. *Cin., N. O. & T. P. R. R.* v. *Int. Com. Comm.*, 162 U. S. 197; *No. Sec. Co.* v. *United States*, 193 U. S. 331; *United States* v. *Freight Ass'n*, 166 U. S. 315; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 565.

The inquiry sought to be made by the Commission concerned conditions regulated by the Sherman Anti-Trust Act, but not by the Interstate Commerce Act.

The Commission's inquisitorial powers are not without limit. *Int. Com. Comm.* v. *Brimson*, 154 U. S. 447, 473.

Section 20 as amended by the Hepburn Act does not give the Commission access to the correspondence of the carrier. *Connecticut Life Ins. Co.* v. *Schaefer*, 94 U. S. 459; *Blackburn* v. *Crawfords*, 3 Wall. 175; 4 Wigmore on Evid., § 2290, p. 3193.

The rule of *noscitur a sociis* applies to the construction of this statute. *Virginia* v. *Tennessee*, 148 U. S. 503.

Penal statutes should be strictly construed. *United States* v. *Wiltberger*, 5 Wheat. 96.

Statutes should be construed, if possible, to avoid reasonable doubts as to constitutionality. *Harriman* v. *Int. Com. Comm.*, 211 U. S. 422.

The Hepburn Amendment to § 20 of the Commerce Act does not give the Commission access to records existing prior to the passage of that Act.

The search of defendant's papers sought by the Commission's examiners would, if permitted, be an unreasonable search, contrary to the Federal Constitution; to the protection of which amendment corporations are entitled. *Hale* v. *Henkel*, 201 U. S. 43, 75; *In re Pacific Ry. Comm.*, 32 Fed. Rep. 241, 263.

Mr. Justice Day delivered the opinion of the court.

This is an appeal from and writ of error to the District Court of the United States for the Western District of Kentucky, refusing a writ of mandamus which the United States undertook to obtain under authority of § 20 of the Act to Regulate Commerce, as amended, June 29, 1906, c. 3591, 34 Stat. 584, 594, 595. In view of the character of an action in mandamus we are of opinion that the review is by writ of error. *Ins. Co.* v. *Wheelwright*, 7 Wheat. 534; *Commonwealth of Kentucky* v. *Dennison*, 24 How. 66, 97;

High on Extraordinary Legal Remedies, §§ 6, 557. The appeal is therefore dismissed.

The petition sets forth the authority conferred upon the Commission by § 20 of the Act, and also § 12, and embodies a copy of a resolution passed by the Senate of the United States which is given in the margin.[1] It further

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[1] "RESOLUTION.

"Resolved, That the Interstate Commerce Commission be, and the same is hereby, directed to investigate, taking proof and employing counsel if necessary, and report to the Senate as soon as practicable—

"First. What amount of stock, bonds, and other securities of the Nashville, Chattanooga and Saint Louis Railway is owned or controlled by the Louisville and Nashville Railroad;

"Second. What other railroad or railroads in the territory served by the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway have been purchased, leased, controlled, or arrangements entered into with, for the purpose of controlling by either the Louisville and Nashville Railroad or the Nashville, Chattanooga & Saint Louis Railway;

"Third. Whether the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway serve the same territory in whole or in part, and whether, under separate ownership, they would be competitive to the various points in their territories;

"Fourth. Any other fact or facts showing or tending to show the further relations between the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway, and any fact or facts showing or tending to show whether these relations restrict competition and maintain fixed rates;

"Fifth. The terms of the lease of the Nashville and Decatur Railroad by the Louisville and Nashville Railroad, and what amount, if any, of stock, bonds, and other securities of the Nashville and Decatur Railroad, and of the Lewisburg and Northern Railroad are owned by the Louisville and Nashville Railroad, or any of its subsidiaries, or holding companies;

"Sixth. Whether the Nashville and Decatur Railroad, the Lewisburg and Northern Railroad, and the Louisville and Nashville Railroad serve the same territory, in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

"Seventh. Any other fact or facts showing or tending to show, the

states that for the purpose of enabling the Commission to perform its duties, it appointed two special agents and duly authorized them to inspect and examine the accounts, records and memoranda of the defendant Railway Company; that on February 4, 1914, one of said agents demanded of the Vice President of the defendant, the officer

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further relations between the Louisville and Nashville Railroad, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, and any fact or facts showing, or tending to show, whether these relations restrict competition and maintain and fix rates;

"Eighth. Any fact or facts showing, or tending to show (a) the relations between the Louisville and Nashville Railroad, the Nashville, Chattanooga and Saint Louis Railway, the Tennessee Midland Railroad, the Tennessee, Paducah and Alabama Railroad, and any other railroads that have been purchased or leased by either or both of said railroad companies, and whether such relations restrict competition and maintain and fix rates; and, (b) whether the lease of the Western and Atlantic Railroad by the Nashville, Chattanooga and Saint Louis Railway from the State of Georgia, and the arrangement made between the Louisville and Nashville and the Nashville, Chattanooga, and Saint Louis Railway by which the former uses the tracks of the said Western and Atlantic Railway restrict competition, restrain trade, and determine and fix rates;

"Ninth. Any fact or facts showing, or tending to show, whether the ownership of the Louisville and Nashville Railroad and the Nashville, Chattanooga and Saint Louis Railway of any railroad terminals or terminal companies, steamboats and steamboat lines upon the Cumberland and Tennessee Rivers, and any dock or dock yards at Pensacola, New Orleans, Mobile, or other seaport establishes a monopoly and restricts competition and determines and fixes rates;

"Tenth. Any fact or facts showing, or tending to show, whether an agreement or arrangement has been entered into between the Louisville and Nashville and other railroad companies for the purpose of preventing competition from entering into any of the territory served by the Louisville and Nashville Railroad, in consideration of the Louisville and Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement;

"Eleventh. What amount of stock, if any, the Atlantic Coast Line Company or Atlantic Coast Holding Company owns in the Louisville and Nashville Railroad, and in the Atlantic Coast Line, and whether

in charge and control of the accounts, records and memoranda of the Company, and to and of other officers, access to and opportunity to examine the accounts, records and memoranda kept by the defendant prior to August 28, 1906, [The Hepburn Act took effect August 29, 1906] and that the same was refused by the officers of the Company; that on February 4, 1914, a demand was made for an opportunity to examine the accounts, records and memoranda of the defendant on and subsequent to August 28, 1906, which was refused; and a writ of mandamus was asked against the company, requiring it to give access to its accounts, records and memoranda, and its correspondence and copies of correspondence, and indexes thereto, and to afford opportunity to examine the same to the Commission and its agents and examiners, and to give such access to and opportunity to examine the said accounts, records and memoranda made and kept by and for said

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the ownership by such holding company of a majority of stock in both of the aforesaid railroads tends to restrict competition and maintain and fix rates;

"Twelfth. What amount, if any, the Louisville and Nashville Railroad, the Nashville, Chattanooga and Saint Louis Railway, the Nashville and Decatur Railroad, and the Lewisburg and Northern Railroad, all or any of them, have subscribed, expended or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads; and,

"Thirteenth. (a) The number of free annual passes; (b) the number of free-trip passes; (c) the number of every kind of free passes issued by each of said railroads each year since January first, nineteen hundred and eleven, to members of legislative bodies and other public officials, or at the request of members of legislative bodies and other public officials; (d) the total mileage traveled upon free passes issued under each of the above classifications; and (e) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads."

defendant both before, on, and subsequent to August 28, 1906, including correspondence, copies of correspondence, and indexes thereto, and other indexes to said accounts, records, and memoranda.

To this petition the defendant answered, setting out that it did, prior to the beginning of the suit, give the examiners access to the correspondence other than privileged communications, and that after this suit it did refuse and does now refuse to give to said Commission or to said agent access to or opportunity to examine correspondence received by it before, on, or subsequent to August 28, 1906, or copies of correspondence sent out by defendant before, on or subsequent to that date, or the indexes kept with respect to said outgoing and incoming correspondence by defendant (except correspondence as to passes issued since January 1, 1911), and the defendant set up that its correspondence contains private communications between its various officers and agents regarding various matters which did not in any way pertain to the provisions of the Act to Regulate Commerce, nor to any act of Congress, the provisions of which it is made the duty of the Interstate Commerce Commission to enforce, and avers that said correspondence contains communications of a private and confidential nature between the president of the railway company and the heads of the various departments, relative to its internal affairs, to its proposed constructions and extensions in the future, to its policies with competing and rival roads, to its relations with labor organizations represented in its operating department, and to a variety of other subjects of a private and confidential nature, and that do not relate to the provisions of the Act to Regulate Commerce and acts amendatory thereto, or to any other act of Congress as to the enforcement of which any duty has been imposed upon the Interstate Commerce Commission, and that said correspondence also contains confidential, private, and privileged communications be-

tween defendant and its attorneys. The answer further sets up that under the provisions of § 20 of the Commerce Act a uniform system of accounting has been prescribed by the Commission, and that defendant has fully complied with all such requirements, and that the Commission's examiners have full and complete access to the same; that if the Act to Regulate Commerce can be construed as giving the said Commission or its examiners a right of access to, and the right to examine or inspect at will, any or all accounts, records, and memoranda, and all correspondence received, and all copies of correspondence sent out by the defendant or its officials in the manner and as set out and claimed in the petition, then the exercise of such alleged right in this respect will amount to and operate as an unreasonable search and seizure of the private papers of the defendant, in violation of the Fourth Amendment to the Constitution of the United States.

The answer further sets out a copy of the Senate Resolution, and the order of the Interstate Commerce Commission ordering the investigation and inquiry concerning the matters and things set forth in the resolution, and providing that the proceeding be set for hearing at such times and places, and that such persons be required to appear and testify, or to produce books, documents and papers, as the Commission may direct, and that a copy be served upon certain railways, including the defendant. The answer also sets up that the subject-matter of the first twelve paragraphs of the Senate Resolution was not within the authority of the Interstate Commerce Commission, and avers that as to the subject-matter of the thirteenth paragraph, which relates to free passes, since January 1, 1911, defendant permitted the Commission and its examiners and agents, on their request, to have access to and to examine and inspect all accounts, records and memoranda, relating to such passes, whether interstate or intrastate, and also all correspondence relating to such passes (al-

though defendant claims that the Commission had no legal right to examine any of said correspondence, nor to examine any intrastate passes, or any accounts, records, and memoranda pertaining thereto).

Motion was made for the writ of mandamus to issue as prayed for in the petition, certain testimony was taken, showing the demand of the agent and the refusal of the Company. Upon hearing the motion was denied.

The testimony shows that the refusal withheld from the inspection of the agents making the demand all accounts, records and memoranda kept prior to August 28, 1906; all accounts, records and memoranda subsequent to that date except such as to which the form had been subsequently prescribed by the Commission; all correspondence and the indexes thereto upon any subject other than the issue of passes subsequent to January 1, 1911, and all certificates of destruction, if any, relating to papers antedating August 28, 1906.

The discussion in this case has taken a wide range, and much has been said of the constitutional rights of the defendant and the authority of the Commission to carry out the purpose of the Interstate Commerce Act, and to make investigations which shall be the basis of the discharge of duties imposed upon it by the law. But, as we view the case, the real questions may be determined by a consideration of certain provisions of the Act to Regulate Commerce. We may at the beginning put aside any question of authority derivable from the resolution passed by the Senate. The resolution was passed by only one branch of the legislative body and it is not contended by the Government or the Commission that any authority is derivable from it.

To authorize the Government to demand the writ of mandamus in this case two sections of the Interstate Commerce Act are invoked,—twelve and twenty. It is enough to say of § 12 that the record discloses that the proceedings

and the demands for inspection in this case were not conducted under its authority. See *Harriman Case*, 211 U. S. 407.

Section 12 deals with the production of evidence in certain cases; it does not make provision for inspection by examiners duly authorized by the Commission. That feature of the law was added by the amendment to § 20, of June 29, 1906.

The substantial question in the case is: Was the right of inspection of the accounts, records and memoranda of the defendant in the manner attempted by the agents who represented the Commission in this respect, authorized by § 20 of the Act, as the same is amended by the Hepburn Act of June, 1906?

That section as amended provides in part:

"The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

"In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such

carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this act.

"Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment.

"Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both."

This section, it will be observed, gives authority to the Commission to employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records and memoranda kept by such carriers. The copy of the authority issued by the Commission to the special agent or

examiner who made the demand for inspection in this case shows that he was clothed with authority to examine any and all "accounts, records and memoranda" kept by carriers subject to the Act to Regulate Commerce. The language here used, taken from § 20, shows that the Commission acted under authority of that section, and the examiner was thereby authorized to make the demand, the refusal to comply with which was the basis for the petition for the writ of mandamus in this case.

This part of the amended section, as the report of the Interstate Commerce Commission, 1905, page 11 shows, was framed by the Commission and became a part of the law upon its recommendation. The appendix to the report (p. 182) shows the amendment in the form in which it became a law. In commending the passage of such an act, the Commission, in its report to Congress, said:

"Examination of Books of Account."

"An efficient means of discovering illegal practices would be found, as we believe, in authority to prescribe a form in which books of account shall be kept by railways, with the right on the part of the Commission to examine such books at any and all times through expert accountants. This recommendation has been urged upon the attention of the Congress in previous reports, and we earnestly renew it at this time. Probably no one thing would go further than this toward the detection and punishment of rebates and kindred wrongdoing.

"We have also called attention to the fact that certain carriers now refuse to make the statistical returns required by the Commission. For example, railways are required, among other things, to indicate what permanent improvements have been charged to operating expenses. Without an answer to this question, it is impossible to determine to what extent gross earnings have been used in improving the property and the actual cost of operation proper.

Admitting the right of a railroad company to use its money as it sees fit, it is certainly proper that the government should know what use is made of it, for the purpose of determining whether its rates and charges imposed are legitimate. Certain important railways decline to furnish this information at all and others furnish it in a very imperfect and unsatisfactory manner.

"We have also recently required carriers to furnish statistics showing the rate per ton-mile actually received for the movement of certain kinds of carload traffic, but this requirement has not been generally complied with."

Responding to this recommendation, and acting upon the bill in the form proposed by the Commission, it was adopted as an amendment and became Amended § 20 of the Act to Regulate Commerce.

Of course this Act, like other acts, may be read in the light of the purpose it was intended to subserve and the history of its origin. We find then that in this section Congress has authorized the Commission to prescribe the forms of accounts, records, and memoranda, which shall include accounts, records and memoranda of the movements of traffic, as well as the receipts and expenditures of money, to which accounts, records and memoranda the Commission is given access at all times. The railroads are not allowed to keep any other than those prescribed by the Commission. The Commission is empowered to appoint agents or examiners with authority to inspect and examine such accounts, records and memoranda, and provision is made, penalizing the failure to comply with the orders of the Commission concerning such accounts, records and memoranda, or the falsification thereof, or the willful destruction or mutilation thereof, or the failure to make full, true and correct entries in such accounts, records and memoranda of all facts and transactions pertaining to the carrier's business, or keeping any other accounts, records and memoranda.

Reading these provisions of the Act, there is nothing to suggest that they were intended to include correspondence relative to the railroad's business. In recommending the passage of the Act, the Commission did not suggest that it was essential to its purpose to have an inspection of the correspondence of the railroad. And, with its expert consideration of the questions involved and having clearly in mind the authority it was intended to secure, it can scarcely be supposed that the Commission would have confined its proposed amendment to the carefully chosen words "accounts, records or memoranda," and would have omitted the word "correspondence," if it had intended to include the latter. If we apply the rule of construction,—*noscitur a sociis*,—we find that all the provisions of the Act as to the inspection of accounts have relation to such as are kept in the system of bookkeeping to be prescribed by the Commission. It would be a great stretch of the meaning of the term as here used, to make "memoranda" include correspondence. The "records" of a corporation import the transcript of its charter and by-laws, the minutes of its meetings—the books containing the accounts of its official doings and the written evidence of its contracts and business transactions. Certainly it was not intended that the Commission should prescribe the forms of correspondence, although it was given the power to prescribe the forms of all accounts, records and memoranda subject to the provisions of the Act.

It is urged that the amendment to § 20 of February 25, 1909, adding a proviso to paragraph 7, shows the intention of Congress to provide for accounts, records and memoranda, including more than those as to which the form may be prescribed by the Commission, and in the word "document" making this section broad enough to include correspondence. The language of this proviso is as follows (35 Stat. 648, c. 193):

"Any person who shall willfully make any false entry

in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment: Provided, that the commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved."

It may be that the section is broad enough, particularly when read in the light of this proviso, to authorize an inspection of accounts, records and memoranda for which no form has been prescribed by the Commission, but we do not find in this proviso anything to indicate that Congress in the original act or the amendment intended to provide for the compulsory inspection of correspondence.

There is nothing from the beginning to the end of the section to indicate that Congress had in mind that it was making any provisions concerning the correspondence received or sent by the railroad companies. The primary object to be accomplished was to establish a uniform system of accounting and bookkeeping, and to have an inspection thereof. If it intended to permit the Commission

to authorize examiners to seize and examine all correspondence of every nature, Congress would have used language adequate to that purpose. A sweeping provision of that nature, attended with such consequences, would not be likely to have been enacted without probable exceptions as to some lines of correspondence required to be kept open and subject to inspection upon demand of the agents of the Government.

In the brief filed on behalf of the United States, it is frankly admitted that there is much force in the objection that Congress did not intend in this grant of authority to include the confidential correspondence of the railroad companies between itself and its counsel, and it is admitted that in this respect the demand of the agent of the Commission may be too broad. The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance. *Connecticut Mutual Life Insurance Co.* v. *Schaefer*, 94 U. S. 457, 458. And see the comments of this court in *Blackburn* v. *Crawfords*, 3 Wall. 175, 192.

How far such a demand as embodied in this petition can be permitted within the constitutional rights set up by the defendant, we do not need to consider, as we do not think that the section of the act of Congress under which the demand was made authorizes the compulsory submission of the correspondence of the company to inspection. It is true that correspondence may contain a record, and it may be the only record of business transactions, but that fact does not authorize a judicial interpretation of this statute which shall include a right to inspection which Congress did not intend to authorize.

The court below held that the right to demand inspection of documents before August 29, 1906, the date when the Hepburn Act went into effect, was of such a doubtful character that the writ ought not to issue. We think the right of inspection and examination given by the Interstate Commerce Act by the amendment to § 20, was not intended to be limited to such accounts, records, and memoranda only as were made after the passage of the Act, but is intended to permit an examination of all such accounts, records, and memoranda, for the purpose of carrying out the provisions of the Act. It is not contended that Congress might not do this within its constitutional authority, and the argument is that it had no such right in contemplation and did not intend to authorize it; but we think it is clear from the terms of the act, read in the light of its purpose, that Congress did not intend to draw the line of inspection at preëxisting accounts, records, and memoranda.

The Government argues that if it be held that the prayer for the writ of mandamus and the accompanying motion were too broad in requiring the production of confidential communications between attorney and client which were contained in this correspondence, nevertheless the court should have issued its writ of mandamus in so far as the relator showed it was entitled thereto, and the case of *West Virginia Northern R. R.* v. *United States*, 134 Fed. Rep. 198, 203, is cited to the effect that such practice is permissible. The case shows, however, an amendment was permitted so as to make the writ conform to the rights which could be properly granted. And that course might have been pursued in this case.

Whether the Commission would desire an inspection of the accounts, records and memoranda as we have construed the terms of the Act, without the right to examine the correspondence we are not advised. As the petition in this case was dismissed by the court below

without prejudice, and a new proceeding my be staarted, asking for such inspection as the law allows, we think the order of the court refusing to grant the writ of mandamus in the broad terms prayed for in the petition and the motion for the writ should not be reversed to permit a grant of relief within the limits which the law allows as we interpret it.

It follows that the judgment of the District Court, refusing the writ and dismissing the petition should be

Affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

RAIL & RIVER COAL COMPANY *v.* YAPLE, ET AL., CONSTITUTING THE INDUSTRIAL COMMISSION OF OHIO.

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

No. 513. Argued December 1, 1914.—Decided February 23, 1915.

A state police statute regulating the basis for compensation of miners on the run of the mine subject to regulations of an industrial commission, but which makes the orders of the Commission only *prima facie* reasonable and provides for their prompt judicial review and which does not prevent employers from screening the coal as they desire for marketing it, amply protects the rights of the employers.

Only alleged infractions of the constitutional rights of those attacking the statute can be considered in determining its constitutionality.

That a State may, without violating the due process provision of the Fourteenth Amendment place reasonable restraints upon liberty of contract, *Chicago &c. R. R.* v. *Maguire*, 219 U. S. 549, applies to prescribing methods for compensation of miners for producing coal. *McLean* v. *Arkansas*, 211 U. S. 539.

Coal mining is a proper subject for police regulation, and it is for the legislature of the State to determine, so long as its action is not arbi-

trary, the measure of relief in regard to evils to be corrected in connection therewith.

It is not the province of the court to revise conclusions which men versed in a business have found practicable; nor will this court do so in advance of the law authorizing a commission composed of such men to prescribe regulations being put into effect.

A state police statute will not be declared unconstitutional as denying due process of law on the ground that the penalties are excessive in a suit brought to enjoin the enforcement of the statute and in which penalties are not involved; nor where, as in this case, the penalties are not so excessive as to prevent a resort to the courts to test the constitutionality of the statute.

The Ohio Run of Mine or Anti-screen Law of 1914 is not unconstitutional under the due process provision of the Fourteenth Amendment either as taking the property of employés without due process of law, or by denying them an opportunity to be heard, nor by unreasonably abridging their liberty of contract nor for prescribing unreasonable conditions as to screening the coal and ascertaining the amount of impurities therein by the Industrial Commission, nor does it exceed the power of the legislature of the State under the constitution of the State.

214 Fed. Rep. 273, affirmed.

THE facts, which involve the constitutionality both under the Fourteenth Amendment to the Constitution of the United States and similar provisions of the constitution of the State of Ohio of the "Run of Mine" or "Anti-Screen" Coal Mine Law of 1914 of the State of Ohio, are stated in the opinion.

Mr. A. C. Dustin, with whom *Mr. Hermon A. Kelley* and *Mr. Paul J. Bickel* were on the brief, for appellant:

The Mine-run law deprives appellant of liberty and property without due process of law in violation of the Fourteenth Amendment.

The quality of coal to be produced is fixed by the Industrial Commission; the operator required to pay for coal conforming to Commission's standard regardless of its own needs. The amount of fine coal is fixed by the Commission.

The manner of production of coal is subject to regula-

tion by the Commission. The determinations of the Commission are based upon "proper mining" and not upon needs of operator's business.

Coal mining is a private business and coal lands are purely private property.

McLean v. *Arkansas*, 211 U. S. 539, sustaining the Arkansas act which was the basis of the decision, does not apply as the Ohio act is different from this Arkansas act.

The provisions in the Ohio act, depriving operators of freedom of contract and of control over their property are arbitrary, unreasonable and unnecessary because:

There are no practicable means of determining the amount of impurities unavoidable in proper mining, nor any practicable means of applying any such standard. No compensating public good results from these burdens; any standard other than that of marketability is useless; the operation of the percentage system will cause discord and trouble; the regulation provided by this act has no relation to purpose of law and is not incidental thereto.

The requirement that the operator pay for coal regardless of his needs is not a protection or benefit to anyone, but an arbitrary burden.

It is immaterial whether the Commission acts in good faith, or that a court review of the Commission's order is provided.

The Ohio act is beyond the bounds of police power.

This law is not intended for, nor justifiable on ground of, safety.

This law is not intended for, nor justifiable on ground of, conservation of natural resources.

The cases of conservation of oil, gas and water can be distinguished now as the conservation amendment of the Ohio constitution is applicable.

The penalties prescribed by the act are so excessive as to deprive appellant of equal protection of the law in violation of the Fourteenth Amendment.

This law is unconstitutional under the constitution of the State of Ohio.

The former mine-run law of 1898 was held invalid under Ohio constitution and the present law is more drastic than the former.

United States courts follow the State Supreme Court in regard to construction of state constitution.

The recent amendments to the Ohio constitution with reference to welfare of labor and conservation of natural resources do not abrogate or repeal the bill of rights of the Ohio constitution.

The present law is invalid under the holding of the Ohio Supreme Court.

In support of these contentions see *Adair* v. *United States*, 208 U. S. 161, 172; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 100; *Debitulia* v. *Lehigh Coal Co.*, 174 Fed. Rep. 886; *Eubank* v. *Richmond*, 226 U. S. 137, 144; *Ex parte Young*, 209 U. S. 123; *Express Co.* v. *Ohio*, 165 U. S. 194, 219; *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389; *Haire* v. *Rice*, 204 U. S. 291, 301; *Holden* v. *Hardy*, 169 U. S. 366; *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355; *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *Merchants Bank* v. *Pennsylvania*, 167 Oh. St. 461; *Minnesota* v. *Barber*, 136 U. S. 313; *McLean* v. *Arkansas*, 81 Arkansas, 304; *McLean* v. *Arkansas*, 211 U. S. 539; *Mo. Pacific Ry.* v. *Tucker*, 230 U. S. 340; *Muller* v. *Oregon*, 208 U. S. 412; *Nullett* v. *People*, 117 Illinois, 294; *Oakes* v. *Mase*, 165 O. S. 363; Ohio Constitution, Art. II, §§ 34 and 36; Ohio Laws, Vol. 93, p. 33 (Act of 1898); Ohio Laws, Vol. 104, page 181 §§ 1–7; *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 202; *People* v. *Williams*, 189 N. Y. 131, 135; *Railroad Co.* v. *Ellis*, 165 U. S. 150, 153; *Railroad Co.* v. *Williams*, 233 U. S. 685; *Slaughter House Cases*, 16 Wall. 37; *Smith* v. *Texas*, 233 U. S. 630; *St. Germain Irrigating Co.* v. *Hawthorne Ditch Co.*, 143 N. W. Rep. 124, 127; *Sterritt* v. *Young*, 14 Wyo-

ming, 146; *Welch* v. *Swasey*, 214 U. S. 91; *Willcox* v. *Gas Co.*, 212 U. S. 19, 54; *Wilmington Mining Co.* v. *Fulton*, 205 U. S. 60.

Mr. Clarence D. Laylin, with whom *Mr. Timothy S. Hogan*, Attorney General of the State of Ohio, *Mr. Robert M. Morgan* and *Mr. James I. Boulger* were on the brief, for appellees.

MR. JUSTICE DAY delivered the opinion of the court.

This case is brought here by appeal from an order of the District Court of the United States for the Northern District of Ohio, refusing an application for interlocutory injunction upon the petition of the Rail and River Coal Company, a West Virginia corporation, against Wallace D. Yaple, Mathew B. Hammond and Thomas J. Duffy, as members of and constituting the Industrial Commission of Ohio. The application was heard under § 266 of the Judicial Code before a Circuit judge and two District judges. The object of the bill was to restrain the Industrial Commission from putting into effect the so-called "Run of Mine" or "Anti-Screen" law of the State of Ohio, passed February 5th, 1914, by the legislature of that State, being entitled "An Act to Regulate the Weighing of Coal at the Mines." 104 Oh. Laws, 181. A copy of the Act is inserted in the margin.[1]

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[1] BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO;

SECTION 1. Every miner and every loader of coal in any mine in this State who under the terms of his employment is to be paid for mining or loading such coal on the basis of the ton or other weight shall be paid for such mining or loading according to the total weight of all such coal contained within the car (hereinafter referred to as mine car) in which the same shall have been removed out of the mine; provided, the contents of such car when so removed shall contain no greater percentage of slate, sulphur, rock, dirt, or other impurity than that as-

Summarized, the bill sets forth that plaintiff is engaged in the mining business in Ohio, owning a large tract of coal lands, of approximately 32,000 acres, upon which it has four coal mines properly developed, employing upward

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certained and determined by the industrial commission of Ohio as hereinafter enacted.

SECTION 2. Said industrial commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal in the several operating mines within this State.

SECTION 3. It shall be the duty of such miner or loader of coal and his employer to agree upon and fix, for stipulated periods, the percentage of fine coal commonly known as nut, pea, dust and slack allowable in the output of the mine wherein such miner or loader is employed. At any time when there shall not be in effect such agreed and fixed percentage of fine coal allowable in the output of any mine said industrial commission shall forthwith upon request of such miner or loader or his employer, fix such allowable percentage of fine coal, which percentage so fixed by said industrial commission shall continue in force until otherwise agreed and fixed by such miner or loader and his employer. Whenever said industrial commission shall find that the total output of such fine coal at any mine for a period of one month during which such mine shall have been operating while the percentage of fine coal so fixed by said industrial commission has been in force, exceeds the percentage so fixed by it, said industrial commission shall at once make, enter and cause to be enforced such order or orders relative to the production of coal at such mine, as will result in reducing the percentage of such fine coal, to the amount so fixed by said industrial commission.

SECTION 4. Said industrial commission shall, as to all coal mines in this State, which have not been in operation heretofore, perform the duties imposed upon it by the provisions hereof.

SECTION 5. Said industrial commission shall have full power from time to time, to change, upon investigation, any percentage by it ascertained and determined, or fixed, as provided in the preceding sections hereof.

SECTION 6. It shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of such contents over a screen or other device, for the purpose of ascertaining or calculating the amount to be paid such miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished. Any person, firm or corporation violating the

of 2,000 persons; that in the State of Ohio there are about 600 coal mines, employing upwards of 45,000 persons; that in the year 1913 more than 36,000,000 tons of coal were produced, and there was expended in wages to said employés upwards of $26,000,000; that the defendants are the members of the Industrial Commission of Ohio, vested by the legislature of that State with authority to enforce the provisions of the "Mine-Run Law"; that for many years mining has been conducted in the State of Ohio by the miners entering into contracts with their employers for a period of two years; that the last contracts expired on April 1, 1914.

The bill set forth the provisions of the act, and alleged that the same are unreasonable and arbitrary and impracticable in operation, and that the act is unconstitutional, as in violation of the Fourteenth Amendment to the Constitution of the United States, and in violation of the constitution of the State of Ohio, and that it delegates legislative authority to the Industrial Commission of the State; and although the bill was filed before the act went into effect, it was alleged that the Industrial Commission in putting the same into effect would work an irreparable

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provisions of this section shall be deemed guilty of a misdemeanor and upon conviction, shall be fined for each separate offense not less than three hundred dollars nor more than six hundred dollars.

SECTION 7. A miner or loader of the contents of a mine car, containing a greater percentage of slate, sulphur, rock, dirt or other impurity, than that ascertained and determined by said industrial commission, as hereinabove provided, shall be guilty of a misdemeanor and upon conviction shall be punished as follows: for the first offense within a period of three days he shall be fined fifty cents; for a second offense within such period of three days he shall be fined one dollar; and for the third offense within such period of three days he shall be fined not less than two dollars nor more than four dollars. Provided, that nothing contained in this section shall affect the right of a miner or loader and his employer to agree upon deductions by the system known as docking, on account of such slate, sulphur, rock, dirt or other impurity.

injury to the plaintiff. Upon application under this bill to the District Court, composed of three judges, the injunction was denied (214 Fed. Rep. 273), and the case is appealed to this court.

Under the system of wage payment and mining of coal in use before the passage of this statute, miners in Ohio were paid at a certain price per ton for screened lump coal, that is, for coal which, after it is mined and brought to the surface, is passed over a screen, the bars of which are one and a quarter inches apart. The report of the Ohio Coal Mining Commission, a public document, copies of which have been filed by counsel in this case, shows that that system of mining was regarded as objectionable by the miners, on the ground that they were not paid for mining of a considerable quantity of marketable coal, and there was dissatisfaction because of the wearing of the screens so as to increase the size of the apertures between the bars above the standard. In Ohio, as in some other States, there was much complaint because of this system. It appears that the employers generally desired to preserve the screened-coal basis of payment, and objected to the run of mine system, in which the miner is paid for mining coal as it is when mined without screening. Before enacting the legislation now in controversy in the State of Ohio, the question was referred to a Coal Mining Commission, which Commission, after full investigation of the subject, made the report referred to, in which it appears that the arguments pro and con were considered and reported upon, and a bill was recommended in the form in which the legislature passed the present law. The report of the Commission cannot be read without a conviction that there was an earnest attempt to eliminate the objections to the "run of mine" basis of payment to the miners, and to enact a system fair alike to employer and miner.

The principal objections of the employers to the run of mine system adopted in some of the States are: a tend-

ency to produce coal unduly mixed and mingled with slate, sulphur, rock, dirt and other impurities; and to yield an increased quantity of fine coal, to the loss of the employer.

As we have said, the result of the consideration of the objections to this system, by the Commission report, was the enactment of the present law.

Its first section shows that it attempts to substitute for the system theretofore in use in the State, where the terms of employment required payment for mining or loading coal on the basis of the ton or other weight, one by which the miner shall be paid according to the total weight of all the coal contained in the mine car in which the same has been removed from the mine; providing, however, that no greater percentage of slate, sulphur, rock, dirt, or other impurity shall be contained in the contents of such car than that ascertained and determined by the Industrial Commission of Ohio.

By the second section of the act, the Industrial Commission is required to ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity *unavoidable* in the proper mining or loading of such cars in the mines of the State. Evidently this section recognized and considered the objections to the plan of payment adopted in the first section, payment by run of mine, and provided for ascertaining by means of the Commission of the percentage of slate, sulphur, rock, dirt or other impurity, which evidently the lawmakers regarded as impracticable to prevent altogether in the mining of coal. In other words, the employer was not obliged to compensate the miner for everything sent up in the car, no matter how loaded with dirt and impurities. The object was to ascertain the amount of unavoidable impurities in proper mining, and place a limitation upon the miner to that extent.

In fixing the penalties for infractions of the act, § 7

penalizes the miner or loader for the contents of a car containing a greater percentage of impurities than that ascertained or determined by the Industrial Commission, and the miner for such infraction is made guilty of a misdemeanor and punishable upon conviction. Section 7 contains the important proviso that nothing contained in the section shall affect the right of a miner or loader and his employer to agree upon deductions by the systems known as docking, on account of such slate, sulphur, rock, dirt, or other impurity.

In other words, the ascertainment of the Industrial Commission which is provided in §§ 1 and 2 is not to be a limitation upon the right of the employer and miner to agree upon deductions of their own arrangement as to the amount of slate, sulphur, rock, dirt or other impurity permitted in the mining of coal. The employer and miner may substitute their own agreement in that respect for the ascertainment of the Commission, and the law fixes no penalty for the mining of coal with such measure of impurities as the employer and miner have thus agreed upon.

Section 3 makes it the duty of the miner and employer to agree upon and fix the percentage of fine coal commonly known as nut, pea, dust and slack allowed in the output of the mines, and where they do not agree, the Industrial Commission may fix such percentage, which percentage thus established shall remain in force until otherwise agreed upon between miner and employer, and the Commission, when it finds the percentage of fine coal as fixed by the Industrial Commission has been exceeded, may make, enter and cause to be enforced such order or orders as will result in reducing the percentage of fine coal to the amount fixed by it.

The report of the Coal Commission (pages 59 and 60) shows the consideration which that body gave to this subject in the interest of fair mining, and its desire to

obviate by this provision the undue production of fine coal to the disadvantage of the employer.

By § 5, the Industrial Commission is given power from time to time upon investigation to change the percentage by it ascertained and determined, or fixed by its previous orders.

The only penalty fixed by the law against the employer is contained in § 6, where it is made unlawful for the employer to pass the coal over a screen or other device, for the purpose of ascertaining and calculating the amount to be paid the miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished.

There is nothing in the law to prevent the employer from screening his coal as he sees fit for other purposes, and so as to fit it for the market, in such wise as he may deem advisable. The inhibition on screening is only upon that operation when it is done for the purpose of calculating the amount to be paid to the miner for mining the coal. Moreover, it is important to be considered in this connection that the orders of the Commission are not final, but are subject to review under the statute of Ohio found in 103 Ohio Laws, at page 95, where the orders of the Commission are declared to be only *prima facie* reasonable, and any employer or other person interested is entitled upon petition to a hearing upon the reasonableness and lawfulness of the order before the Commission, and under § 38 of the law, any employer or other person in interest, being dissatisfied with any order of the Commission, may commence an action in the Supreme Court of Ohio to vacate or amend any such order upon the ground that the same is unreasonable or unlawful, and the Supreme Court is authorized to hear and determine such action and may, in its discretion (§ 41) suspend all or any part of the order of the Commission. The statute makes provision for the prompt hearing of all such actions, in prefer-

ence to other civil cases, with some exceptions. It would seem that this system of law, with a right to review in the manner we have stated in the Supreme Court of Ohio, has provided a system ample for the protection of the rights of the employers (see *Plymouth Coal Co.* v. *Commonwealth of Pennsylvania*, 232 U. S. 531). And of course in this, as in other cases, only alleged infractions of constitutional rights of those complaining can be considered in determining the constitutionality of the law. *Southern Ry.* v. *King*, 217 U. S. 524, 534; *Rosenthal* v. *New York*, 226 U. S. 260, 271; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576.

The objection that the law is unconstitutional as unduly abridging the freedom of contract in prescribing the particular method of compensation to be paid by employers to miners for the production of coal was made in the case of *McLean* v. *Arkansas*, 211 U. S. 539, in which this court sustained a law of the State of Arkansas requiring coal mined to be paid for according to the run of mine system according to its weight when brought out of the mine in cars. In that case the constitutional objections founded upon the right of contract which are made here were considered and disposed of. This court has so often affirmed the right of the State in the exercise of its police power to place reasonable restraints like that here involved, upon the freedom of contract that we need only refer to some of the cases in passing. *Schmidinger* v. *Chicago*, 226 U. S. 578; *Chicago &c. R. R.* v. *McGuire*, 219 U. S. 549, and cases therein cited and reviewed.

The contention that this law has no reasonable or legal relation to the object to be attained seems to us to be equally without foundation, in view of the recognized right of the legislature to regulate a business of this character, and to determine for itself, in the absence of arbitrary action, the measure of relief necessary to affect the desired purposes. That the law is within the authority

of the Ohio legislature, acting under the constitution of Ohio, there can be no question, in view of the authority conferred by that instrument in § 36, Art. II, which provides that "laws may be passed . . . to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

As to the alleged impracticability of the law, because of the impossibility of the Industrial Commission determining the quantity of dirt and other impurities in any coal mined, we can find no force in that objection. Agreements as to the amount of docking for dirt and impurities in the mining of coal have been constantly made, and it is not the province of a court to revise conclusions which men versed in the business have found practicable, certainly not in advance of an attempt to put the law into operation. The consideration of the law already given shows the means enacted to do away with these impurities, and to insure as far as possible the production of clean coal.

As to the objection because of the penalties, this is not a suit to enforce penalties; nor in view of the provisions of the statute can we say that the penalties are so great as to prevent a resort to the courts to ascertain the constitutionality of the law. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Grand Trunk Ry.* v. *Michigan Railroad Commission*, 231 U. S. 457; *Ohio Tax Cases*, 232 U. S. 576.

We are unable to discover in the statute any infraction of the constitutional rights of the appellant, and the order denying the temporary injunction is accordingly

Affirmed.

PENNSYLVANIA COMPANY *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

No. 591. Argued December 14, 15, 1914.—Decided February 23, 1915.

Section 3 of the Act to Regulate Commerce forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality, and what is such undue or unreasonable preference or advantage is not a question of law but of fact.

The courts cannot set aside an order of the Interstate Commerce Commission in regard to interchange of freight by carriers which does not contravene any constitutional limitation and is within the constitutional and statutory authority of that body and is not unsupported by testimony; such an order is only the exercise of the authority vested by the law in the Commission.

Although § 3 of the Act to Regulate Commerce remains in its original form, it must now be read in connection with amendments to, and subsequent provisions of, that Act by which the term transportation covers the entire carriage and services in connection with the receipt and delivery of property transported, including facilities of a terminal character for delivery. As so read, § 3 must be construed with a view to carrying out all the provisions of the Act as it now is and to make every part of it effective in accordance with the intention of Congress.

The Interstate Commission has jurisdiction to require an interstate carrier to receive and transport over its terminals carload interstate freight from one carrier having a physical connection with its lines on the same terms on which it performs such service for other connecting carriers similarly situated.

Such an order is not an appropriation of the terminal property of the carrier in violation of the due process provision of the Fifth Amendment but a regulation of its terminal facilities within the power properly delegated by Congress. *Grand Trunk Ry.* v. *Michigan Railway Commission*, 231 U. S. 457, followed; *Louis. & Nash. R. R.* v. *Stock Yards Co.*, 212 U. S. 132, distinguished.

Congress may so control the terminal facilities of a carrier, and the Interstate Commerce Commission may make such orders, as will

prevent creation of monopolies within the prohibitions and limitations of the Anti-trust Act. *United States* v. *St. Louis Terminal*, 224 U. S. 383.

214 Fed. Rep. 445, affirmed.

THE facts, which involve the validity of orders of the Interstate Commerce Commission regarding the establishment of joint and through rates to and from, and regulations as to switching cars at, New Castle, Pennsylvania, by the Pennsylvania Company, are stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. A. P. Burgwin* and *Mr. Gordon Fisher* were on the brief, for appellant:

In the absence of statute there is no principle of established law which requires one carrier to share the use and advantages of its terminals with another carrier, a competitor engaged in like business. As private property, still in the absence of statute, the use of terminals are the subject of contract at the will of their owner who may elect to share their advantages with some carriers while denying them to others. The only statute which concerns the present issue is the Act to Regulate Commerce, which, while forbidding (§ 3), undue or unreasonable preference or advantage "to any particular person, company, firm, corporation, or locality, or any particular description of traffic," and though requiring common carriers subject to its provisions "according to their respective powers" to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of . . . property to and from their respective lines and those connecting therewith," expressly declares that "this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business," such exception very accurately defining the very object and purpose which the Rochester Company in and by its proceeding before the

Commission sought, and by virtue of the order of the Commission, if same shall be upheld, will have obtained. *Kentucky Bridge Co.* v. *L. & N. Ry.*, 37 Fed. Rep. 567, 573; *Oregon Short-Line* v. *Northern Pac. Co.*, 61 Fed. Rep. 158; *Little Rock Co.* v. *St. Louis Co.*, 63 Fed. Rep. 775.

The fact that the Congress when making the extensive amendments of 1906 and 1910, did not see fit to alter § 3 relating to the affording of equal facilities for the interchange of traffic between carriers (on which the order here made was based) is highly persuasive that it intended to leave the law and its practical working exactly as it had been. *Spokane* v. *Nor. Pac. R. R.*, 15 I. C. C. 376, 398.

The Commission itself in several proceedings before it has held that industrial tracks of this character form a part of the terminal facilities of a carrier, and that it lacks power to compel their use in favor of another carrier engaged in like business. *Morris Co.* v. *B. & O. R. R.*, 26 I. C. C. 240, 244. See also *Waverly Oil Works Co.* v. *Penna. R. R.*, 28 I. C. C. 621, 627.

Based upon the decisions cited, the finding of the Commission that the reciprocal switch agreements complained of are or were unduly discriminatory is wholly immaterial, the statute itself having declared carriers' terminals as such to be beyond the reach of the Commission's regulatory power, thus leaving the carriers themselves as free to deal with terminals and their use as they had been before the enactment of the statute. *Bridge Co.* v. *L. & N. R. R.*, 37 Fed. Rep. 567, 573; *Little Rock Co.* v. *St. Louis Co.*, 63 Fed. Rep. 775, 779.

The Solicitor General, with whom *Mr. Blackburn Esterline* was on the brief, for the United States:

The practice of the Pennsylvania Company constituted an undue and unreasonable discrimination as against the complainant carrier and the shippers on its lines.

Undue discrimination is a question of fact, as to which the finding of the Commission is conclusive. *Int. Com. Comm.* v. *Alabama Midland Ry.*, 168 U. S. 144, 170; *Tex. & Pac. Ry.* v. *Int. Com. Comm.*, 162 U. S. 197, 219.

And this finding of fact is not now open to review. *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314.

The order of the Commission finding the discrimination unreasonable cannot be said to be without substantial evidence to support it or contrary to the indisputable character of the evidence.

The order did not exceed the power of the Commission or require the appellant to give to the Buffalo, Rochester & Pittsburg Railway the use of its terminals.

The service sought by the complaining company is a service of transportation, the performance of which is expressly commanded.

All that is sought to be forbidden by the order of the Interstate Commerce Commission is the furnishing of transportation for one and the arbitrary declination to do so for another.

The order of the Commission and the opinion of the court below are fully supported by the decision of this court in *Grand Trunk Ry.* v. *Michigan R. R. Commission*, 231 U. S. 457.

Congress has deliberately rejected as contrary to the public welfare the policy for which appellant contends, namely, that of absolute and unrestricted monopoly in the control and use of its terminals.

A carrier's terminal tracks may be put to the legitimate uses of transportation for the benefit of the public just as may its main lines. *St. L., S. & P. R. R.* v. *Peoria & Pekin Un. Ry.*, 26 I. C. C. 226, 237.

The proviso of § 3 of the Act to Regulate Commerce, though not repealed, must be read in the light of later amendments.

The order is not obnoxious to the Fifth Amendment.

What is sought here is a mere regulation of a discriminatory practice. There is no taking of property, and the question of compensation is not involved. *Chi., Mil. & St. P. Ry.* v. *State of Iowa*, 233 U. S. 334, and cases there cited.

Mr. Charles W. Needham, with whom *Mr. Joseph W. Folk* was on the brief, for the Interstate Commerce Commission.

Mr. William A. Glasgow, Jr., for the Buffalo, Rochester & Pittsburgh Railway:

The service required of the Pennsylvania Company was a transportation service and that Company was required by § 1 of the Act to "furnish such transportation upon reasonable request therefor."

It was the duty of the Pennsylvania Company, upon request, to establish through routes and joint rates with the Buffalo, Rochester & Pittsburgh Railway Company covering the transportation to and from points on the lines of road of the Pennsylvania Company within the District of New Castle.

The Commission's order is justified by the second paragraph of § 3 of the Act to Regulate Commerce.

In support of these contentions, see *Grand Trunk Ry.* v. *Mich. Ry. Commission*, 231 U. S. 457; *Int. Com. Comm.* v. *D., L. & W. R. R.*, 220 U. S. 235; *Kentucky & Indiana Bridge* v. *Louis. & Nash. R. R.*, 37 Fed. Rep. 567; *Louis. & Nash. R. R.* v. *Stockyards Co.*, 212 U. S. 132; *Louis. & Nash. R. R.* v. *United States*, 216 Fed. Rep. 672; *Penna. R. R.* v. *International Coal Co.*, 230 U. S. 184; *Tex. & Pac. Ry.* v. *Int. Com. Comm.*, 162 U. S. 197.

MR. JUSTICE DAY delivered the opinion of the court.

This case comes here by appeal from an order of the District Court of the United States for the Western Dis-

trict of Pennsylvania, denying a motion for interlocutory injunction against the Interstate Commerce Commission. 214 Fed. Rep. 445.

The Buffalo, Rochester & Pittsburgh Railway Company, hereinafter called the Rochester Company, filed its petition before the Interstate Commerce Commission against the Pennsylvania Company, averring that in the City of New Castle, Pennsylvania, there was a physical connection between the railroads jointly operated by the Rochester Company and the Baltimore & Ohio Railroad Company, and the terminal facilities of the Pennsylvania Company, at which joint traffic could be properly exchanged, and is exchanged between the railroad operated by the Rochester Company and the Baltimore & Ohio Railroad, so that traffic on the lines owned and operated by the Rochester Company, and from manufactories and industries reached by the terminal lines of said company in the City of New Castle can be delivered to the Pennsylvania Company and thus transported to its destination; that there are no joint routes or through rates in effect between the Rochester Company and the Pennsylvania Company by which traffic to and from industries upon the terminal line of the Pennsylvania Company in or near the City of New Castle may be carried and although complainant had frequently requested the Pennsylvania Company to join in establishing the same, the Pennsylvania Company failed and neglected so to do; that the Rochester Company, upon interstate traffic carried by it to the point of physical connection with the road of the Pennsylvania Company, which traffic is destined to manufactories or industries upon the lines of the Pennsylvania Company in or near the city of New Castle, is ready and willing, and has offered to pay the Pennsylvania Company its lawful and proper charges for receiving, carrying and delivering such traffic, which charges it makes to other persons or companies for like services;

that the action of the Pennsylvania Company in declining to receive, carry and deliver to the point of physical connection aforesaid, interstate traffic offered by the Rochester Company subjects said company and shippers of interstate traffic over its lines destined to the manufactories and industries upon the line of the said Pennsylvania Company to an undue and unreasonable prejudice and disadvantage, and is in violation of § 3 of the Act to Regulate Commerce (Feb. 4, 1887, c. 104, 24 Stat. 379), in that it constitutes a failure to afford reasonable, proper and equal facilities to complainant with those afforded to other persons for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of property to and from their several lines; that there are no other through routes and joint rates in effect to which the Rochester Company and Pennsylvania Company are parties for the through transportation of interstate traffic carried by the Rochester Company, destined to the manufactories and industries on the lines of the Pennsylvania Company, in or near said city, nor are there any through routes or joint rates in effect between the companies for interstate traffic originating at the manufactories and industries on the lines of the Pennsylvania Company in or near New Castle, destined to points upon the line of the Rochester Company or points which are reached by its connections; and that the failure and refusal of the Pennsylvania Company is forbidden by § 15 of the Act to Regulate Commerce. The Rochester Company prayed for an order commanding the Pennsylvania Company to cease and desist from such violations of the Act to Regulate Commerce, and for such orders as might be deemed necessary, and that the Commission should establish through routes and joint rates on articles of merchandise tendered to the Pennsylvania Company at the point of physical connection above set forth for delivery on the lines of defendant's railroad, in or near

the said city of New Castle, and from the industries and manufactories on the lines of the above named railroad in or near the city of New Castle to points on the line of the Rochester Company or its connections; said joint rates so established to be the maximum to be charged, and that the Commission prescribe a division of the same and the terms upon which such through route can be operated.

The Commission made no order establishing through routes and joint rates, but held that inasmuch as the Pennsylvania Company's refusal to accept from and move to the Rochester Company carload lots of freight within the switching limits of New Castle, while performing the service in connection with the said other three carriers within said switching limits was a discrimination, the same was undue, unreasonable, and in violation of the Act to Regulate Commerce. The Commission ordered that the Pennsylvania Company be required on or before March 15, 1914, to cease and desist from such undue and unreasonable prejudice and disadvantage as against the Rochester Company, and required the Pennsylvania Company to establish and maintain rates, regulations and practices which would prevent and avoid the aforesaid undue and unreasonable prejudice and disadvantage for a period of two years. Subsequently orders were made, making the order effective from a later date, to-wit, April 15, 1914.

From the facts found by the Commission it appears that New Castle is a manufacturing city of much importance, having a population of about forty thousand people, situated near the center of the iron, steel and ore industries of the Mahoning and Shenango Valleys. The switching limits of New Castle in their greatest length are about four miles in extent, and included therein are about 100 industries. The Pennsylvania Railroad, the Baltimore & Ohio Railroad, the Pittsburgh & Lake Erie Railroad, the Erie Railroad, and the Rochester Railroad all reach and

serve New Castle by their several lines of railroad. Each of the four roads has switching connections with the Pennsylvania Company with interchange tracks and terminals within the switching limits. The Rochester road operates a line of railroad from Rochester and Buffalo, in the State of New York, to New Castle and Pittsburgh, in the State of Pennsylvania. It reaches New Castle from the town of Butler, Pennsylvania, over the rails of the Allegheny & Western Railroad, which are now jointly used by the Rochester Company and the Baltimore & Ohio Railroad, under a contract between them. The terminal facilities of the Pennsylvania Company at New Castle consist of depots, freight stations, yards, team tracks and side tracks, together with spur tracks reaching 26 industries within the switching limits. Within the switching limits there are two points of connection with the lines of the Pennsylvania Company, and those jointly used by the Baltimore & Ohio and the Rochester road. One of these points is at Moravia Street, near the center of the city, where the Pennsylvania Company has interchange yards with a capacity for 250 cars. This point is about 1000 feet from the freight station of the Rochester road, where the latter road has two unloading tracks of ten cars capacity each and a team track of twelve cars capacity. The second point of connection is near the outer yards of the Pennsylvania Company, where there are ample facilities for interchange of traffic.

The Pennsylvania Company refuses all interchange of carload freight, whether incoming or outgoing, with the Rochester road within the switching limits of New Castle, but it does conduct such interchange with the Erie, the Pittsburgh & Lake Erie, and the Baltimore & Ohio roads. As to these roads the Pennsylvania Company has published its tariffs, and offers to receive, transport and deliver to and from the lines of these three carriers carload shipments to and from about 128 industries within the

switching limits and immediate vicinity of New Castle, at a charge of $2.00 per car within the limits and a varying charge with a maximum of $5.00 per car without the limits. The industries on the tracks of the Pennsylvania Company within the switching limits, which receive carload freight from the Rochester road, or which may desire to ship such freight over the Rochester road, to points beyond New Castle, must dray their traffic to and from the depot or team track of the Rochester Company. Representatives of such industries testified as to the disadvantage to them resulting from the refusal of the Pennsylvania Company to perform switching service on traffic moving over the line of the Rochester Company.

The Commission found this practice to be an undue and unreasonable discrimination against the Rochester Company, and made an order requiring the Pennsylvania Company to desist therefrom. Commissioner Harlan dissenting was disposed to agree to an order fixing reasonable joint through rates for the use of the terminals of the Pennsylvania Company and over the rails of the Rochester Company, but disagreed with the order on the grounds made. The Pennsylvania Company then filed the bill in this case in the District Court of the United States for the Western District of Pennsylvania, and moved for a preliminary injunction, restraining the enforcement of the order. Answer was filed on behalf of the United States, and the Interstate Commerce Commission and the Rochester Company intervened, and, after hearing, the motion was denied, two judges concurring and one judge dissenting. *Pennsylvania Company* v. *United States*, 214 Fed. Rep. 445. From this action the Pennsylvania Company appeals, and the case is now before this court.

Section 3 of the Act to Regulate Commerce, 24 Stat. 379, 380, provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue

or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

This section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; what is such undue or unreasonable preference or advantage is a question not of law, but of fact. *Texas & Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, 219; *Interstate Commerce Commission* v. *Alabama Midland Railway*, 168 U. S. 144, 170. If the order made by the Commission does not contravene any constitutional limitation and is within the constitutional and statutory authority of that body, and not unsupported by testimony, it cannot be set aside by the courts, as it is only the exercise of an authority which the law vests in the Commission. *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western R. R.*, 220 U. S. 235, 251; *Los Angeles Switching Case*, 234 U. S. 294, 311; *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, 359.

It is to be remembered that in the aspect which the case

now presents, there is no question as to the terms which the Commission might prescribe, or the compensation which the Pennsylvania Company should receive for the service to be rendered. The sole question is whether the Commission exceeded its authority in requiring the Pennsylvania Company to cease and desist from what the Commission found to be a discriminatory practice.

In determining whether the Commission exceeded its authority under § 3 of the Act to Regulate Commerce, it is essential to consider the character of the service required in the present case. Section 3 was a part of the original Act, and remains unchanged, but there are certain amendments to the Act which are to be read in connection with § 3 as if they were originally incorporated within the Act. *Blair* v. *Chicago*, 201 U. S. 400, 475. The Act as amended June 29, 1906, c. 3591, 34 Stat. 584, defines what is meant by common carriers—engaged in transportation by railroad—which are brought within the control of the Act, and a railroad is defined to include all switches, spurs, tracks and terminal facilities of every kind, used or necessary in the transportation of persons or property designated in the Act, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property. Not only does the Act define railroads, but it specifically defines what is meant by transportation, which is made to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." It is made the duty of every carrier "subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates ap-

plicable thereto"; and on June 18, 1910, c. 309, 36 Stat. 539, 545, it was additionally provided that the carrier should "provide reasonable facilities for operating such through routes and make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto." See *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286, and as to the character of such commerce, *Illinois Central R. R.* v. *Railroad Commission of Louisiana,* decided February 1, 1915, *ante,* p. 157.

It follows that the provisions of § 3 of the Act must be read in connection with the amendments and subsequent provisions, which show that transportation as used in the Act covers the entire carriage and services in connection with the receipt and delivery of property transported. There can be no question that when the Pennsylvania Railroad used these terminal facilities in connection with the receipt and delivery of carload freight transported in interstate traffic, it was subject to the provisions of the Act, and it was obliged as a common carrier in that capacity to afford all reasonable, proper and equal facilities for the interchange of traffic with connecting lines and for the receiving, forwarding and delivering of property to and from its own lines and such connecting lines, and was obliged not to discriminate in rates and charges between such connecting lines. By the amendments to the Act, the facilities for delivering freight of a terminal character are brought within the terms of the transportation to be regulated.

The cars transported over the Rochester road are brought to a physical connection with the Pennsylvania road at a point where it receives carloads of freight from other roads and transports them over its connecting terminals to points of destination, and at that point in like

manner forwards over other railroads carloads of freight transported in interstate commerce and destined for points on such other connecting railroads.

If the cars of the Rochester Company reaching the point of connection are drawn by a Baltimore & Ohio locomotive they are received and delivered by the Pennsylvania Company over its terminals.

The Pennsylvania Company insists that these statutory provisions do not apply to it under the circumstances of this case, and that the Commission exceeded its authority in requiring it to desist from what the Commission found to be a discriminatory practice, for certain reasons which, as we understand them, may be reduced to three: (a) That upon the facts shown there is no discrimination in a real sense, and certainly none which warrants the making of the order in question; (b) That the order requires the railroad company to give up the use of its terminals to another company in violation of the last clause of § 3; and (c) that the order is a taking of the railroad company's property in violation of the protection afforded to it under the Constitution of the United States, preventing the taking of property without due process of law, for the contention is that the effect of the order is to subject the Pennsylvania Railroad's property to the use of the Rochester Company without compensation.

That there is no discrimination in fact is rested upon the argument that with the other three roads the Pennsylvania Railroad has certain reciprocal arrangements in the Mahoning and Shenango Valleys, by which these three roads interchange cars with the Pennsylvania Railroad. It is contended that this, more than the $2.00 per car, is the real inducement for the treatment of those railroads. But, as the Commission found, the amount of traffic exchanged between these three railroads is of a varying and differing quantity, and to ascertain the value of such service to the Pennsylvania Railroad would be a futile under-

taking, involving uncertain and speculative considerations as to the value of this and that service and the varying cost of performing such service at remote and different places. The statements in the record, presented to the Commission by the Pennsylvania Company, show the great difference in service of this character rendered by the three railroads and by the Pennsylvania Company for the different roads. For instance, it is shown that during 1911 the Baltimore & Ohio switched for the Pennsylvania 69 cars at New Castle, and in the Valleys generally 4,185 cars, while the Pennsylvania Company switched for the Baltimore & Ohio 8,286 cars in New Castle, and in the Valleys generally 8,900 cars. The Rochester Company switched for the Pennsylvania in the same year 406 cars in New Castle and 3,661 cars to points adjacent thereto. The Rochester Company moved for the Pennsylvania Company in New Castle 337 cars more than did the Baltimore & Ohio, and in gross totals, through and into adjacent regions, 187 cars less. The Pennsylvania Company moved nearly twice as many cars for the Baltimore & Ohio road as the Baltimore & Ohio did for it. The Government therefore contends with much force that such reciprocal switching arrangements ought not to justify giving cars shipped over the Baltimore & Ohio Railroad a preference denied the cars shipped over the lines of the Rochester road, which cars enter New Castle on the same track and reach the same junction points. And as we have said the question of compensation is not here involved, and what compensation the Pennsylvania Company might require from the Rochester Company is not now to be determined. We agree with the Commission and the court below that the alleged reciprocal shipping arrangements do not remove the discriminatory character of the treatment of the Rochester road.

The objection that the railroad is required to give up the use of its terminals to another company, is perhaps

the principal contention of the Pennsylvania Company, and is based upon the last clause of the second paragraph of § 3, which provides that the section shall not be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

As we have heretofore shown, the Act, as it now is, provides that transportation which must be furnished to all upon equal terms includes the delivery of freight as part of its transportation. While § 3 remains part of the Act in its original form, it must be given a reasonable construction with a view to carrying out all the provisions of the Act and to make every part of it effective, in accordance with the intention of Congress.

The majority of the District Court thought the present case was controlled by the case of *Grand Trunk Ry.* v. *Michigan Railroad Commission*, 231 U. S. 457, and certainly that case is closely analogous to the present one. In that case the Michigan statute, which was enforced by the State Commission, as to intrastate commerce, required railroads in that State to afford reasonable and proper facilities, by the establishment of switching connections between the roads and the establishment of depots and freight yards for the interchange of traffic, for the receiving, forwarding and delivering of passengers and property to and from other lines and those connecting therewith, and to transport and deliver without undue delay and discrimination freight and cars destined to any point on its own lines or connecting lines, and not to discriminate in rates and charges between connecting lines. That act, like the Federal act, contained a provision that nothing therein should be construed as requiring any railroad to give the use of its tracks and terminal facilities to another railroad engaged in like business. This court sustained an order of the Commission requiring the Grand Trunk Railway to accept freight for other roads at con-

nected points for shipment in the city of Detroit. In that connection this court stated the question to be (p. 464):

"Whether, under the statutes of the State of Michigan, appellants can be compelled to use the tracks it owns and operates in the city of Detroit for the interchange of intrastate traffic; or, stating the question more specifically, whether the companies shall receive cars from another carrier at a junction point or physical connection with such carrier within the corporate limits of Detroit for transportation to the team tracks of the companies; and whether the companies shall allow the use of their team tracks for cars to be hauled from their team tracks to a junction point or physical connection with another carrier within such limits and be required to haul such cars in either of the above-named movements or between industrial sidings."

In answering the contention that the service required was not transportation, but amounted to an appropriation of the terminal facilities of the Grand Trunk Railway, this court said (p. 467):

"The proposition of appellants is, as said by the District Court, that such service and team track service 'are not in a proper sense transportation, but are essentially distinguishable therefrom'; or, to put it another way—and one which expresses more specially the contention of appellants—they are mere conveniences at the destination or initial point of the transportation and hence are terminal facilities merely and their use is not required to be given to other railroads. The District Court did not regard them in the latter character. After stating the conditions which exist in Detroit and its extent, the court said of them: 'Such tracks are necessary to prevent the congestion which would result from requiring all carload freight, both in and out, to be delivered at the freight depots of the respective roads, and in a very proper sense are shipping stations.' The court concluded that the services were

transportation and that the statute of the State validly empowered the Commission 'to require local transportation by a railroad between its own shipping stations within a city, whether such plurality of shipping stations has been voluntarily established by the railroad, as here, or has been required by the Commission under its lawful powers, and provided such transportation is for such substantial distance and of such a character as reasonably to require a railroad haul, as distinguished from other means of carriage.' The court further said: 'It is clear that a statute validly may, and the statutes we are considering do, authorize the employment of such depots, sidetracks, and team tracks of a railroad for transporting carload freight to and from the junction of such road with another road as a substantial part of a continuous transportation routing, where such junction is outside the city limits.' And it was remarked that the fact that the freight movement begins and ends within the limits of a city does not take from it its character 'of an actual transportation between two termini,' the other conditions obtaining. We concur in the conclusion of the court."

After describing the extent of the city of Detroit to be about 22 miles, and its population about 500,000, the court held that it was competent for the state commission to require transportation between points in that city, as the beginning and destination of traffic, and that to call the service necessary to such movement a taking of terminals was misleading, and that the statute involved was a proper regulation of the business of appellants, and not an appropriation of their terminal facilities for the use and benefit of another road.

In the present case we think there is no requirement in the order of the Commission amounting to a compulsory taking of the use of the terminals of the Pennsylvania Company by another road, within the inhibition of this clause of § 3. The order gives the Rochester road no right

to run its cars over the terminals of the Pennsylvania Company or to use or occupy its stations or depots for purposes of its own. There is no requirement that the Rochester Company be permitted to store its cars in the yards of the Pennsylvania Company or to make use of its freight houses or other facilities; but simply that the Pennsylvania Company receive and transport the cars of the Rochester Company over its terminals at New Castle in the same manner and with the same facilities that it affords to other railroads connecting with the Pennsylvania railroad at the same point.

The third and last objection is that the effect of the order of the Commission is to appropriate the property of the Pennsylvania Company without compensation to the use of the Rochester Company, in violation of the Constitution of the United States. Certainly the railroad cannot maintain, in view of the provisions of the statute to which we have referred, that these terminal facilities are exempt from public regulation and under all circumstances subject to its own control, to be dealt with in such manner as it may see fit. This court recognized, in the case of *United States* v. *Terminal R. R. Ass'n*, 224 U. S. 383, that terminal facilities might be so used as to create monopolies, which it was within the power of Congress to control, a power which it might exercise within the prohibitions and limitations of the Sherman Act. So in the present case, all that the order requires the Pennsylvania Company to do is to receive and transport over its terminals by its own motive power, for the Rochester Company, as it does for other companies, similarly situated, carload freight in the course of interstate transportation.

To support the constitutional argument in this connection, reliance is had upon the decision of this court in *Louisville &c. R. R.* v. *Stock Yards*, 212 U. S. 132. That case was also relied upon to support a like argument in the *Grand Trunk Case*, *supra*, and in the opinion of the

court was analyzed and its application to the situation then presented denied. An examination of the *Louisville Case* shows that it was unlike the one now presented. The Louisville & Nashville Company and the Southern Railway Company were competing companies for the live stock business at Louisville. Each maintained its own stock yards, the yard of the Louisville & Nashville Company being known as the Bourbon Stock Yard, and that of the Southern Railway Company as the Central Stock Yard. (See 118 Fed. Rep. 113, and the same case in this court in 192 U. S. 568.) The Railway Company was ordered in the state court to receive at its stations in Kentucky, and to bill, transport, transfer, switch and deliver in the customary way, at some point of physical connection with the tracks of the Southern Railway, and particularly at one described, all live stock or other freight consigned to the Central Stock Yards or to persons doing business there; to transfer, switch and deliver to the Southern Railway at the said point of connection any and all live stock or other freight coming over its lines in Kentucky, consigned to the Central Stock Yards or persons doing business there; to receive at the same point and to transport, switch, transfer and deliver all live stock consigned to any one at the Bourbon Stock Yards, the shipment of which originates at the Central Stock Yards; and was required, whenever requested by the consignor, consignee, or owner of the stock, at any of the stations, and particularly at its break-up yards in South Louisville, Kentucky, to recognize their right to change the destination, and upon payment of the whole freight rate and proper presentation of the bill of lading duly indorsed, to change the destination and deliver at a point of connection with the Southern Railway tracks for delivery by the latter to the Central Stock Yards. This judgment of the state court was reversed in this court, among other things the court saying (212 U. S., p. 145):

"If the principle is sound, every road into Louisville, by making a physical connection with the Louisville & Nashville, can get the use of its costly terminals and make it do the switching necessary to that end, upon simply paying for the service of carriage. The duty of a carrier to accept goods tendered at its station does not extend to the acceptance of cars offered to it at an arbitrary point near its terminus by a competing road, for the purpose of reaching and using its terminal station. To require such an acceptance from a railroad is to take its property in a very effective sense, and cannot be justified, unless the railroad holds that property subject to greater liabilities than those incident to its calling alone."

As this court said in the *Grand Trunk Case,* the case turned upon the point that the roads were competitive and the point of delivery an arbitrary one and that thereby the terminal station of one company was required to be shared with the other. In that connection it used language applicable to the present situation (231 U. S., p. 472):

"In the case at bar a shipper is contesting for the right, as a part of transportation. The order of the Commission was a recognition of the right and legally so. Considering the theater of the movements, the facilities for them are no more terminal or switching facilities than the depots, side tracks and main lines are terminal facilities in a less densely populated district. A precise distinction between facilities can neither be expressed nor enforced. Transportation is the business of railroads, and when that business may be regulated and to what extent regulated may depend upon circumstances."

So here there is no attempt to appropriate the terminals of the Pennsylvania Company to the use of the Rochester Company. What is here accomplished is only that the same transportation facilities which are afforded to the shipments brought to the point of connection over tracks used in common by the Baltimore & Ohio Railroad and

the Rochester Company, shall be rendered to the Rochester Company as are given to the Baltimore & Ohio Company under precisely the same circumstances of connection for the transportation of interstate traffic. All that the Commission ordered was that the Company desist from the discriminatory practice here involved, and in so doing we think it exceeded neither its statutory authority nor any constitutional limitation, and that the District Court was right in so determining.

It follows that the order denying the application for temporary injunction was properly made, and the judgment must be

Affirmed.

MR. CHIEF JUSTICE WHITE, dissenting.

The court now holds that this controversy involves merely a switching privilege and the duty of one railroad not to refuse such privilege to another, or at all events if it permits it to one, to allow it to other roads on terms of equality. By a necessary inference, therefore, the decision now made is concerned alone with that subject and does not in any degree whatever as a matter of law involve the right of one railroad company to compel another to permit it to share in its terminal facilities. If I could bring my mind to understand the facts of the controversy as they are now appreciated by the court, there would be no difficulty whatever on my part in accepting the legal principle which is applied to them. But the difficulty which I have is in the premise of fact upon which the case is decided. In other words, I have found it impossible to escape the conclusion that instead of being one concerning a mere switching privilege, the case is really one involving the using of terminal facilities. Differing only therefore as to an appreciation of the facts I am very reluctant to express a dissent, a reluctance which is greatly increased by the consideration that the view

of the facts now taken by the court is the one which was adopted by the court below and which was stated by the Interstate Commerce Commission. Strong, however, as is the admonition resulting from this situation, it is not strong enough to overcome the force of my conviction as to what the case really concerns and to overcome the belief that it is my duty at least to state the fact of my dissent.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

MILLER *v.* WILSON, SHERIFF OF RIVERSIDE COUNTY, STATE OF CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 112. Argued January 12, 1915.—Decided February 23, 1915.

The liberty of contract guaranteed by the due process clause of the Fourteenth Amendment is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest.

In determining the constitutionality of a state police statute the question is whether its restrictions have reasonable relation to a proper purpose; and reasonable regulations limiting the hours of labor of women are within the scope of legislative action. *Muller* v. *Oregon*, 208 U. S. 412; *Riley* v. *Massachusetts*, 232 U. S. 671; *Hawley* v. *Walker*, 232 U. S. 718.

While the limitation of the hours of labor of women may be pushed to an indefensible extreme, the limit of reasonable exertion of the protective authority of the State is not overstepped and liberty of contract unduly abridged by a statute prescribing eight hours a day or a maximum of forty-eight hours a week.

The legislature of a State is not debarred from classifying according to

general considerations and with regard to prevailing conditions, otherwise there could be no legislative power to classify.

The legislature is free to recognize degrees of harm and may confine its restrictions to those classes where it deems the need is greatest, and if the law hits an evil where it is most felt the prohibition need not be all embracing. *Keokee Coke Co.* v. *Taylor*, 234 U. S. 227.

The statute of California of 1911 prohibiting the employment of women in certain businesses including hotels is not unconstitutional as to women employed in hotels, either as an unwarranted invasion of liberty of contract or as denying the equal protection of the law on the ground of unreasonable discrimination because of the omissions of certain classes of female laborers from its operation, or because the classification is based on the employé's business and not upon the character of the employé's work.

162 California, 687, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of the Women's Eight Hour Labor Law of California, are stated in the opinion.

Mr. Frank P. Flint and *Mr. Henry S. Van Dyke* for plaintiff in error, submitted:

The restrictions imposed by the Act upon women and their employers as to their freedom of contract in certain designated employments are not reasonably necessary, and are not such a necessary invasion of freedom of contract as will be justified under the sanction of the police power or of any other constitutional power.

The legislation is not necessary to safeguard the health of any considerable class nor is it justified by the needs of the community as a whole. As in *Ritchie* v. *Wyman*, 214 Illinois, 509, the police power's exercise must be reasonable and not confiscatory, like a war power, and must be absolutely necessary to the public health or safety. Bierly's Police Power, p. 13; *People* v. *Commonwealth*, 9 Michigan, 285; *Smiley* v. *McDonald*, 42 Nebraska, 5; *Railroad Co.* v. *State*, 47 Nebraska, 549; Russell's Police Powers, p. 34.

And see *Lawton* v. *Steele*, 152 U. S. 133; Brannon's Fourteenth Amendment, pp. 172, 202.

The limitation to eight hours a day and particularly the limitation to forty-eight hours a week is unnecessary and unreasonable as applied to hotels and many of the other enumerated employments. To hold such legislation unconstitutional is to promote humanitarian legislation for women, for it makes possible such humanitarian legislation as is consistent with their liberty and their means of livelihood; while, on the contrary, the present law, as to many employments, by an unnecessary curtailment of their usefulness, and therefore of their earning capacity, does more harm than good. *Lochner* v. *New York*, 198 U. S. 45, 61; *Ex parte Kuback*, 85 California, 274.

There is nothing in the ordinary labor, by men of full age for more than eight hours a day, that calls for prohibition in the interest of the public health, the public safety, the public morals, or the public welfare. *Lochner* v. *New York, supra.*

This doctrine is affirmed by every court in the union having occasion to pass upon the question, except in certain cases on the women's employment acts which are bad on principle and on precedent. *Seattle* v. *Smyth*, 22 Washington, 327; *In re Morgan*, 26 Colorado, 415.

Only when an occupation possesses such characteristics of danger to health of those engaged therein as to justify the legislature in concluding that the welfare of the community demands a restriction, can the hours of labor for men be limited by legislative enactment. *Re Martin*, 157 California, 51, 55.

For the history of legislation and adjudication in this country on limitation of hours of employment for women, see *Commonwealth* v. *Hamilton Mfg. Co.*, 120 Massachusetts, 383; *Holden* v. *Hardy*, 169 U. S. 366; *Commonwealth* v. *Beatty*, 15 Pa. Sup. Ct. 5; *Wenham* v. *State*, 65 Nebraska, 395; *State* v. *Buchanan*, 29 Washington, 604;

Muller v. *Oregon*, 208 U. S. 412; *Commonwealth* v. *Riley*, 97 N. E. Rep. 367; *State* v. *Somerville*, 122 Pac. Rep. 324; *People* v. *Elerding*, 98 N. E. Rep. 982; *People* v. *Chicago*, 100 N. E. Rep. 194; *State* v. *Newman Lumber Co.*, 59 So. Rep. 923; *Matter of Jacobs*, 98 N. Y. 98; *People* v. *Williams*, 189 N. Y. 131; *Low* v. *Rees Printing Co.*, 41 Nebraska, 127; *Burcher* v. *People*, 41 Colorado, 495.

The Act is vitiated by manifold and fatal discriminations, and is therefore unconstitutional.

The first and most obvious discrimination is the express exception of all women employed in harvesting fruit or vegetables. Several considerable classes of women employés, whose employments are in no wise distinguishable in any particulars from many of those included,—e. g., stenographers, clerks and assistants employed by the professional classes and all domestic servants, are totally omitted. *Cotting* v. *Godard*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

The freedom to contract is protected from unreasonable restriction, similarly with every other proper freedom, by the Fourteenth Amendment. *Allgeyer* v. *Louisiana*, 165 U. S. 578–589; *State* v. *Peel Splint Coal Co.*, 36 W. Va. 856; *State* v. *Goodwill*, 33 W. Va. 179; *Barbier* v. *Connolly*, 113 U. S. 27; *Gulf &c. Ry.* v. *Ellis*, 165 U. S. 150; *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 237; *Low* v. *Rees Printing Co.* (Neb.), 59 N. W. Rep. 362; *Dougherty* v. *Austin*, 94 California, 620; *Darcy* v. *San Jose*, 104 California, 642; *Lodi* v. *State*, 51 N. J. L. 402; *Hellman* v. *Shoulters*, 114 California, 147; *Budd* v. *Hancock*, 66 N. J. L. 135; *Ex parte Sohncke*, 148 California, 262, 267.

Statutes have been held unconstitutional as violating the constitutional inhibitions against special laws, the classification being held arbitrary and without reasonable basis in *Slocum* v. *Bear Valley Co.*, 122 California, 555; *Johnson* v. *Goodyear Mining Co.*, 127 California, 417; *Krause* v. *Durbrow*, 127 California, 681, 685; *Beveridge* v.

Lewis, 137 California, 619, 623; *Ex parte Sohncke*, 148 California, 262; *Ex parte Westerfield*, 55 California, 550, 552, 553.

As to the discrimination between hotels and boarding houses and as to what constitutes an inn or hotel see *Pinkerton* v. *Woodward*, 33 California, 557; *Fay* v. *Pacific Improvement Co.*, 93 California, 253, 259; Schouler on Bailments, 253; *Cromwell* v. *Stephens* (N. Y.), 2 Daly, 15, 17, 23; *Kelly* v. *Excise Comr's*, 54 How. Prac. 327; *Martin* v. *State Ins. Co.*, 44 N. J. Law, 495; 22 Cyc. 1070; 16 Am. and Eng. Ency. of Law, 510; Beale on Innkeepers and Hotels, pp. 24–25, etc.; *Ex parte Jentzsch*, 112 California, 468, 474.

Mr. William Denman and *Mr. Louis D. Brandeis*, with whom *Mr. U. S. Webb*, Attorney General of the State of California, and *Mr. G. S. Arnold* were on the brief, for defendant in error:

California has the power to prevent the gainful employment of women for over eight hours a day in hotels and hospitals, and such a restriction is not an unconstitutional denial of freedom of contract.

The limitation of the number of hours women must work in these two employments has a direct relationship to women's health, and hence to the health of the race as a whole, as well as the safety and health of those she serves.

Women are admittedly weaker than men in the struggle of economic competition and may be protected by legislative enactment against the oppressive bargaining or control of their employer, whether arising from cupidity or such a mistaken philanthropy as that of the hospital here, which admittedly works its undergraduate girl nurses the equivalent of twelve hours a day for a six day week to make a better showing of the number of poor people cared for.

The limitation of the number of hours of woman's labor in gainful occupations to not over a half of her waking time

may check the rapid decline in reproduction of the older American stocks and in any event leaves her free for the development of mind and body for wifehood and motherhood, and hence insures the increased intelligence and strengthening of the race through the mother, to whom primarily (in California at least) the shaping of the child mind, the directing of his habits and the development of his character is primarily entrusted.

The California statutes in question do not deny equal protection of the law.

The continuous work of women in hotels and hospitals differs essentially from the intermittent seasonal work of women in harvesting, curing, canning or drying of any variety of perishable fruit or vegetables.

There is an essential difference between the work of women in hotels and in lodging houses.

The graduate nurse belongs to a class composed of women mentally better educated, physically better trained, professionally more experienced, and economically better organized to resist oppressive regulation imposed by their employers, and hence may be left free from legislative restriction in the performance of her distinctive functions in the hospital. She is the best fitted to cope with those emergencies arising in the operating room and ward, which often require attendance for more than the eight hour period and hence excepting her from the law provides for such emergencies.

In support of these contentions see *Adams* v. *Milwaukee*, 228 U. S. 572; *Barrett* v. *Indiana*, 229 U. S. 26; Bureau of Education Bulletin, 1912, No. 7.

Boarding houses are excluded from statutes regulating hotels in Delaware, Illinois, Michigan, Maryland, New Jersey, Oregon, Pennsylvania, Utah, Virginia, Washington. See *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Cotting* v. *Kansas*, 183 U. S. 79; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *Hawley* v. *Walker*, 232 U. S. 718; *Holden* v.

Hardy, 169 U. S. 366; *Lindsley* v. *Nat. Gas Co.*, 220 U. S. 76; *McLean* v. *Arkansas*, 211 U. S. 539; *Ex parte Miller*, 162 California, 687; *Muller* v. *Oregon*, 208 U. S. 412; *Patsone* v. *Pennsylvania*, 232 U. S. 138; *People* v. *Elerding*, 254 Illinois, 579; *Quong Wing* v. *Kirkendall*, 223 U. S. 59; *Riley* v. *Massachusetts*, 232 U. S. 671; *Smith* v. *Texas*, 233 U. S. 630; *Wenham* v. *State*, 65 Nebraska, 395.

Mr. Justice Hughes delivered the opinion of the court.

The plaintiff in error, the proprietor of the Glenwood Hotel in the City of Riverside, California, was arrested upon the charge of employing and requiring a woman to work in the hotel for the period of nine hours in a day, contrary to the statute of California which forbade such employment for more than eight hours a day or forty-eight hours a week. Act of March 22, 1911; Stats. 1911, p. 437. It was stated in the argument at this bar that the woman was employed as a chambermaid. Urging that the act was in violation of the state constitution, and also that it was repugnant to the Fourteenth Amendment as an arbitrary invasion of liberty of contract and as unreasonably discriminatory, the plaintiff in error obtained a writ of *habeas corpus* from the Supreme Court of the State. That court, characterizing the statute as one 'intended for a police regulation to preserve, protect, or promote the general health and welfare,' upheld its validity and remanded the plaintiff in error to custody. 162 California, 687. This writ of error was then sued out.

The material portion of the statute, as it then stood, was as follows:

"No female shall be employed in any manufacturing, mechanical or mercantile establishment, laundry, hotel, or restaurant, or telegraph or telephone establishment or office, or by any express or transportation company in this state more than eight hours during any one day or

more than forty-eight hours in one week. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than eight hours during the twenty-four hours of one day, or forty-eight hours during any one week; *provided, however*, that the provisions of this section in relation to the hours of employment shall not apply to nor affect the harvesting, curing, canning or drying of any variety of perishable fruit or vegetable."

As the liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest—the question is whether the restrictions of the statute have reasonable relation to a proper purpose. *Chicago, Burlington & Quincy R. R.* v. *McGuire*, 219 U. S. 549, 567; *Erie R. R.* v. *Williams*, 233 U. S. 685, 699; *Coppage* v. *Kansas, ante*, pp. 1, 18. Upon this point, the recent decisions of this Court upholding other statutes limiting the hours of labor of women must be regarded as decisive. In *Muller* v. *Oregon*, 208 U. S. 412, the statute of that State, providing that 'no female shall be employed in any mechanical establishment, or factory, or laundry' for 'more than ten hours during any one day,' was sustained as applied to the work of an adult woman in a laundry. The decision was based upon considerations relating to woman's physical structure, her maternal functions, and the vital importance of her protection in order to preserve the strength and vigor of the race. 'She is properly placed in a class by herself,' said the court, p. 422, 'and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. . . . Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to

him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence.' In *Riley* v. *Massachusetts*, 232 U. S. 671, the plaintiff in error had been convicted upon the charge of employing a woman in a factory at a different hour from that specified in a notice posted in accordance with the statute relating to the hours of labor. The general provision of the statute being found to be valid, the particular requirements which were the subject of special objection were also upheld as administrative rules designed to prevent the circumvention of the purpose of the law. The case of *Hawley* v. *Walker*, 232 U. S. 718, arose under the Ohio act prohibiting the employment of 'females over eighteen years of age' to work in 'any factory, workshop, telephone or telegraph office, millinery, or dressmaking establishment, restaurant or in the distributing or transmission of messages more than ten hours in any one day, or more than fifty-four hours in any one week.' The plaintiff in error was charged with employing a woman in a millinery establishment for fifty-five hours in a week. The constitutionality of the law as thus applied was sustained by this court.

It is manifestly impossible to say that the mere fact that the statute of California provides for an eight hour day, or a maximum of forty-eight hours a week, instead of ten hours a day or fifty-four hours a week, takes the case out of the domain of legislative discretion. This is not to imply that a limitation of the hours of labor of women might not be pushed to a wholly indefensible extreme, but there is no ground for the conclusion here that the limit of the reasonable exertion of protective authority has been overstepped. Nor, with respect to liberty of contract, are we able to perceive any reason upon which the State's power thus to limit hours may be upheld with respect to women in a millinery establishment and denied as to a chambermaid in a hotel.

We are thus brought to the objections to the act which are urged upon the ground of unreasonable discrimination. These are (1) the exception of women employed in 'harvesting, curing, canning or drying of any variety of perishable fruit or vegetable;' (2) the omission of those employed in boarding houses, lodging houses, etc.; (3) the omission of several classes of women employés, as for example stenographers, clerks and assistants employed by the professional classes, and domestic servants; and (4) that the classification is based on the nature of the employer's business and not upon the character of the employé's work.

With respect to the last of these objections, it is sufficient to say that the character of the work may largely depend upon the nature and incidents of the business in connection with which the work is done. The legislature is not debarred from classifying according to general considerations and with regard to prevailing conditions; otherwise, there could be no legislative power to classify. For it is always possible by analysis to discover inequalities as to some persons or things embraced within any specified class. A classification based simply on a general description of work would almost certainly bring within the class

a host of individual instances exhibiting very wide differences; it is impossible to deny to the legislature the authority to take account of these differences and to do this according to practical groupings in which, while certain individual distinctions may still exist, the group selected will as a whole fairly present a class in itself. Frequently such groupings may be made with respect to the general nature of the business in which the work is performed; and, where a distinction based on the nature of the business is not an unreasonable one considered in its general application, the classification is not to be condemned. See *Louisville & Nashville R. R.* v. *Melton*, 218 U. S. 36, 53, 54. Hotels, as a class, are distinct establishments not only in their relative size but in the fact that they maintain a special organization to supply a distinct and exacting service. They are adapted to the needs of strangers and travelers who are served indiscriminately. As the state court pointed out, the women employés in hotels are for the most part chambermaids and waitresses; and it cannot be said that the conditions of work are identical with those which obtain in establishments of a different character, or that it was beyond the legislative power to recognize the differences that exist.

If the conclusion be reached, as we think it must be, that the legislature could properly include hotels in its classification, the question whether the act must be deemed to be invalid because of its omission of women employed in certain other lines of business is substantially the same as that presented in *Hawley* v. *Walker*, *supra*. There, the statute excepted 'canneries or establishments engaged in preparing for use perishable goods'; and it was asked in that case on behalf of the owner of a millinery establishment why the act should omit mercantile establishments and hotels. The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound,

in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not necessary that the prohibition 'should be couched in all-embracing terms.' *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227. Upon this principle, which has had abundant illustration in the decisions cited below, it cannot be concluded that the failure to extend the act to other and distinct lines of business, having their own circumstances and conditions, or to domestic service, created an arbitrary discrimination as against the proprietors of hotels. *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 251, 256; *Heath & Milligan* v. *Worst*, 207 U. S. 338, 354; *Engel* v. *O'Malley*, 219 U. S. 128, 138; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225, 235; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160; *Rosenthal* v. *New York*, 226 U. S. 260, 270; *Barrett* v. *Indiana*, 229 U. S. 26, 29; *Sturges & Burn* v. *Beauchamp*, 231 U. S. 320, 326; *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, 418; *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 213; *Atlantic Coast Line R. R.* v. *Georgia*, 234 U. S. 280, 289.

For these reasons the judgment must be affirmed.

Judgment affirmed.

BOSLEY *v.* McLAUGHLIN, LABOR COMMISSIONER OF THE STATE OF CALIFORNIA.

SAME *v.* SAME.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Nos. 362, 363. Argued January 12, 1915.—Decided February 23, 1915.

The nature of the work of pharmacists and student nurses in hospitals and the importance to the public that it should not be performed by those overfatigued, make it a proper subject for legislative control as to hours of labor of women so employed.

Whether there is necessity for limiting the hours of labor of women pharmacists and nurses in hospitals is a matter for legislative and not judicial control, and the legislature is not prevented by the due process clause of the Fourteenth Amendment from limiting such labor to eight hours a day or a maximum of forty-eight hours a week. Such a restriction is not so palpably arbitrary as to be an unconstitutional invasion of the liberty of contract.

Miller v. *Wilson, ante*, p. 373, followed in regard to the right of the legislature to limit the hours of labor of women other than pharmacists and student nurses employed in hospitals in California.

An exception of graduate nurses from the operation of a statute limiting the hours of labor of women is not so arbitrary, either as to female pharmacists or student nurses in hospitals, as to make the statute unconstitutional as denying equal protection of the law. The distinction in their employment is one of which the legislature may take notice.

Enforcement of a state police statute will not be enjoined on the ground that it violates the equal protection provision of the Fourteenth Amendment where the bill fails to show as to the persons attacking the statute any such injury, actual or threatened, as warrants resort to a court of equity.

The California Statute of 1911 as amended in 1913 limiting the hours of labor of women in certain employments including those in hospitals to eight hours in any one day or a maximum of forty-eight hours a week is not unconstitutional under the Fourteenth Amendment either as unduly abridging the liberty of contract, or as denying equal protection of the law because graduate nurses were excepted therefrom.

THE facts, which involve the constitutionality under the Fourteenth Amendment of the California Women's Eight Hour Labor Law, are stated in the opinion.

Mr. John F. Bowie, with whom *Mr. Charles S. Wheeler* was on the brief, for appellants:

The provision of the statute excepting graduate nurses from the operation of the law results in denying equal protection of the laws to all other women working in hospitals.

The fact that a law may be passed in exercise of the police power does not obviate the requirement of equal protection.

Equal protection of the laws requires that no impediment be interposed to the pursuits of one except as applied to the pursuits of others under like circumstances.

Appellants offered to prove as a fact that the statute imposed on women following the same pursuits as those followed by graduate nurses impediments not imposed on graduate nurses: that no difference existed justifying this discrimination.

The pursuits followed by graduate nurses in hospitals are the same as those followed by other women in hospitals and there is no difference in theory or past experience justifying the discrimination.

The statute will if enforced operate to deprive appellants of liberty without due process of law.

The act under consideration is not a health law.

Laws limiting hours of labor of adults operate to deprive those subject thereto of liberty.

Liberty includes freedom to work at a lawful calling.

Women are not wards of the State.

The statute operates to deprive appellants of liberty without due process of law.

The statute is invalid even if viewed as an exercise of

police power as the restrictions imposed are arbitrary and unnecessarily oppressive.

In support of these contentions see *Addyston Co.* v. *United States*, 175 U. S. 211; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Attorney General* v. *Sillem*, 33 L. J. Ex. 92; *Chicago, B. & Q.* v. *McGuire*, 219 U. S. 549; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Cotting* v. *Kansas*, 183 U. S. 79; *Ex parte Drayton*, 153 Fed. Rep. 986; *Dyke* v. *Elliott*, L. R. 4 P. C. 184; *Erie R. R.* v. *Williams*, 233 U. S. 685; *Eubank* v. *Richmond*, 226 U. S. 137; *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389; *Gulf, Col. & Santa Fe R. R.* v. *Ellis*, 165 U. S. 150; *Ex parte Jentzsch*, 112 California, 468; *Lawton* v. *Steele*, 152 U. S. 133; *Lochner* v. *New York*, 198 U. S. 45; *Low* v. *Rees Printing Co.*, 41 Nebraska, 127; *Minnesota* v. *Barber*, 136 U. S. 313; *Mugler* v. *Kansas*, 123 U. S. 623; *Muller* v. *Oregon*, 208 U. S. 412; *Opinion of Justices*, 208 Massachusetts, 622; *People* v. *Elerding*, 254 Illinois, 579; *People* v. *Williams*, 189 N. Y. 131; *Ritchie* v. *People*, 155 Illinois, 98; *In re Sing Tuck*, 126 Fed. Rep. 386; *Smith* v. *Alabama*, 124 U. S. 465; *Smith* v. *Texas*, 233 U. S. 630; *Soon Hing* v. *Crowley*, 113 U. S. 703; *State ex rel. Galle* v. *New Orleans*, 113 Louisiana, 371; *United States* v. *Ragsdale*, Hempst. 479; *United States* v. *Wiltberger*, 5 Wheaton, 76; Statutes of California, 1913, p. 713.

Mr. William Denman and *Mr. Louis D. Brandeis*, with whom *Mr. G. S. Arnold* were on the brief, for appellees:

Eight-hour laws for women are valid.

Statutes have been passed for women's eight-hour laws in private businesses.

There are eight-hour laws for men and women in certain private businesses,—in mines, smelters, ore reduction, and in miscellaneous private businesses.

There are eight-hour laws for men and women telegraphers and telephone operators in railroad service; for

men and women in work done in private business for national, state or municipal governments and public employments.

The classifications made in Cal. Stat. 1911, chaps. 238 and 324, are not arbitrary.

There are recognized evils of employing pupil nurses, while still in training, to perform the duties of graduate nurses.

There was common knowledge and widespread discussion of the exemption of Graduate Nurses before the California Act of 1913 was passed.

There was general condemnation of the practice of many hospitals in employing pupil nurses instead of graduate nurses for the sake of financial gain.

The common practice in the best hospitals is to sharply differentiate between graduate and pupil nurses as to capacities, functions and duties.

There is an acknowledged power of associated graduate nurses to improve standards in their profession.

The reasonableness of the eight-hour day for pupil nurses is apparent as is also the reasonableness of not exempting "experienced" nurses from the scope of the act and including pharmacists within the scope of the act.

The act does not apply to women internes acting as physicians and surgeons.

In support of these contentions see *Ex parte Hawley*, 98 N. E. Rep. 1126; *Hawley* v. *Walker*, 232 U. S. 718; *Muller* v. *Oregon*, 208 U. S. 412; *People* v. *Elerding*, 98 N. E. Rep. 982; *State* v. *Somerville*, 122 Pac. Rep. 324; *Withey* v. *Bloem*, 128 N. W. Rep. 913.

Mr. Justice Hughes delivered the opinion of the court.

This is a suit to restrain the enforcement of the statute of California prohibiting the employment of women for more than eight hours in any one day or more than forty-

eight hours in any one week. The act is the same as that which was under consideration in *Miller* v. *Wilson*, *ante*, p. 373, decided this day, as amended in 1913. By the amendment, the statute was extended to public lodging houses, apartment houses, hospitals, and places of amusement. The proviso was also amended so as to make the statute inapplicable to 'graduate nurses in hospitals.' Stats. (Cal.) 1913, p. 713.

The complainants are the trustees of 'The Samuel Merritt Hospital' in Alameda, California, and one of their employés, Ethel E. Nelson. Their bill set forth that there were employed in this hospital approximately eighty women and eighteen men; that of these women ten were what are known as 'graduate nurses,' that is to say, those who had 'pursued and completed, at some training school for nurses in a hospital, courses of study and training in the profession or occupation of nursing and attending the sick and injured,' and had received diplomas or certificates of graduation. By reason of their qualifications, they were paid 'a compensation greatly in excess of that paid to female pupils engaged in nursing in hospitals while students of the training school.'

It was further averred that, in addition to these ten graduate nurses, certain other women were employed in the hospital, one as bookkeeper, two as office assistants, one as seamstress, one as matron or housekeeper, five who were engaged in ordinary household duties, and one—the complainant Ethel E. Nelson—as pharmacist. It was stated that this complainant was a graduate pharmacist, licensed by the state board; that she also acted as storekeeper, but that her chief duty was to mix and compound drugs for use in the treatment of the hospital patients. The general allegation was made that these last-mentioned eleven employés performed work that was in no manner different from that done by 'persons engaged in similar employments or occupations and not

employed in hospitals.' The apprehended injury to the complainant Nelson by reason of the interference of the statute with her freedom to contract was specially alleged.

It was also set forth that the hospital maintained a school with a three years' course of study wherein women were trained to nurse the sick and injured; that in this school there were enrolled twenty-four in the third year class, eighteen in the second year class, and twenty-three in the first year class; that a part of the 'education and training' of these 'student nurses' consisted in 'aiding, nursing, and attending to the wants of the sick and injured persons' in the hospital, this work being done while the student was pursuing the prescribed course of study; that the student nurses were paid $10 a month during each of the first two years of their course and $12.50 a month in the third year, and were also provided throughout the three years 'with free board, lodging and laundry.' It was averred that the cost to the hospital of maintaining the school was $2,500 a month, and that the cost of procuring the work to be performed by graduate nurses that was being done by student nurses would be not less than $3,600 a month. It was set forth as a reason why the work of the student nurses was done at less expense, that their compensation was paid not only in money, board, etc., but also partially in their education and training, their attendance on patients being in itself an indispensable part of their course of preparation. It was said further that their hours of labor must be determined by the exigencies of the cases they were attending.

The enforcement of the act with respect to these student nurses, it was stated, would require the hospital either to cease the operation of the school or largely to increase the number in attendance in order that an equal return in service could be obtained; and such increase would involve a greatly enlarged expense.

The complainants attacked the act on the grounds

that it interfered with their liberty of contract and denied to them the equal protection of the laws, contrary to the Fourteenth Amendment. And in support, it was asserted in substance, that labor in hospitals did not afford, in itself, a basis for classification; that there was no difference between such labor and the 'same kind of labor' performed elsewhere; that a hospital is not an unhealthful or unsanitary place; and, generally, that the statute and its distinctions were arbitrary.

Upon the bill, an application was made for an injunction pending the suit. It was heard by three judges and was denied. The appeal in No. 362 is from the order thereupon entered.

The defendants, the officers charged with the enforcement of the law, filed an answer. On final hearing, the complainants made an offer to prove that "all the allegations of fact set forth in the bill were true; that the fact that a woman was a graduate nurse merely showed that she had completed a course of study for the treatment of the sick, but that the course of study which a woman must take for that purpose was not prescribed by law or fixed by custom, but was such as any hospital or training school might, in the discretion of its governing officers see fit to prescribe; that the difference between a graduate nurse and an experienced nurse is a difference of technical education only, and that there is no standard by which this difference can be measured; that graduate nurses working in and employed by hospitals do not ordinarily perform therein the work of nursing the sick, but act as overseers to assistants to the medical staff." The District Judge thereupon stated that upon the hearing of the motion for an interlocutory injunction it had been held that the complaint did not state a cause of action and that it was considered unnecessary to take the evidence. The offer of proof was rejected and the bill of complaint dismissed. No. 363 is an appeal from the final decree.

1. *As to liberty of contract.* The gravamen of the bill is with respect to the complainant Nelson, a graduate pharmacist, and the student nurses. As to the former,—it appears that a statute of California limits the hours of labor of pharmacists to ten hours a day and sixty hours a week. Stats. (Cal.) 1905, p. 28. In view of the nature of their work, and the extreme importance to the public that it should not be performed by those who are suffering from over-fatigue, there can be no doubt as to the legislative power reasonably to limit the hours of labor in that occupation. This, the appellants expressly concede. But this being admitted to be obviously within the authority of the legislature, there is no ground for asserting that the right to contractual freedom precludes the legislature from prohibiting women pharmacists from working for more than eight hours a day in hospitals. The mere question whether in such case a practical exigency exists, that is, whether such a requirement is expedient, must be regarded as a matter for legislative, not judicial, consideration.

The appellants, in argument, suggest a doubt whether the statute is applicable to the student nurses, but the bill clearly raises the question of its validity as thus applied and urges the serious injury which its enforcement would entail upon the hospital. Assuming that these nurses are included, the case presented would seem to be decisive in favor of the law. For it appears that these persons, upon whom rests the burden of immediate attendance upon, and nursing of, the patients in the hospital are also pupils engaged in a course of study, and the propriety of legislative protection of women undergoing such a discipline is not open to question. Considerations which, it may be assumed, moved the legislature to action have been the subject of general discussion as is shown by the bulletin issued by the United States Bureau of Education on the 'Educational Status of Nursing' (Bulletin,

1912, No. 7). With respect to the 'hours of duty' for student nurses, it is there said (pp. 29–32): "These long hours have always formed a persistent and at times an apparently immovable obstacle in efforts to improve the education of nurses and to establish a rational adjustment of practice to theory. . . . Ten or more hours a day in addition to class work and study might be endured for a period of two years without obvious or immediate injury to health. The same hours carried on for three years would prove a serious strain upon the student's physical resources, inflicting perhaps irreparable injury. The conclusions reached in this first study of working hours of students (1896) were that they were universally excessive, that their requirement reacted injuriously not only upon the students, but eventually upon the patients and the hospital, that it was a short-sighted and unjustifiable economy in hospital administration which permitted it to exist. Fifteen years later, statistics show that though the course of training has now in the great majority of schools been lengthened to three years, shorter hours of work have not generally accompanied this change, and that progress in that direction has been slow and unsatisfactory." After quoting statistics the bulletin continues: "In speaking of hours it must be remembered that these statistics refer only to practical work in ward, clinic, operating room, or other hospital department, and not to any portion of theoretical work; that the 10 hours in question are required of the student irrespective of lectures, class, or study. This practical work, also, is in many of its aspects unusually exacting and fatiguing; much of it is done while standing, bending, or lifting; much of it is done under pressure of time and nervous tension, and to a considerable degree the physical effort which the student must make is accompanied by mental anxiety and definite, often grave, responsibility. Viewed from any standpoint whatever, real nursing is difficult,

exacting work, done under abnormal conditions, and all the extraordinary, subtile, intangible rewards and satisfactions which are bound up in it for the worker cannot alter that fact.—Ten hours, or even nine hours, of work daily of this nature cannot satisfactorily be combined with theoretical instruction to form a workable educational scheme.— . . . How largely the superintendents of training schools feel the need of improvement in this direction may be gathered from the fact that over two-thirds of the replies to the questions on this subject suggested shorter hours as advisable or necessary, that a large proportion of these stated their firm belief in an 8-hour day, and that almost every reply which came showed clearly in one way or another the difficulties under which the schools were laboring in trying to carry on the hospital work with the existing number of students."

Whatever contest there may be as to any of the points of view thus suggested, there is plainly no ground for saying that a restriction of the hours of labor of student nurses is palpably arbitrary.

As to certain other women (ten in number) employed in the hospital, such as the matron, seamstress, bookkeeper, two office assistants and five persons engaged in so-called household work, the bill contains merely this general description without further specifications; and from any point of view it is clear, that, with respect to the question of freedom of contract, no facts are alleged which are sufficient to take the case out of the rulings in *Muller* v. *Oregon*, 208 U. S. 412; *Riley* v. *Massachusetts*, 232 U. S. 671; *Hawley* v. *Walker*, 232 U. S. 718; and *Miller* v. *Wilson*, *ante*, p. 373.

2. *As to the equal protection of the laws.* The argument in this aspect of the case is especially addressed to the exception of 'graduate nurses.' The contention is that they are placed 'on one side of the line and doctors, surgeons, pharmacists, experienced nurses and student nurses

and all other hospital employés on the other side of the line.' So far as women doctors and surgeons are concerned, the question is merely an abstract one as no such question is presented by the allegations of the bill with regard to the complainant hospital. (*Southern Railway* v. *King*, 217 U. S. 524, 534; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550.) With regard to other nurses, whether so-called 'experienced' nurses or student nurses, it sufficiently appears that the graduate nurse is in a separate class. The allegations of the bill itself show this to be the fact. It is averred that the graduate nurses are those who 'have pursued and completed, at some training school for nurses in a hospital, courses of study and training in the profession or occupation of nursing and attending the sick and injured, and have received, in recognition thereof, diplomas or certificates of graduation from said courses of study.' And, in the appellants' offer of proof, it is said that 'graduate nurses working in and employed by hospitals do not ordinarily perform therein the work of nursing the sick, but act as overseers to assistants to the medical staff.' It may be, as asserted, that the difference in qualifications between a graduate nurse and an 'experienced nurse' is a difference of technical education only, but that difference exists and is not to be brushed aside. It is one of which the legislature could take cognizance. Not only so, but as such nurses act as overseers of wards or assistants to surgeons and physicians, it would be manifestly proper for the legislature to recognize an exigency with respect to their employment making it advisable to take them out of the general prohibition. Again, with regard to the complainant Nelson, who is a graduate pharmacist, while she has been graduated from a course of training for her chosen vocation, it is a different vocation. The work is not the same. There is no relation to the supervision of the wards, and, putting mere matters of expediency aside, there is no basis for concluding that

the legislature was without power to treat the difference as a ground for classification.

As to the ten other women employés, the validity of the distinction made in the case of graduate nurses is obvious. It should further be said, aside from the propriety of classification of women in hospitals with respect to the general conditions there obtaining (*Louisville & Nashville R. R.* v. *Melton*, 218 U. S. 36, 53, 54), that the bill wholly fails to show as to the employment of any of these persons any such injury—actual or threatened—as would warrant resort to a court of equity to enjoin the enforcement of the law.

And the objection based upon the failure of the legislature to extend the prohibition of the statute to persons employed in other establishments is not to be distinguished in principle from that which was considered in *Miller* v. *Wilson*, *supra*, and cases there cited.

Decrees affirmed.

WRIGHT-BLODGETT COMPANY *v.* UNITED STATES.

SAME *v.* SAME.

SAME *v.* SAME.

SAME *v.* SAME.

SAME *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Nos. 151, 152, 154, 155, 156. Argued January 26, 27, 1915.—Decided February 23, 1915.

Although several cases cancelling patents for fraud have been decided by the District Court without opinion, if the same decree was entered in all the cases and all were alike in their main features, although varying in details, and the Circuit Court of Appeals affirmed all the decrees with an opinion stating that fraud in the entry was proved and that the grantee was charged with knowledge, the two courts must be deemed to have concurred in their findings; and the rule that under such conditions their determinations upon questions of fact, in absence of clear error will not be disturbed, applies.

While a patent obtained by fraud is not void or subject to collateral attack, it may be directly assailed by the Government in a suit against the patentee or grantee, and such a suit can only be sustained by proof producing conviction.

Despite satisfactory proof of fraud in obtaining the patent, if the legal title has passed, *bona fide* purchase for value is a perfect defense, but it is an affirmative one which the grantee must establish in order to defeat the Government's right to cancel a patent which fraud alone is shown to have induced. *Boone* v. *Chiles*, 10 Pet. 177.

203 Fed. Rep. 263, affirmed.

THE facts, which involve the validity of certain land patents issued under the homestead laws of the United States, are stated in the opinion.

Mr. J. Blanc Monroe, with whom *Mr. Monte M. Lemann* and *Mr. A. R. Mitchell* were on the brief, for appellant:

When the United States brings a suit to annul a patent to land held by a vendee of the entryman, on the ground of fraud in the entryman it must prove actual notice of such fraud in said vendee. *United States* v. *Clark*, 200 U. S. 601; *United States* v. *Detroit Lumber Co.*, 200 U. S. 321.

When the United States seeks to annul a patent on grounds of fraud in the entryman and notice in his vendee, the specific details of the fraud and of the notice must be set out in the bill, and the probata must conform to the allegata. *Maxwell Land Grant Case*, 121 U. S. 325; *United States* v. *Barber Lumber Co.*, 172 Fed. Rep. 950; *United States* v. *Atherton*, 102 U. S. 372; *Harrison* v. *Nixon*, 9 Pet. 503.

It will not do for the United States to allege notice in one way and through named individuals, and to attempt to prove notice in another way and through other individuals. See cases *supra*.

When seeking to annul a patent under the seal and signature of the President, the United States to succeed must adduce that class of evidence which commands respect and that amount which produces conviction. A patent cannot be set aside upon a bare preponderance of evidence which leaves the issue in doubt. *Maxwell Land Grant Case*, 121 U. S. 381; *Colorado Coal Co.* v. *United States*, 123 U. S. 307; 133 U. S. 193; *United States* v. *Stinson*, 197 U. S. 200.

The officials of the land office of the United States are affirmatively charged with the duty of investigating land entries and of ascertaining before issuing either a final receipt or patent, that the law is fully complied with. The

purchaser from a person holding a final receipt is charged with no such duty. On the contrary, he is entitled to buy on the faith of the patent and receipt and without looking for grounds of doubt. If the bill shows that the entryman's actions, settlement and proof deceived the trained sleuths of the Government land department, and that they issued both final receipt and patent, a strong *de facto* presumption arises that the entryman's vendee was likewise deceived.

General statements that representatives of the defendant were in the general neighborhood at the time of the purchase are not sufficient to overcome this presumption particularly so when the improvements placed upon the land were such as to create in the casual observer the belief that the law was fully complied with. *Maxwell Land Grant Case*, 121 U. S. 381; *Clark Case*, 200 U. S. 601.

Nor will such general statements prevail when the record shows that defendants were in the habit of buying land on a general cruiser's estimate without special examination and that they purchased the particular land in controversy on the advice of counsel of high standing after examination of the abstract of title thereto.

As Rev. Stat., § 2301 does not require a commuter to prove that he has not agreed to sell his land before receiving his final receipt, this court will not write such a provision into that statute. *Williamson* v. *United States*, 207 U. S. 455; *United States* v. *Biggs*, 211 U. S. 507; *Adams* v. *Church*, 193 U. S. 510; *United States* v. *Sullenberger*, 211 U. S. 525; *United States* v. *Freeman*, 211 U. S. 523.

When the United States, while attempting to discharge its obligation to show actual notice on the part of the defendant of the fraud in the entryman places the entryman on the stand and the latter swears that he took an agent of the defendant to the land, pointed out to him the improvements which he, the entryman, had placed upon it and "assured" said agent that everything which the

law required had been done, the United States not only fails to prove notice in the defendant but affirmatively establishes defendant's good faith and absence of notice.

Mr. Assistant Attorney General Knaebel, with whom *Mr. S. W. Williams* was on the brief, for the United States:

The two lower courts having concurred in finding that the testimony respecting cultivation, residence, and improvements was false, and that the appellant had notice through its agents on the ground at the time of its purchase, the finding should not be disturbed unless clearly erroneous.

There is evidence to support the findings.

The Government having, with the requisite certainty, established that the entries were fraudulent, the *onus* was upon the appellant to make good its plea of *bona fide* purchase without notice.

The evidence of the unlawful prior agreements was competent.

In support of these contentions, see *Bailey* v. *Sanders*, 228 U. S. 603; *Boone* v. *Chiles*, 10 Pet. 177; *Gilson* v. *United States*, 234 U. S. 380; *Jones* v. *Meehan*, 175 U. S. 1; *Neale* v. *Neales*, 9 Wall. 1; *Texas & Pac. Ry.* v. *R. R. Com. of La.*, 232 U. S. 338; *United States* v. *Brannan*, 217 Fed. Rep. 849; *United States* v. *Cal. & Oreg. Land Co.*, 192 U. S. 355; *United States* v. *Clark*, 200 U. S. 601; *United States* v. *Hill*, 217 Fed. Rep. 841.

MR. JUSTICE HUGHES delivered the opinion of the court.

These five cases, although involving separate transactions, may conveniently be considered in a single opinion. The suits were brought by the United States to annul certain land patents [1] issued under the homestead laws upon

[1] In No. 151 the entry was made October 19, 1898, by Joe J. Hicks; commutation proof was offered June 11, 1901, and final certificate is-

the ground that the respective entrymen had defrauded the Government in securing the patents in that they had not actually resided upon the land and cultivated it as required by the statute, the statements in their proofs upon commutation being false. Rev. Stat., § 2301. It was further averred that the Wright-Blodgett Company, the appellant, at the time of its purchase of the respective tracts had notice through its agents of the fraud which had been perpetrated by the entrymen. The appellant answered in each case, disclaiming all knowledge of the alleged fraud and setting up that it was a *bona fide* purchaser for value after the issuance to the entrymen of the final receipts. The cases were separately heard and in each, upon pleadings and proofs, a decree was entered canceling the patent. Upon appeal, the Circuit Court of Appeals affirmed the decrees. The opinion of that court stated that it found 'that fraud in the homestead entry' was proved, and that the appellant was 'charged through its active agents on the ground with knowledge of the fraud.'

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sued July 6, 1901; on July 10, 1901, the entryman sold the land to the appellant. Patent was issued April 1, 1902.

In No. 152 the entry was made April 10, 1899, by Walter O. Allen; commutation proof was offered June 11, 1901, and final certificate issued July 8, 1901; on July 10, 1901, the entryman sold the land to the appellant. Patent was issued July 5, 1902.

In No. 154 the entry was made January 13, 1900, by Elijah Z. Boyd; commutation proof was offered May 18, 1901, and final certificate issued May 24, 1901; on June 21, 1901, the entryman sold the land to the appellant. Patent was issued February 15, 1902.

In No. 155 the entry was made May 4, 1899, by Samuel S. Akin, Jr., commutation proof was offered August 17, 1901, and final certificate issued September 18, 1901; on September 28, 1901, the entryman sold the land to the appellant. Patent was issued April 1, 1902.

In No. 156 the entry was made January 31, 1900, by Samuel E. Bryers; commutation proof was offered August 17, 1901, and final certificate issued September 18, 1901; on September 28, 1901, the entryman sold the land to the appellant. Patent was issued April 1, 1902.

The appellant urges that it does not appear that the two courts concurred in their findings as the cases were decided in the District Court without opinion and, in three of the cases, there was testimony which, according to the Government, tended to show that the transactions were fraudulent not only because there had not been the residence and cultivation required by the statute and stated in the proofs, but also because of agreements prior to the commutation proofs to sell the lands to the appellant. But the District Court rendered its decree in the five cases on the same day; in two of these, it is not suggested that there was evidence of such anticipatory agreements, but the same decree was entered and must have proceeded on the evidence as to the lack of residence and cultivation. While the facts in the several cases vary in details they are so far alike in their main features with respect to residence and cultivation as to make it absolutely impossible to assume that any different conclusion of fact was reached by the District Court in the three cases than that at which it arrived in the two others. The two courts must be deemed to have concurred in their findings and in accordance with the well-settled rule their determination upon mere questions of fact will not be disturbed, unless clear error is shown. *Stuart* v. *Hayden*, 169 U. S. 1, 14; *Towson* v. *Moore*, 173 U. S. 17, 24; *Texas & Pacific Ry.* v. *Railroad Commission*, 232 U. S. 338, 339; *Washington Securities Co.* v. *United States*, 234 U. S. 76, 78; *Gilson* v. *United States*, 234 U. S. 380, 384. An examination of the record fails to disclose any such error in the finding as to the fraud of the entrymen, and it is not necessary to recite the evidence.

It is insisted, however, that in the finding as to the standing of the appellant there was involved an erroneous application of the law. In substance, the argument comes to this,—that in a suit by the United States to cancel a patent upon the ground of fraud, where the land is held

by a grantee of the entryman, the Government must establish that the grantee is not a *bona fide* purchaser for value; that this must be shown by proof of a clear and cogent character; and that, measured by this standard, the Government's case was not made out. This contention proceeds upon an erroneous view of the governing principles as repeatedly set forth in the decisions of this court. These principles may be briefly restated: Where a patent is obtained by false and fraudulent proofs submitted for the purpose of deceiving the officers of the Government, and of thus obtaining public lands without compliance with the requirements of the law, while the patent is not void or subject to collateral attack, it may be directly assailed in a suit by the Government against the parties claiming under it. In such case, the respect due to a patent, the presumption that all the preceding steps required by the law had been observed before its issue, and the immense importance of stability of titles dependent upon these instruments, demand that suit to cancel them should be sustained only by proof which produces conviction. *United States* v. *Minor*, 114 U. S. 233, 239; *Maxwell Land-Grant Case*, 121 U. S. 325, 381; *United States* v. *Stinson*, 197 U. S. 200, 204, 205; *Diamond Coal Co.* v. *United States*, 233 U. S. 236, 239. And, despite satisfactory proof of fraud in obtaining the patent, as the legal title has passed, *bona fide* purchase for value is a perfect defense. *Colorado Coal Co.* v. *United States*, 123 U. S. 307, 313; *United States* v. *Stinson*, *supra; Diamond Coal Co.* v. *United States*, *supra; United States* v. *Detroit Lumber Co.*, 200 U. S. 321; *United States* v. *Clark*, 200 U. S. 601. But this is an affirmative defense which the grantee must establish in order to defeat the Government's right to the cancellation of the conveyance which fraud alone is shown to have induced. The rule as to this defense is thus stated in *Boone* v. *Chiles*, 10 Pet. 177, 211, 212: "In setting it up by plea or answer, it must state the deed of purchase, the

date, parties, and contents briefly; that the vendor was seized in fee, and in possession; the consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to, and down to the time of paying the money, and the delivery of the deed; and if notice is specially charged, the denial must be of all circumstances referred to, from which notice can be inferred; and the answer or plea show how the grantor acquired title. . . . The title purchased must be apparently perfect, good at law, a vested estate in fee-simple. . . . It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. . . . Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchase without notice; the case stated must be made out, evidence will not be permitted to be given of any other matter not set out." See also *Smith* v. *Orton*, 131 U. S., *appendix*, lxxv, lxxviii; *Colorado Coal Co.* v. *United States*, *supra*; *United States* v. *California &c. Land Co.*, 148 U. S. 31, 41, 42; *United States* v. *Stinson*, *supra*; Story's Eq. Pl., §§ 805, 805a, 806; 2 Pomeroy, Eq. Jur., §§ 745, 784; *Jewett* v. *Palmer*, 7 Johns. Ch. 65, 68; *Seymour* v. *McKinstry*, 106 N. Y. 230; *Graves* v. *Coutant*, 31 N. J. Eq. 763; *Sillyman* v. *King*, 36 Iowa, 207; *Prickett* v. *Muck*, 74 Wisconsin, 199; *Bank* v. *Ellis*, 30 Minnesota, 270; *Lewis* v. *Lindley*, 19 Montana, 422. In *United States* v. *Detroit Lumber Co.*, *supra*, the Circuit Court of Appeals found that the Detroit Company was a purchaser in good faith and this court reviewing the facts reached the same result. The Company had no knowledge or intimation of wrong until long after the issuance of the patents. In *United States* v. *Clark*, *supra*, both courts below had found that Clark had no actual knowledge of the alleged frauds or of facts sufficient to put

him upon inquiry. Clark, his agents and advisers, testified that they did not know or suspect anything wrong. (200 U. S., p. 608.) The defense of *bona fide* purchaser for value was completely made out and what is said in the opinion must be read in the light of that fact. Nothing was shown to impair the case which the defendant had established; and there was no intention to depart from the well-settled rule to which we have referred.

In the present case the appellant had its agents upon the ground and it has been found that through these agents it had knowledge of the fraud. The contention that as the Government had alleged notice through particular agents it could not be shown that the Company had acquired knowledge through other agents than those named is without merit; the allegation in the bill as to the particular agents was surplusage. Upon the question of fact, with respect to *bona fides* in its purchase, both courts below have found against the appellant and the record does not show any error requiring the reversal of the decrees.

Decrees affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

UNITED STATES *v.* SMULL.

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

No. 598. Argued January 7, 1915.—Decided February 23, 1915.

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

A charge of perjury may be based on § 125, Criminal Code, for knowingly swearing falsely to an affidavit required either expressly by Act of Congress or by an authorized regulation of the Land Department.

When by valid regulation the Land Department requires an affidavit to be made before an otherwise competent officer, that officer is authorized to administer the oath under § 125, Criminal Code, and the false swearing is made a crime and the penalty is fixed therefor by Congress and not by the Department.

In regard to affidavits required by the Land Department, § 125, Criminal Code, must be read in the light of § 2246, Rev. Stat., authorizing and making it the duty of the specified officer of the Land Department to administer oaths.

The departmental rule requiring an applicant for homestead entry under § 2289, Rev. Stat., to state under oath whether or not he has made a former entry under the homestead law is one addressed to the enforcement of the laws, the administration whereof is confided to the Land Department, and is not inconsistent with any specific statutory provision and the oath required is therefore one administered by authority of law as provided in § 125, Criminal Code.

THE facts, which involve the construction and application of Rev. Stat., § 2289, and the validity of an indictment for perjury for violation thereof, are stated in the opinion.

Mr. Assistant Attorney General Knaebel, with whom *Mr. S. W. Williams* was on the brief, for the United States:

The case was one in which the laws of the United States authorized the oath, and the false matter was material within the meaning of § 125 of the Criminal Code.

The homestead law expressly forbids the making of second entries, such as was attempted in this case, and charges the Land Department with the duty of preventing them.

In the performance of this duty it is not merely convenient but essential that the Department examine the applicant concerning the existence of a former entry, and therefore the duty to make the examination is a duty springing directly from the homestead law itself and covered by its specific requirement (Rev. Stat., § 2478) that every part of it shall be enforced by appropriate regulations.

The duty to examine the applicant includes the duty, and hence the power, to examine him on oath.

That such oaths were intended to be included by § 125, Crim. Code (Rev. Stat., § 5392) is demonstrated by its broad terms and its evident purpose, illuminated by the statutes from which it was derived.

The language is, "in any case in which a law of the United States authorizes an oath to be administered."

The evident purpose is as broad as the letter.

An inquiry into the antecedents of this section will leave no doubt of its applicability to cases like the present.

The circumstance that certain matters to be covered by the claimant's initial affidavit are specified in § 2290 implies no prohibition against his examination under oath upon other matters which are vital to the right of entry. *United States* v. *George*, 228 U. S. 14, distinguished.

In support of these contentions, see *Babcock* v. *United States*, 34 Fed. Rep. 873; *Caha* v. *United States*, 152 U. S. 211; *Ingraham* v. *United States*, 155 U. S. 434; *Leonard* v. *Lennox*, 181 Fed. Rep. 760; *Patterson* v. *United States*, 181 Fed. Rep. 970; *United States* v. *Bailey*, 9 Pet. 238; *United States* v. *Bedgood*, 49 Fed. Rep. 54; *United States* v. *Boggs*, 31 Fed. Rep. 337; *United States* v. *George*, 228 U. S. 14; *United States* v. *Grimaud*, 170 Fed. Rep. 205; *United States* v. *Grimaud*, 220 U. S. 506; *United States* v. *Hardison*, 135 Fed. Rep. 419; *United States* v. *Hearing*, 26 Fed. Rep. 744; *United States* v. *Maid*, 116 Fed. Rep. 650; *United States* v. *Minor*, 114 U. S. 233; *United States* v. *Nelson*, 199 Fed. Rep. 464; *Williamson* v. *United States*, 207 U. S. 425; Act of March 3, 1857, 11 Stat. 250; Act of May 20, 1862, 12 Stat. 392; Act of March 3, 1891, 26 Stat. 1098; Act of June 11, 1906, 34 Stat. 233; Criminal Code, § 125; Rev. Stat., §§ 453, 2246, 2289, 2290, 2291, 2298, 2302, 2478, 5392, 5596; 2 Revisers' Draft and Notes, p. 2583; Circular of Interior Department of September 17, 1867; March 10, 1869, p. 22; of August 23, 1870, p. 24.

No appearance or brief filed for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is an indictment for perjury. It is charged that Luther Jerome Smull, the defendant in error, in making application for a homestead entry under § 2289 of the Revised Statutes swore falsely, before the receiver of the land office, that he had not theretofore 'made any entry under the homestead laws,' whereas in fact, as he well knew, he had previously made a homestead entry upon which he had obtained patent. The defendant demurred upon the ground that the indictment did not state a crime. The District Court sustained the demurrer, ruling that the affidavit was not within the statute defining perjury. Criminal Code, § 125. The Government brings the case here under the Criminal Appeals Act.

The charge of crime must have clear legislative basis. *Williamson* v. *United States*, 207 U. S. 425; *United States* v. *Grimaud*, 220 U. S. 506; *United States* v. *George*, 228 U. S. 14; *United States* v. *Birdsall*, 233 U. S. 223. The Criminal Code, § 125, provides: "Whoever, 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, . . . shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury. . . ." This statute takes the place of the similar provision of § 5392 of the Revised Statutes, which in turn was a substitute for a number of statutes in regard to perjury and was phrased so as to embrace all cases of false swearing whether in a court of justice or before administrative officers acting within their powers (see revisers' report, Vol. 2, pp. 2582, 2583).[1] It cannot be

[1] Among these statutes was the Act of March 3, 1857, c. 116, § 5 (11 Stat. 250), which provided:

"That in all cases where any oath, affirmation, or affidavit shall be made or taken before any register or receiver or either or both of them

doubted that a charge of perjury may be based upon § 125 of the Criminal Code where the affidavit is required either expressly by an act of Congress or by an authorized regulation of the General Land Office, and is known by the affiant to be false in a material statement. That is, the Land Department has authority to make regulations which are not inconsistent with law and are appropriate to the performance of its duties (Revised Statutes, §§ 161, 441, 453, 2478), and when by a valid regulation the Department requires that an affidavit shall be made before an officer otherwise competent, that officer is authorized to administer the oath within the meaning of § 125. The false swearing is made a crime, not by the Department, but by Congress; the statute, not the Department, fixes the penalty. *United States* v. *Grimaud*, 220 U. S., p. 522. Section 125 of the Criminal Code must be read in the light of § 2246 of the Revised Statutes which is explicit:

"The register or receiver is authorized, and it shall

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of any local land-office in the United States or any territory thereof, or where any oath, affirmation, or affidavit, shall be made or taken before any person authorized by the laws of any State or territory of the United States to administer oaths or affirmations, or take affidavits, and such oaths, affirmations, or affidavits are made, used, or filed in any of said local land-offices, or in the General Land-Office, as well in cases arising under any or either of the orders, regulations, or instructions, concerning any of the public lands of the United States, issued by the Commissioner of the General Land-Office, or other proper officer of the government of the United States, as under the laws of the United States, in any wise relating to or affecting any right, claim, or title, or any contest therefor, to any of the public lands of the United States, and any person or persons shall, taking such oath, affirmation or affidavit, knowingly, wilfully, or corruptly swear or affirm falsely, the same shall be deemed and taken to be perjury, and the person or persons guilty thereof shall, upon conviction, be liable to the punishment prescribed for that offence by the laws of the United States."

See also acts of May 20, 1862, c. 75, § 7, 12 Stat. 392, 393; March 3, 1873, c. 277, § 7, 17 Stat. 605, 606; March 13, 1874, c. 55, § 7, 18 Stat. 21, 22; June 14, 1878, c. 190, § 6, 20 Stat. 113, 114.

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."

As it is apparent that the departmental rule makes it necessary for the applicant to state under oath whether or not he has made a former entry under the homestead laws, the sole question in the present case is whether this requirement was one which the Department could impose. This inquiry is naturally divided into two branches: (1) Was the regulation addressed to the enforcement of the laws, the administration of which was confided to the Department, and (2) Was it inconsistent with any specific provision of the statutes?

As to the former, it is sufficient to say that the homestead laws contain an express prohibition with respect to the amount of land which any one person may secure under their provisions, and the Commissioner of the General Land Office is entrusted with the duty of promulgating appropriate rules to make this prohibition effective. Thus, by the act of May 20, 1862, c. 75, § 6 (12 Stat. 392, 393), it was provided: 'That no individual shall be permitted to acquire title to more than one quarter section under the provisions of this act; and that the Commissioner of the General Land Office is hereby required to prepare and issue such rules and regulations, consistent with this act, as shall be necessary and proper to carry its provisions into effect.' The prohibition was carried forward into the Revised Statutes (§§ 2289, 2298; act of Mar. 3, 1891, c. 561, § 5, 26 Stat. 1095, 1098) and the authority of the Department to enforce it was continued and not diminished (§ 2478). It would seem to be plain that a rule requiring an affidavit from the applicant stating whether or not he had made other entries was suitably addressed to the execution of the law. *United States* v. *Bailey*, 9 Pet. 238; *Caha* v. *United States*, 152

U. S. 211; *United States* v. *Grimaud, supra; United States* v. *Birdsall, supra; Leonard* v. *Lennox,* 181 Fed. Rep. 760, 766, 767.

There remains the question whether the regulation is inconsistent with the terms of the statute; that is, as there is no suggestion of inconsistency otherwise, whether it is repugnant to the specific requirements of § 2290 of the Revised Statutes as amended by the act of March 3, 1891, c. 561, *supra,* in relation to the affidavit to be made by the applicant for a homestead entry. We do not think that it is. Section 2290, it is true, does not provide that the affidavit of the applicant shall set forth whether there has been a previous entry. Neither does it provide that the applicant shall state that he is a citizen or has filed his declaration of intention to become such. Yet, under § 2289, he cannot make entry unless this qualification exists. We are concerned with positive requirements of the law, which are to be enforced by the Department. They are not superadded by an unauthorized departmental caution. And this being true, the fact that § 2290 is specific as to certain matters which the applicant's affidavit must contain cannot be regarded as destroying the authority of the Department to exact proof as to other facts which are also essential conditions of the right of entry and as to the existence of which the Department must be satisfied.

It is not a case where the statute points out the character of the proof to be required as to the particular fact and thus impliedly denies authority to exact proof of a different sort. Thus, with respect to final proof of residence and cultivation, § 2291 of the Revised Statutes requires the proof to be made by 'two credible witnesses'—not by the claimant; accordingly it was held that Congress had provided the 'exact measure' of the claimant's obligation and that the Department could neither add to nor detract from it. *United States* v. *George,* 228 U. S. 14. But

here the statute is silent as to the mode of proving the particular fact. Still it is an essential fact; Congress made it the duty of the Department to enforce the condition prescribed, and in the absence either of inhibition or of a requirement of some other procedure we are unable to find any ground for saying that Congress debarred the Department from availing itself of the natural and appropriate course in examining the applicant. It has been the long established departmental practice to insist upon a verified statement by him whether or not he has made an earlier entry, and we are of the opinion that the practice is authorized. The oath in such cases is administered by authority of law as provided in § 125 of the Criminal Code.

The judgment of the District Court is reversed and the case is remanded for further proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

MEEKER, SURVIVING PARTNER OF MEEKER & COMPANY, *v.* LEHIGH VALLEY RAILROAD COMPANY.

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

No. 434. Argued October 13, 14, 1914.—Decided February 23, 1915.

The limitations in Rev. Stat., § 1047, on suits for penalties accruing under the laws of the United States, relate to punitive penalties for infractions of public law and not to liabilities imposed for redressing a private injury even though the wrongful act be a public offense and punishable as such. It does not relate to a liability ac-

cruing under §§ 8, 9, 14 and 16 of the Act to Regulate Commerce which is not punitive but strictly remedial.

While Congress did not intend, in amending § 16 of the Act to Regulate Commerce by the act of July 29, 1906, to reserve claims already barred by local statutes, it did intend to take all other claims out of the operation of the varying state laws and subject them to limitations of its own creation operating alike in all the States.

The effect of the amendment to § 16 of the Act to Regulate Commerce by the act of July 29, 1906, was to extend the time for invoking action by the Commission upon complaints for damages to two years from the accrual of the claim, but until one year after the passage of the act as to all claims which had accrued before its passage.

The purpose of the joint resolution of June 30, 1906, postponing the effective date of the act of June 29, 1906, amending the Act to Regulate Commerce, was to cause the act to speak and operate at the end of the postponed period as if that were the time of its passage, and when the extended period expired it gave a full year for presenting accrued claims.

Objections to portions of the reports of the Interstate Commerce Commission awarding reparation for which the action is brought, on the ground that they contain statements which are not findings of fact, and not definitely identified in the record, are waived by failure to direct the court to the subject when charging the jury.

Under § 16 of the Act to Regulate Commerce, as amended by the act of June 29, 1906, the report of the Commission awarding reparation need not necessarily state the evidential facts, but must contain findings of the ultimate facts, and as so stated they are to be taken as *prima facie* true.

In this case *held* that the facts stated, although interwoven with other matter, and not expressed in terms generally employed by courts in special findings of fact, if taken as *prima facie* true, sustain an award against the carrier made by the Commission to shippers, as damages for unjust discrimination resulting from giving rebates to other shippers.

Where there are two reports of the Interstate Commerce Commission in the same proceeding and the later affirmatively shows that it was supplemental to the original report, they should be read together.

The measure of damages to a shipper is the pecuniary loss inflicted upon him as the result of giving rebates to other shippers and requiring him to pay the higher rate. Such loss must be proved in order to be recovered. Where the findings show that the amount awarded was the actual loss and recite that they are based on evi-

dence, it must be presumed, in the absence of the contrary being shown, that they are justified by the evidence.

A statute making findings and reparation order of a body, such as the Interstate Commerce Commission, *prima facie* evidence of facts therein stated, but only establishing, as in the case of § 16 of the Act to Regulate Commerce, a rebuttable presumption, cutting off no defense, and taking no question of fact from the court or the jury, is merely a rule of evidence and is not unconstitutional as abridging the right of trial by jury or denying due process of law.

Quære, whether the mere amount of an allowance for counsel fees under § 16 of the Act to Regulate Commerce, made by the court below, can be reëxamined in this court; but *held* that where the record shows that it was predicated upon a transcript of proceedings, and on statements in open court, and no evidence appears to have been offered or objections made by defendant as to amount, defendant cannot claim in this court that the allowance is excessive.

Although this court may not review the amount of such an allowance, it may determine whether as matter of law it is objectionable altogether.

Under §§ 8 and 16, of the Act to Regulate Commerce, the allowance for attorney's fee to be added as costs to the judgment recovered by a shipper on an unpaid award for reparation is for services of the attorney in the action on the award and not for services in the proceeding before the Commission, and such part of an allowance for attorney's fees as is specially given for services in that proceeding should be eliminated from the judgment.

211 Fed. Rep. 785, reversed.

THE facts, which involve the construction of §§ 1 and 2 of the Act to Regulate Commerce and questions of discrimination by the carrier against shippers of coal over its line, are stated in the opinion.

Mr. John A. Garver and *Mr. William A. Glasgow, Jr.*, for petitioner.

Mr. John G. Johnson, with whom *Mr. Edgar H. Boles*, *Mr. Frank H. Platt* and *Mr. George W. Field* were on the brief, for respondent:

Plaintiff has failed to prove by competent evidence that

the railroad violated the Commerce Act. Plaintiff relied for his proof, upon the reports and orders of the Commission. These do not prove that Meeker and Company were discriminated against; and do not prove that unlawful rates were charged.

Plaintiff has failed to prove by competent evidence that petitioner sustained damage. The measure of damages, if any, should be the loss to petitioner as the result of the alleged discrimination or the alleged unreasonable rate. It does not follow from the conclusion of the Commission that an established rate is unreasonable in so far as it exceeds a stated amount, that a shipper who paid the established rate has been damaged, or that his damage, if any, should be measured by the difference between the two amounts.

The Commission's opinions contain statements, arguments and conclusions which the act does not purport to make admissible as *prima facie* evidence in a suit for damages. In admitting the reports in evidence the trial court prejudiced the rights of defendant, making it thereafter impossible for the defendant to place before the jury its side of the case unembarrassed by the incompetent and misleading statements in the opinions.

Section 16 of the Act to Regulate Commerce is unconstitutional in so far as it deprives the defendant in a damage suit of a fair trial by jury.

The complaint in the proceeding before the Commission was filed July 17, 1907, at a time when the right of the Commission to pass upon the discrimination claims and the greater part of the excessive charge claims had expired by limitation.

The Commission had no jurisdiction over any claims accrued prior to July 17, 1905.

On July 17, 1907, when the complaint was filed before the Commission all claims accruing prior to July 17, 1902, had been outlawed by § 1047, Rev. Stat.

On September 3, 1912, when an action was commenced the plaintiff was barred by limitation from bringing an action upon any of his claims.

The allowances for counsel fees are invalid and excessive.

In support of these contentions, see *Atchison, T. & S. F.* v. *Int. Com. Comm.*, 188 Fed. Rep. 229; *Atchison, T. & S. F.* v. *Matthews*, 174 U. S. 96; *Baer Bros.* v. *Denver & R. G. R. R.*, 200 Fed. Rep. 614, 233 U. S. 479; *Balt. & Oh. R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Blake* v. *National Banks*, 23 Wall. 307; *Carter* v. *N. O. & N. E. R. R.*, 143 Fed. Rep. 90; *Cattle Raisers' Assn.* v. *Ft. Worth & D. C. Ry.*, 7 I. C. C. 513; *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Chicago, B. & Q. R. R.* v. *Feintuch*, 191 Fed. Rep. 482; *Cin., & Tex. Pac. Ry.* v. *Int. Com. Comm.*, 162 U. S. 184; *Coggell* v. *Lawrence*, 6 Fed. Cases, 2957; *Councill* v. *R. R.*, 1 I. C. C. 339; *Darnell Lumber Co.* v. *Sou. Pac. Co.*, 190 Fed. Rep. 659; *Dickerson* v. *Louis. & Nash. R. R.*, 15 I. C. C. 170, 191 Fed. Rep. 705; *Equitable Life Ass'n* v. *Hughes*, 125 N. Y. 106; *Farmers' Warehouse Co.* v. *Louis. & Nash. R. R.*, 12 I. C. C. 457; *Goff-Kirby Coal Co.* v. *Railroad*, 13 I. C. C. 383; *Gulf, Col. & S. F. Ry.* v. *Ellis*, 165 U. S. 150; *Heck* v. *Railroad*, 1 I. C. C. 495; *Int. Com. Comm.* v. *C. P. & V. R. R.*, 124 Fed. Rep. 624; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 73 Fed. Rep. 409, 227 U. S. 88; *Int. Com. Comm.* v. *Un. Pac. R. R.*, 222 U. S. 541; *Jacoby* v. *Penna. R. R.*, 200 Fed. Rep. 989; *Kile & Morgan* v. *Railway Co.*, 15 I. C. C. 235; *Ky. & Ind. Bridge Co.* v. *Louis. & Nash. R. R.*, 37 Fed. Rep. 567; *Lehigh Valley R. R.* v. *Clark*, 207 Fed. Rep. 717; *Macloon* v. *Railroad*, 5 I. C. C. 84; *Maryland* v. *Balt. & Ohio R. R.*, 3 How. 534; *McClaine* v. *Rankin*, 179 U. S. 158; *Mitchell Coal Co.* v. *Penna. R. R.*, 230 U. S. 247; *Morrisdale Coal Co.* v. *Penna. R. R.*, 183 Fed. Rep. 929; *S. C.*, 230 U. S. 304; *Mo. & Kan. Shippers' Assn.* v. *R. R.*, 13 I. C. C. 411; *Nicola* v. *Louis. & Nash. R. R.*, 14 I. C. C. 199; *Norris* v. *Crocker*, 13 How. 429; *Parsons* v. *Bedford*, 3 Peters, 433; *Parsons*

v. *Chic. & N. W. Ry.*, 167 U. S. 447; *Penn. R. R.* v. *International Coal Co.*, 230 U. S. 184; *Rawson* v. *R. R.*, 3 I. C. C. 266; *Riddle* v. *Railroad*, 1 I. C. C. 594; *Robinson* v. *Balt. & Ohio R. R.*, 222 U. S. 506; *Russe* v. *Int. Com. Comm.*, 193 Fed. Rep. 678; *Seaboard Air Line* v. *Seegers*, 207 U. S. 73; *Southern Ry.* v. *St. Louis Hay Co.*, 153 Fed. Rep. 728; *Tex. & Pac. Ry.* v. *Abilene Cotton Co.*, 204 U. S. 426; *United States* v. *Del. & Hud. Co.*, 213 U. S. 366; *United States* v. *Standard Oil Co.*, 148 Fed. Rep. 719; *Walker* v. *Sou. Pac. Co.*, 165 U. S. 593; *Western N. Y. & P. Ry.* v. *Penn. Refining Co.*, 137 Fed. Rep. 343; *Woodward* v. *R. R.*, 17 I. C. C. 9; 1 Bouvier's Law Dict., p. 370; Drinker on Interstate Commerce; Judson on Interstate Commerce; 2 Stewart's Purdon's Digest, 13th ed., p. 2282; Rev. Stat., § 1047.

By leave of court, *Mr. Joseph W. Folk* and *Mr. Charles W. Needham* filed a brief in behalf of the Interstate Commerce Commission.

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

This was an action under § 16 of the Act to Regulate Commerce [1] to recover from the Lehigh Valley Railroad Company damages alleged to have been sustained by a shipper and awarded by the Interstate Commerce Commission by reason of the company's violation of the prohibition in §§ 1 and 2 of that act against unreasonable rates and unjust discrimination. The plaintiff prevailed in the District Court, but the Circuit Court of Appeals reversed the judgment, 211 Fed. Rep. 785, and a writ of

[1] See act February 4, 1887, c. 104, 24 Stat. 379, and amendments of March 2, 1889, c. 382, 25 Stat. 855; February 10, 1891, c. 128, 26 Stat. 743; February 8, 1895, c. 61, 28 Stat. 643; June 29, 1906, c. 3591, 34 Stat. 584; and June 30, 1906, 34 Stat. 838, Joint Resolution No. 47.

certiorari granted under § 262 of the Judicial Code brings the case here. 234 U. S. 749.

The plaintiff was the surviving member of Meeker & Company, a copartnership, and sued in that capacity. This firm was engaged in the anthracite coal trade in New York City and was accustomed to purchase its coal at collieries in Pennsylvania and to ship it over the defendant's railroad to tidewater at Perth Amboy, New Jersey, and thence by vessel to New York. Two distinct claims were involved. The first covered shipments from November 1, 1900, to August 1, 1901, and was grounded upon a charge that the railroad company had unjustly and injuriously discriminated against Meeker & Company by giving (on August 1, 1901) to another and extensive shipper of anthracite between the same points an indirect but substantial rebate upon all shipments during the same period, and that by reason of this rebate the other shipper had obtained a contemporaneous service in all respects like that rendered for Meeker & Company at a less rate than was exacted from the latter. The second covered shipments from August 1, 1901, to July 17, 1907, and was based upon the charge that the established rate paid by Meeker & Company during that period was excessive and unreasonable.

On July 17, 1907, a complaint embodying both claims was presented to the Interstate Commerce Commission under §§ 9 and 13 of the act, and after a full hearing in which the railroad company was an active participant, the Commission made a written report (21 I. C. C. 129) finding that the charge of unjust discrimination was sustained by the evidence, condemning as excessive and unreasonable the rate which was in effect from August 1, 1901, to the date of the report, naming what was deemed a maximum reasonable rate, holding that the claimant was entitled to an award of reparation upon both claims, and directing that further proceedings be had to determine the

amount to be awarded. Under § 15 of the act an order was then made requiring the railroad company within a time named to cease giving effect to the prior rate found unreasonable and to establish a new rate not exceeding that found reasonable.

Thereafter a further hearing was had at which additional evidence bearing upon the question of reparation was presented, and, on May 7, 1912, the Commission made a supplemental report, saying (23 I. C. C. 480):

"In our original report we found that the rates charged complainant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory in violation of § 2 of the act to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Company under the contract then in effect between that company and defendant; and we further found that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable to the extent that they exceeded rates of $1.40 per gross ton on prepared sizes, $1.30 on pea, and $1.15 on buckwheat.

"On basis of our conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, we now find that during the period from November 1, 1900, to August 1, 1901, complainant shipped from the Wyoming coal region of Pennsylvania to Perth Amboy, N. J., 55,257.75 tons of coal of prepared sizes, 16,689.76 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, and paid charges thereon, amounting to $129,989.18, at the rates found to have been unjustly discriminatory; that complainant has been damaged to the extent of the difference between the amount which he did pay and $118,979.85, the amount which he would have paid had he been given the benefit of the rates applied by defendant to similar ship-

ments of the Lehigh Valley Coal Company; and that he is, therefore, entitled to an award of reparation in the sum of $11,009.33, with interest thereon from August 1, 1901. We find further that from August 1, 1901, to July 17, 1907, complainant shipped from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., 246,870.15 tons of coal of prepared sizes, 106,051.09 tons of pea coal, and 87,250 tons of buckwheat coal, and paid charges thereon amounting to $685,375.27, at the rates found to have been unreasonable; that complainant has been damaged to the extent of the difference between the amount which he did pay and $626,945.62, the amount which he would have paid at the rates found reasonable, less $193.20 deducted by stipulation of all parties on account of certain claims already paid; and that he is, therefore, entitled to an additional award of reparation in the sum of $58,236.45, with interest, amounting to $27,750.64, on the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of $58,236.45 from September 1, 1911.

* * * * * * * *

"The exhibits showing details respecting the shipments upon which reparation is asked are too extensive to be set forth in this report. But inasmuch as the accuracy of the figures in said exhibits respecting the shipments made, freight charges paid, and reparation due, is conceded of record by defendant, we deem it unnecessary to make detailed findings respecting the numerous shipments involved."

Thereupon the Commission made and entered of record an order for reparation which, with a slight amendment made June 15, 1912, was as follows:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and

things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"It is Ordered, That defendant Lehigh Valley Railroad Company be and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the 1st day of August, 1912, the sum of $11,009.33, with interest thereon, at the rate of 6 per cent. per annum, from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the Commission.

"It is Further Ordered, That defendant Lehigh Valley Railroad Company be and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the 1st day of August, 1912, the sum of $58,236.45, with interest thereon at the rate of 6 per cent. per annum, amounting to $27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2, together with interest at the rate of 6 per cent. per annum on said sum of $58,236.45, from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commis-

sion to have been unreasonable, as more fully and at large appears in and by said report of the Commission."

Although duly served with a copy of this order, the railroad company refused to comply with it; and, on September 3, 1912, after the time allotted for compliance had expired, the plaintiff, conformably to § 16 of the act, filed in the District Court his petition setting forth briefly the causes for which he claimed damages and the reports and orders of the Commission, and praying judgment against the railroad company for the amounts claimed and awarded and for interest and costs, including a reasonable attorney's fee. The defendant answered denying the claims set forth in the petition and asserting that they were barred by the applicable statute of limitations, that the Commission was without jurisdiction "to make the findings and order of reparation" relied upon, and that "there was before the Commission no substantial evidence to sustain said findings and said order." A trial resulted in a verdict for the plaintiff assessing the damages at $109,280.17, the total amount awarded by the Commission with interest, and judgment was entered for this sum with costs, including an attorney's fee.

At the trial the plaintiff produced no evidence tending to show unjust discrimination, exaction of unreasonable rates, injury to Meeker & Company or what damages were sustained by them, other than the evidence afforded by the reports and orders of the Commission; and the defendant produced no evidence whatever, save some computations intended to be helpful in determining how much of the claims was barred according to each of several views advanced respecting the applicable statute of limitations.

Whether the claims were barred in whole or in part by some applicable statute is one of the questions which the record presents, and to dispose of it we must notice three statutes upon which the defendant relies.

One of these is Rev. Stat., § 1047, which places a limitation of five years upon any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States." The words "penalty or forfeiture" in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed for the purpose of redressing a private injury, even though the wrongful act be a public offense and punishable as such. Here the liability sought to be enforced was not punitive but strictly remedial, as is shown by §§ 8, 9, 14 and 16 of the Act to Regulate Commerce. So § 1047 was not applicable. *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390, 397; *O'Sullivan* v. *Felix*, 233 U. S. 318; *Huntington* v. *Attrill*, 146 U. S. 657, 666–669; *Brady* v. *Daly*, 175 U. S. 148.

Next in order is a Pennsylvania statute containing a limitation of six years. 2 Stewart's Purdon's Digest, 13th ed. 2282. It could apply only in the absence of a controlling Federal statute. Rev. Stat., § 721; *Campbell* v. *Haverhill*, 155 U. S. 610; *McClaine* v. *Rankin*, 197 U. S. 154, 158; *O'Sullivan* v. *Felix*, *supra*. Such a statute was adopted and put in force before any part of either claim fell within the bar of the local limitation. By the act of June 29, 1906, c. 3591, 34 Stat. 584, 590, Congress amended § 16 of the Act to Regulate Commerce by incorporating therein the following limitations: "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court [1] within one year from the date of the order, and not after: Provided, that claims accrued prior to the passage of this Act may be presented

[1] The Judicial Code, § 291, which became effective January 1, 1912, requires that the words "Circuit Court" be read "District Court."

within one year." The words of the proviso make it certain that the amendment was to reach claims already accrued as well as those thereafter accruing. And while there doubtless was no purpose to revive claims then barred by local statutes, it is evident that Congress intended to take all other claims out of the operation of the varying laws of the several States and subject them to limitations of its own creation which would operate alike in all the States.

This amendment is the third statute upon which the defendant relies, the contentions advanced thereunder being (a) that it prevented the Commission from considering any claim accrued more than two years prior to the amendment, and (b) that the year granted for filing claims which accrued before the amendment expired June 28, 1907. Either contention, if sound, would defeat all of the first claim in suit and the major part of the second.

The first contention is plainly not tenable. The amendment contained a general provision limiting the time for invoking action by the Commission upon complaints for damages to two years from the accrual of the claim, and also a proviso saying that "claims accrued prior to the passage of this Act may be presented within one year." The proviso was in the nature of a saving clause, and, while, as before observed, it probably was not intended to revive claims which were then barred by applicable local laws, we think there is no warrant for saying that it was not intended to include claims accrued more than two years before the amendment. The plain import of the words is to the contrary. The Commission has uniformly construed it as permitting all accrued claims, not already barred, to be presented within the year named, and we think they reasonably could not have done otherwise.

The other contention turns upon the sense in which the words "the passage of this Act" were used in the proviso. The act contained a concluding section saying

"this Act shall take effect and be in force from and after its passage," but, on the day following its approval, its effective date was postponed by a joint resolution for sixty days, that is, from June 29 to August 28, 1906. 34 Stat. 838. If the act be separately considered and the proviso read in connection with the concluding section, we think it is apparent that the words named referred to the time when the act was to speak and operate as a law, and that the year given for filing accrued claims was to be reckoned from that time. In other words, the meaning was the same as if the proviso had said "claims accrued heretofore may be presented within one year hereafter," or "claims accrued before this Act becomes effective may be presented within one year thereafter." It was not an instance where words referring to the date of passage were chosen to distinguish it from the effective date of the act, for the act was to take effect and be in force upon its passage, and therefore there was no occasion for such a distinction. And, coming to the joint resolution, we think it did not affect the sense of the words in the proviso. That was to be determined in the light of the situation in which they were used, and not by what subsequently happened. Not only so, but the purpose of the joint resolution was to cause the act to speak and operate at the end of the sixty days as if that were the time of its passage. In the meantime the act laid no duty upon this or any other claimant and when the sixty days expired it gave a full year for presenting accrued claims, and not a year less sixty days. See *Matter of Howe*, 112 N. Y. 100; *Harding* v. *People*, 10 Colorado, 387, 392; *State* v. *Bemis*, 45 Nebraska, 724, 739; *Patrick* v. *Perryman*, 52 Ill. App. 514, 518; *Schneider* v. *Hussey*, 2 Idaho, 8; *Charless* v. *Lamberson*, 1 Iowa, 435, 443. It is not a question of notice, as in *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611, 615–616, but of the meaning and operation of the statute.

It follows from these views that the complaint, which was filed with the Commission July 17, 1907, was seasonably presented and that no part of either claim was barred at that time. And, as the action in the District Court was begun within a year after the date of the order for reparation, the defense predicated upon the statute of limitations must fail.

With a single exception, the other questions pressed upon our attention center about the use and effect of the reports and orders of the Commission as evidence, a subject concerning which the courts below differed.

The pertinent provisions of the Act to Regulate Commerce are these: Section 14 (34 Stat. 589) requires the Commission, upon investigating a complaint, to make a written report thereon "which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises," and, if damages be awarded, "shall include the findings of fact on which the award is made." Section 16 (34 Stat. 590) requires the Commission, upon awarding damages to a complaining party, to make an order directing that "the sum to which he is entitled" be paid within a fixed time; and then, after authorizing a suit to enforce payment, if the order be not obeyed, provides: "Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."

At the trial the plaintiff offered in evidence the reports and orders of the Commission and asked that the facts stated in the findings and orders be taken as *prima facie* true.

An objection was interposed to the admission of the reports upon the ground that they contained various statements which it was claimed were not findings of fact and therefore were not admissible. A colloquy ensued

between court and counsel in which counsel for the plaintiff conceded that portions of the reports should be eliminated and suggested that this could be done in the charge to the jury. As a result of the colloquy the reports were received in evidence, the court observing that it would indicate to the jury what portions were to be considered. The reports were not read at the time, but when the evidence was concluded counsel for the plaintiff, as the record recites, "read to the jury what he stated to be material portions" of them. The record does not more definitely identify what was read; nor does it show that complaint was then made that anything was read that should have been omitted, or that the court's attention was drawn to the subject at the time of charging the jury either by a request for a particular instruction thereon or by excepting to the absence of such an instruction. The court's charge apparently proceeded upon the theory that the portions of the reports which had been read to the jury were properly before them. In these circumstances the objection cannot now be considered. If it was not obviated by excluding the supposedly objectionable portions of the reports from what was read to the jury, it was waived by the failure to direct the court's attention to the subject when the jury was charged.

Another objection which was directed against the orders as well as the reports is that they contain no findings of fact or at least not enough to sustain an award of damages: The arguments advanced to sustain this objection proceed upon the theory that the statute requires that the reports, if not the orders, shall state the evidential rather than the ultimate facts, that is to say, the primary facts from which through a process of reasoning and inference the ultimate facts may be determined. We think this is not the right view of the statute and that what it requires is a finding of the ultimate facts—a finding which, as applied to the present case, would disclose (1) the relation of the parties

as shipper and carrier in interstate commerce; (2) the character and amount of the traffic out of which the claims arose; (3) the rates paid by the shipper for the service rendered and whether they were according to the established tariff; (4) whether and in what way unjust discrimination was practiced against the shipper from November 1, 1900, to August 1, 1901; (5) whether, if there was unjust discrimination, the shipper was injured thereby, and, if so, the amount of his damages; (6) whether the rate collected from the shipper from August 1, 1901, to July 17, 1907, was excessive and unreasonable and, if so, what would have been a reasonable rate for the service; and (7) whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and, if so, the amount of his damages. Upon examining the reports as set forth in the record, we think they contain findings of fact which meet the requirements of the statute and that the facts stated in the findings, if taken as *prima facie* true, sustain the award of the Commission. True, the findings in the original report are interwoven with other matter and are not expressed in the terms which courts generally employ in special findings of fact, but there is no difficulty in separating the findings from the other matter or in fully understanding them, and particularly is this true when the two reports are read together, as they should be. We say "should be" because both were made in the same proceeding and the later one affirmatively shows that it was made to supplement and give effect to the original.

But it is said that the reports disclose that the Commission applied an erroneous and inadmissible measure of damages, and therefore that no effect can be given to the award. What the reports really disclose is that the Commission, "upon consideration of the evidence adduced upon the hearing upon the question of reparation" found (a) that by reason of the unjust discrimination resulting from

giving the rebate to the Lehigh Valley Coal Company Meeker & Company were "damaged to the extent of the difference" between what they actually paid from November 1, 1900, to August 1, 1901, and what they would have paid had they been dealt with on the same basis as was the Coal Company, and (b) that by reason of being charged an excessive and unreasonable rate from August 1, 1901, to July 17, 1907, Meeker & Company were "damaged to the extent of the difference" between what they actually paid and what they would have paid had they been given the rate which the Commission found would have been reasonable. In this we perceive nothing pointing to the application of an erroneous or inadmissible measure of damages. The Commission was authorized and required by § 8 of the Act to Regulate Commerce to award "the full amount of damages sustained," and that, of course, was to be determined from the evidence. If it showed that the damages corresponded to the rebate in one instance and to the overcharge in the other the claimant was entitled to an award upon that basis. The case of *Pennsylvania Railroad* v. *International Coal Mining Co.*, 230 U. S. 184, is cited as holding otherwise, but it does not do so. There a shipper, without proving that he sustained any damages, sought to recover from a carrier for giving a rebate to another shipper, and this court, referring to § 8, said (p. 203): "The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered." There is nothing in either report of the Commission which is in conflict with what was said in that case. On the contrary, the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss; and, in view of the recital that the

findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it.

It is also urged, as it was in the courts below, that the provision in § 16 that, in actions like this, "the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated" is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.

This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any wise work a denial of due process of law. In principle it is not unlike the statutes in many of the States whereby tax deeds are made *prima facie* evidence of the regularity of all the proceedings upon which their validity depends. Such statutes have been generally sustained, *Pillow* v. *Roberts*, 13 How. 472, 476; *Marx* v. *Hanthorn*, 148 U. S. 172, 182; *Turpin* v. *Lemon*, 187 U. S. 51, 59; Cooley's Constitutional Limitations, 7th ed. 525, as have many other state and Federal enactments establishing other rebuttable presumptions. *Mobile &c. Railroad* v. *Turnipseed*, 219 U. S. 35, 42; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 81; *Reitler* v. *Harris*, 223 U. S. 437; *Luria* v. *United States*, 231 U. S. 9, 25. An instructive case upon the subject is *Holmes* v. *Hunt*, 122 Massachusetts, 505, where, in an elaborate opinion by Chief Justice Gray, a statute making the report of an auditor *prima facie* evidence at the trial before a jury was held to be a legitimate exercise of legislative power over rules of evidence and in no wise inconsistent with the constitutional right of trial by jury. And in *Chicago &c. Railroad* v. *Jones*, 149 Illinois, 361, 382, a like ruling was

made in respect of a statutory provision similar to that now before us.

Complaint is made because the court refused to direct a verdict for the defendant, but of this it suffices to say that the ruling was undoubtedly right, because the plaintiff's evidence, including the findings and orders of the Commission, tended to show every fact essential to a recovery upon both claims and there was no opposing evidence.

The District Court made an allowance of $20,000 as a fee for the plaintiff's attorneys and directed that it be taxed and collected as part of the costs, the allowance being expressly apportioned in equal amounts between the services in the proceeding before the Commission and the services in the action in court. Complaint is made of this on the grounds (a) that the allowance is in any view excessive, (b) that the act does not authorize an allowance for services before the Commission, and (c) that the provision authorizing an allowance for services in the action is invalid as being purely arbitrary and as imposing a penalty merely for failing to pay a debt.

Without considering whether the mere amount of an allowance under the statute can ever be reëxamined here (see Rev. Stat., § 1011; *Martinton* v. *Fairbanks*, 112 U. S. 670, 672; *Montague* v. *Lowry*, 193 U. S. 38, 48; *Railroad Co.* v. *Fraloff*, 100 U. S. 24, 31; *New York &c. Railroad* v. *Winter*, 143 U. S. 60, 75) we are clear that it cannot be in this instance. The record discloses that the allowance was predicated upon an exhibition of a transcript of the proceedings before the Commission and upon a statement made in open court, in the presence of counsel for the defendant, of the services rendered before the Commission and in the action. But the transcript and statement have not been made part of this record and so we cannot know what was shown by them and cannot judge of their bearing upon the amount of the allowance. Besides, it does not appear that the defendant offered any evidence tend-

ing to show what would be a reasonable allowance or that it in any way objected or excepted to the amount of the allowance when it was made. The only exception reserved was addressed to the allowance of any fee for the services before the Commission or for those in the action. In this situation the defendant is not now in a position to claim that as matter of fact the allowance is excessive. Whether as matter of law it is objectionable is another question.

Section 8 provides that a carrier violating the act shall be liable to any person injured for the damages he sustains, "together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." And § 16, relating to actions to enforce claims for damages after the Commission has acted thereon, provides "If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

In our opinion the services for which an attorney's fee is to be taxed and collected are those incident to the action in which the recovery is had and not those before the Commission. This is not only implied in the words of the two provisions just quoted but is suggested by the absence of any reference to proceedings anterior to the action. And that nothing more is intended becomes plain when we consider another provision in § 16 which requires the Commission, upon awarding damages, to make an order directing the carrier to pay the sum awarded "on or before a day named" and then declares that, if the carrier does not comply with the order "within the time limit," the claimant may proceed to collect the damages by suit. The Commission is not to allow a fee, but only to find the amount of the damages and fix a time for payment and, if the carrier pays the award within the time named, no right to an attorney's fee arises. It is only when the

damages are recovered by suit that a fee is to be allowed, and this is as true of the provision in § 8 as of that in § 16. The evident purpose is to charge the carrier with the cost and expenses entailed by a failure to pay without suit—if the claimant finally prevails—and to that end to tax as part of the costs in the suit wherein the recovery is had a reasonable fee for the services of the claimant's attorney in instituting and prosecuting that suit. It follows that the District Court erred in matter of law in allowing a fee for services before the Commission.

The contention that the provision for an attorney's fee for services in the suit is invalid as being purely arbitrary and as imposing a penalty for merely failing to pay a debt is without merit. The provision is leveled against common carriers engaged in interstate commerce, a *quasi* public business, and is confined to cases wherein a recovery is had for damages resulting from the carrier's violation of some duty imposed in the public interest by the Act to Regulate Commerce. *Atlantic Coast Line Railroad* v. *Riverside Mills*, 219 U. S. 186, 208. One of its purposes is to promote a closer observance by carriers of the duties so imposed; and that there is also a purpose to encourage the payment, without suit, of just demands does not militate against its validity. *Missouri, Kansas & Texas Railway* v. *Cade*, 233 U. S. 642, 651, and cases cited. It requires that the fee be reasonable and fixed by the court, and does not permit it to be taxed against the carrier until the plaintiff's demand has been adjudged upon full inquiry to be valid. In these circumstances the validity of the provision is not doubtful but certain.

It results from what has been said that the judgment of the Circuit Court of Appeals must be reversed and that of the District Court must be modified by eliminating the allowance of $10,000 as an attorney's fee for services before the Commission and affirmed as so modified.

It is so ordered.

MEEKER *v.* LEHIGH VALLEY RAILROAD.

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

No. 435. Argued October 13, 14, 1914.—Decided February 23, 1915.

Meeker & Co. v. *Lehigh Valley R. R.*, *ante*, p. 412, followed as to construction effect of the amendment to § 16 of the Act to Regulate Commerce and the act of June 29, 1906, in regard to presentation of claims by shippers against carriers for damages by reason of unreasonable and excessive rates and discrimination, and that the attorney's fee allowed for recovery of the amount awarded can only be for proceeding in court and not on proceedings before the Commission.

A report of the Interstate Commerce Commission holding a rate excessive and declaring what would be a reasonable rate and a reparation order based thereon were properly admitted as *prima facie* evidence of the facts therein contained, although made in another and identical proceeding between the same parties, and which the Commission had power in its discretion to consolidate therewith, it also appearing that the carrier did not then object to its admission and the order recited that it was made after a full hearing on, and submission of, the issues in the proceeding in which it was made.

Harmless error constitutes no ground for reversal, and so *held* as to the presence of irrelevant matter in a report of the Interstate Commerce Commission which matter, while it should not have gone to the jury, did not prejudice respondent.

211 Fed. Rep. 785, reversed.

THE facts, which involve the construction of §§ 1, 2 and 16 of the Act to Regulate Commerce and questions of discrimination, are stated in the opinion.

Mr. John A. Garver and *Mr. William A. Glasgow, Jr.*, for petitioner.

Mr. John G. Johnson, with whom *Mr. Edgar H. Boles*, *Mr. Frank H. Platt* and *Mr. George W. Field* were on the brief, for respondent. (See argument, *ante*, p. 412.)

By leave of court, *Mr. Joseph W. Folk* and *Mr. Charles W. Needham* filed a brief in behalf of the Interstate Commerce Commission.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a companion case to that just decided and involves a claim for reparation similar to the second claim in that case, and arising out of the same rate.

In this instance the shipper was Henry E. Meeker, who had succeeded to the business of Meeker & Company, the shippers in the other case, and the shipments in respect of which reparation is sought were made between April 13, 1908, and April 13, 1910. Otherwise the two claims differ only in amount. A complaint covering this claim was filed with the Interstate Commerce Commission April 13, 1910, before it passed upon the complaint covering the other. In its report of June 8, 1911, upon the earlier complaint the Commission referred to the later one and said (21 I. C. C. 129, 137): "As the subject-matter of the two complaints is the same, in so far as the reasonableness of the rates is concerned, the disposition of the later case will perhaps be determined by the conclusions reached in this case." In that report it found that the rate in question was excessive and unreasonable and what would have been a reasonable rate, and directed a further hearing upon the matter of reparation. Such a hearing was had on both complaints and, on May 7, 1912, the Commission made a supplemental report, entitled in both cases, in which it referred to its original report and the findings therein and, after dealing with the reparation sought in the first complaint (Commission's No. 1180), said of the present claim (23 I. C. C. 480, 482):

"On basis of our decision in No. 1180, and upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant, we now find that the rates exacted by defendant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy,

N. J., during the period from April 13, 1908, to April 13, 1910, were unreasonable to the extent that they exceeded rates of $1.40 per gross ton on prepared sizes, $1.30 on pea, and $1.15 on buckwheat; that complainant shipped from said point of origin to said destination during the period above set forth, 46,772.02 tons of coal of prepared sizes, 26,972.06 tons of pea coal, and 22,004.09 tons of buckwheat coal; that complainant paid charges thereon, amounting to $136,663.41, at the rates herein found to have been unreasonable, and was damaged to the extent of the difference between the amount which he did pay and $125,849.81, the amount which he would have paid at the rates above found reasonable; and that he is, therefore, entitled to an award of reparation in the sum of $10,813.60, with interest amounting to $1,526.53 upon the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of $10,813.60 from the 1st day of September, 1911.

"The exhibits showing details respecting the shipments upon which reparation is asked are too extensive to be set forth in this report. But inasmuch as the accuracy of the figures in said exhibits respecting the shipments made, freight charges paid, and reparation due, is conceded of record by defendant, we deem it unnecessary to make detailed findings respecting the numerous shipments involved."

Thereupon the Commission made and entered the following order:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of $10,813.60, with interest at the rate of 6 per cent. per annum, amounting to $1,526.53 upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 1, together with interest at the rate of 6 per cent. per annum on said sum of $10,813.60 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission."

The railroad company was duly served with a copy of the order, but refused to comply with it, and, on September 3, 1912, after the expiration of the period allowed for compliance, the claimant brought the present action in the District Court. The railroad company answered as in the other case. At the trial the plaintiff relied in the main upon the findings and order of the Commission as *prima facie* evidence of the facts therein stated, and no opposing evidence was presented. The plaintiff had a verdict and judgment for $13,161.78, the amount of damages awarded by the Commission with interest. The court also allowed an attorney's fee of $5,000, to be taxed and collected as part of the costs, one-half of the allowance being expressly attributed to services before the Commission and the other half to the services in the action. The case was taken to the Circuit Court of Appeals where the judgment was reversed with that in the other case. 211 Fed. Rep. 785. This case was then brought here in the same way as the other. 234 U. S. 749.

Save that the statute of limitations is not relied upon, the questions here presented are almost all identical with those in the other case, and in so far as they are the same they are sufficiently disposed of by what is there said. There are but two points of difference and they require only brief mention.

The Commission's report of June 8, 1911, finding the rate in question excessive and unreasonable and what would have been a reasonable rate was admitted in evidence over the defendant's objection that it was made in another and separate proceeding, that is, upon the complaint of Meeker & Company, and therefore was not admissible in this case for any purpose. The objection was rightly overruled. Without any doubt it was within the discretion of the Commission to permit Henry E. Meeker to intervene in respect of his individual claim in the proceeding begun by Meeker & Company or to consolidate his complaint with theirs. This, in effect, is what was done. The supplemental report so shows and it does not appear that the railroad company objected to that course or was in any way prejudiced by it. Besides, the reparation order recites that it was made after a full hearing and submission of the issues presented by the complaint and answer relating to this claim and there was no evidence tending to contradict the recital.

The further objection was made to the admission of the same report that it contained much that was not relevant to the case on trial, but the objection was overruled and it is fairly inferable from the record that the entire report was placed before the jury. It hardly could be said that the presence of some irrelevant matter rendered the whole report inadmissible, and yet the objection seems to have been made in that view. The objection would have been better founded had it been confined to what was deemed irrelevant. Of course, all that should have gone before the jury was the relevant findings

in the report, and counsel for the plaintiff ought not to have asked more. But we need not fix the responsibility for what occurred, for it is certain that the defendant was not harmed by it. The case made by the evidence rightly admitted was such as, in the absence of any opposing evidence, and there was none, clearly entitled the plaintiff to a verdict for the amount claimed. Every fact essential to a recovery, save the service of the reparation order and the refusal to comply with it, was *prima facie* established by the findings and order of the Commission and these could not be rejected by the jury in the absence of any countervailing evidence. *Kelly* v. *Jackson*, 6 Pet. 622, 632. The service of the order was expressly admitted and the refusal to comply with it was fully proved and practically conceded. Of course, harmless error constitutes no ground for reversal.

We conclude, therefore, that the judgment of the Circuit Court of Appeals must be reversed and that of the District Court must be modified by eliminating the allowance of an attorney's fee of $2,500 for services before the Commission and affirmed as so modified.

It is so ordered.

SOUTHERN RAILWAY COMPANY *v.* RAILROAD COMMISSION OF INDIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 107. Argued December 9, 1914.—Decided February 23, 1915.

If the car is moving on a railroad engaged in interstate commerce it is subject to the provisions and penalties of the Safety Appliance Act, although engaged at the time in intrastate commerce. *United States* v. *Southern Ry.*, 222 U. S. 20.

The principle that an act may constitute a criminal offense against

two sovereignties so that punishment by one does not prevent punishment by the other, only relates to cases where both sovereignties have jurisdiction over the act. It has no application where one of the governments has exclusive jurisdiction of the subject-matter and therefore has the exclusive power to punish.

Under the Federal Constitution the power of Congress to regulate interstate commerce is such that when exercised it is exclusive and *ipso facto* supersedes existing state legislation on the same subject.

Congress may so circumscribe its regulations in regard to a matter within its exclusive jurisdiction as to occupy only a limited field and leave a part of the subject open to incidental legislation by the States; but the Safety Appliance Act extended to the whole subject of equipping cars with safety appliances to the exclusion of further action by the States.

The Indiana statute requiring railway companies to place grab-irons and hand-holds on the sides and ends of every car having been superseded by the Federal Safety Appliance Act, penalties imposed by the former cannot be recovered as to cars operated on interstate railroads although engaged only in intrastate traffic.

THE facts, which involve the effect of the Federal Safety Appliance Act on state statutes relating to safety appliances on railroad cars used in interstate commerce, are stated in the opinion.

Mr. John D. Welman, with whom *Mr. Alexander P. Humphrey* and *Mr. Edward P. Humphrey* were on the brief, for plaintiff in error.

Mr. Frank H. Hatfield, with whom *Mr. John R. Brill*, *Mr. John W. Brady* and *Mr. Thomas W. Littlepage* were on the brief, for defendant in error:

Congress has such power as has been delegated to it by the States and all power not granted by the States is reserved to the States.

If the state statute is not a regulation of interstate commerce, it is not in contravention of or opposed to the right of Congress and therefore not in violation of the commerce clause. *Smith* v. *Alabama*, 124 U. S. 465; *Hennington* v.

Georgia, 163 U. S. 299; *Gibbons* v. *Ogden*, 9 Wheat. 1; *People* v. *Chicago &c. R. R.*, 79 N. E. Rep. 144.

The state statute in question was passed in the exercise of the police power of the State.

A statute of a State and an act of Congress on the same subject may be enforced in pursuance of a common purpose to afford a remedy. *Voelker* v. *Chicago &c. R. R.*, 116 Fed. Rep. 867–873.

If a railroad company is engaged in both interstate and intrastate commerce, this does not prevent the State from adopting such regulations as it may deem proper to provide for the safety of its citizens. *People* v. *Chicago &c. R. R.*, 220 Illinois, 581; *People* v. *Erie R. R.*, 198 N. Y. 369; *Missouri &c. R. R.* v. *Haber*, 169 U. S. 613; *Reid* v. *Colorado*, 187 U. S. 137; 2 Elliott on Railroads, 690; 4 *Id.* 1671; *Missouri &c. R. R.*, v. *Kansas*, 216 U. S. 262; and see as to an Ohio statute identical with the one here involved, *Detroit &c. Co.* v. *State*, 91 N. E. Rep. 869.

The state statute in question has not been superseded. When Congress acts the state laws are superseded only to the extent that they affect commerce outside of the State as it comes within the State. *Hall* v. *DeCuir*, 95 U. S. 485; *Reid* v. *Colorado*, 187 U. S. 137; *N. Y. &c. R. R.* v. *New York*, 165 U. S. 628; *Morgan Steamship Co.* v. *Louisiana*, 118 U. S. 455; *Compagnie &c. Co.* v. *State Board*, 186 U. S. 380; *Barbier* v. *Connolly*, 113 U. S. 27.

The state statute is not invalid unless it is repugnant to the act of Congress. *Lake Shore R. R.* v. *Ohio*, 173 U. S. 285; *Pittsburg &c. R. R.* v. *State*, 172 Indiana, 147; *Chicago &c. R. R.* v. *Solan*, 169 U. S. 133; *Missouri &c. R. R.* v. *Haber*, 169 U. S. 613.

A state statute is not invalid because of a Federal statute on the same subject, unless the state statute is repugnant to the Federal statute. *People* v. *Erie R. R.*, 198 N. Y. 369; *Gulf &c. R. R.* v. *Hefley*, 158 U. S. 98; *Hennington* v. *Georgia*, 163 U. S. 299; *New Orleans &c.*

R. R. v. *Mississippi*, 133 U. S. 587; *Minneapolis &c. R. R.* v. *Emmonds*, 149 U. S. 364.

In order that a state law or the action of state authorities under such law should be construed a regulation of commerce between the States, the operation of such law or the action of such state authorities must be a direct interference or regulation and directly or substantially hurtful to such commerce, not a mere incidental or casual interruption or regulation or remotely hurtful. *Sherlock* v. *Alling*, 93 U. S. 99; *Louis. & Nash. R. R.* v. *Kentucky*, 183 U. S. 503; *New York &c. R. R.* v. *Pennsylvania*, 158 U. S. 431; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150; *Louis. & Nash. R. R.* v. *Kentucky*, 161 U. S. 677; *Nashville &c. R. R.* v. *Alabama*, 128 U. S. 96; *Davis* v. *Cleveland &c. R. R.*, 217 U. S. 157.

So long as the action of the State is not repugnant to, or does not interfere with, or place burdens upon, or undertake to regulate, interstate commerce, or is a mere police regulation, its action, though in aid of interstate commerce, is not invalid, unless it is a direct interference. *Savage* v. *Jones*, 225 U. S. 501; *Standard &c. Co.* v. *Wright*, 225 U. S. 540; *United States* v. *Minneapolis*, 223 U. S. 335; *Meyer* v. *Wells*, 223 U. S. 298; *Atchison &c. R. R.* v. *O'Connor*, 223 U. S. 280; *Gladson* v. *Minnesota*, 166 U. S. 427; *Louisville &c. R. R.* v. *Mississippi*, 133 U. S. 587; *Mobile County* v. *Kimball*, 102 U. S. 691.

It is not enough to render the state law invalid simply that it is similar to the Federal statute. *United States* v. *DeWitt*, 9 Wall. 41; *Slaughterhouse Cases*, 16 Wall. 36; *United States* v. *Reese*, 92 U. S. 214; *Patterson* v. *Kentucky*, 97 U. S. 501; *Sherlock* v. *Alling*, 93 U. S. 99; *New York &c. Co.* v. *Pennsylvania*, 158 U. S. 431.

Where both the State and Congress have made certain acts a violation of the criminal law, the commission of the act may be an offense against, or transgression of, the laws of both, and may be punished in both jurisdictions.

Dashing v. *State*, 78 Indiana, 357; *Snoddy* v. *Howard*, 51 Indiana, 411; *Fox* v. *Ohio*, 5 How. 410; *Moore* v. *People*, 14 How. 13; 11 Cyc. 311.

The same act may be an offense against the laws of two different jurisdictions and may be punished in each. *Ambrose* v. *State*, 6 Indiana, 351; *State* v. *Gapin*, 17 Ind. App. 524.

For cases holding that one act may constitute an offense against both the state and Federal Government and that both may punish, see *Ex parte Siebold*, 100 U. S. 371–389; *Cross* v. *North Carolina*, 132 U. S. 131; *Reid* v. *Colorado*, 187 U. S. 137; *Detroit &c. R. R.* v. *State*, 82 Ohio, 60.

A statute of the State and an act of Congress on the same subject may be enforced in pursuance of a common purpose to afford a remedy. *Voelker* v. *Chicago &c. R. R.*, *supra; Southern Railway* v. *Railroad Commission*, 100 N. E. Rep. 337–341; *In re Loney*, 134 U. S. 372; *State* v. *Kirkpatrick*, 32 Arkansas, 117; *People* v. *McDonnell*, 80 California, 285; *United States* v. *Amy*, 14 Maryland, 152; *State* v. *Olesen*, 26 Minnesota, 507; *State* v. *Whittemore*, 50 N. H. 245; *People* v. *Welch*, 141 N. Y. 266; *Territory* v. *Coleman*, 1 Oregon, 191; *State* v. *Norman*, 16 Utah, 457; *Smith* v. *United States*, 1 Wash. T. 262; *People* v. *White*, 34 California, 183; *Martin* v. *State*, 18 Tex. App. 225; *State* v. *Bordwell*, 72 Mississippi, 541; *Bohannon* v. *State*, 18 Nebraska, 57; *In re Trueman*, 44 Missouri, 183; *Smith* v. *Maryland*, 18 How. 71; *Commonwealth* v. *Ellis*, 158 Massachusetts, 555; *People* v. *Miller*, 38 Hun, 82.

The state statute in question is in aid of the Federal Act. *Charles* v. *Atlantic Coast Line*, 78 S. Car. 36; *Seegers Bros.* v. *Seaboard Air Line*, 73 S. Car. 71.

For cases holding that state statutes may be enforced as a valid exercise of the police power of the State when they do no more than to remotely and indirectly control the instrumentalities of interstate commerce, see state "full crew" law. *Pittsburg &c. R. R.* v. *State*, 223 U. S. 713;

state attachment law, *Davis* v. *Cleveland &c. R. R.*, 217 U. S. 157; state statute requiring locomotive engineers to be examined and licensed, *Smith* v. *Alabama*, 124 U. S. 465; state statutes making it unlawful to run freight trains on Sunday, *Hennington* v. *Georgia*, 163 U. S. 299; heating car statutes, *New York &c. R. R.* v. *New York*, 165 U. S. 628; automatic couplers required, *Voelker* v. *Chicago &c. R. R.*, 116 Fed. Rep. 867; *Johnson* v. *Southern Pac. Co.*, 196 U. S. 1; statutes governing transfer of cars, *Mo. Pac. Ry.* v. *Larabee Co.*, 211 U. S. 612; transmitting messages, *West Un. Tel. Co.* v. *James*, 162 U. S. 650; adjusting freight rates under state statutes, *Atlantic Coast Line R. R.* v. *Mazursky*, 216 U. S. 122; enforcing separation of whites and blacks, *New Orleans &c. R. R.* v. *Mississippi*, 133 U. S. 587; requiring fences and cattle guards, *Minneapolis* v. *Emmonds*, 149 U. S. 364; shipping diseased meats into States, *Missouri &c. R. R.* v. *Haber*, 169 U. S. 613; state headlight law, *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280.

There is a presumption in favor of the state statute. *Chesapeake &c. R. R.* v. *Manning*, 186 U. S. 238.

There is no presumption that Congress intended to supersede the State. *Savage* v. *Jones*, 225 U. S. 501–533; *Reid* v. *Colorado*, 187 U. S. 137, 148; *Detroit &c. R. R.* v. *State*, 91 N. E. Rep. 869; *Southern Railway* v. *Indiana*, 100 N. E. Rep. 337; *Howard* v. *Ill. Cent. Ry.*, 207 U. S. 463.

Mr. Justice Lamar delivered the opinion of the court.

The Indiana statute requires railway companies to place secure grab-irons and hand-holds on the sides or ends of every railroad car, under a penalty of $100 fine to be recovered in a civil action.

In March, 1910, the Railroad Commission of the State brought such a suit against the Southern Railway Company, alleging that the Company on February 24, 1910, had transported from Boonville, Indiana, to Milltown,

Indiana, a car which did not have the required equipment. The defendant filed an answer in which it denied liability under the state law inasmuch as on February 24, 1910, the Federal Safety Appliance Act imposed penalties for failing to equip cars with hand-holds and also designated the court in which they might be recovered. The Commission's demurrer to the answer was sustained. The defendant refusing to plead further, judgment was entered against the Company. That judgment was affirmed by the state court and the case was brought here by writ of error.

The car alleged to have been without the required equipment, though transporting freight between points wholly within the State of Indiana, was moving on a railroad engaged in interstate commerce and the Company was, therefore, subject to the provisions and penalties of the Safety Appliance Act. 27 Stat. 531, § 4. *Southern Railway* v. *United States*, 222 U. S. 20.

The defendant in error insists, however, that the Railroad Company was also liable for the penalty imposed by the Indiana statute. In support of this position numerous cases are cited which, like *Cross* v. *North Carolina*, 132 U. S. 131, hold that the same act may constitute a criminal offense against two sovereignties, and that punishment by one does not prevent punishment by the other. That doctrine is thoroughly established. But, upon an analysis of the principle on which it is founded, it will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction. This concurrent jurisdiction may be either because the nature of the act is such that at the same time it produces effects respectively within the sphere of state and Federal regulation and thus violates the laws of both; or, where there is this double effect in a matter of which one can exercise control but an authoritative declaration that the paramount jurisdiction of one shall not

exclude that of the other. Compare, R. S., § 711; 37 Stat. 670.

But the principle that the offender may, for one act, be prosecuted in two jurisdictions has no application where one of the governments has exclusive jurisdiction of the subject-matter and therefore the exclusive power to punish. Such is the case here where Congress, in the exercise of its power to regulate interstate commerce, has legislated as to the appliances with which certain instrumentalities of that commerce must be furnished in order to secure the safety of employés. Until Congress entered that field the States could legislate as to equipment in such manner as to incidentally affect without burdening interstate commerce. But Congress could pass the Safety Appliance Act only because of the fact that the equipment of cars moving on interstate roads was a regulation of interstate commerce. Under the Constitution the nature of that power is such that when exercised it is exclusive, and *ipso facto*, supersedes existing state legislation on the same subject. Congress of course could have "circumscribed its regulations" so as to occupy a limited field. *Savage* v. *Jones*, 225 U. S. 501, 533. *Atlantic Line* v. *Georgia*, 234 U. S. 280, 293. But so far as it did legislate, the exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employés. The States thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties. For, as said in *Prigg* v. *Commonwealth of Pennsylvania*, 16 Pet. 539, 617: "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as

it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it . . . the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed."

Without, therefore, discussing the many cases sustaining the right of the States to legislate on subjects which, while not burdening, may yet incidentally affect interstate commerce, it is sufficient here to say that Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject. The principle is too well established to require argument. Its application may be seen in rulings in the closely analogous cases relating to state penalties for failing to furnish cars and to state penalties for retaining employés at work on cars beyond the time allowed by the Hours-of-Service Law.

In *St. L., Iron Mt. & S. Ry.* v. *Hampton*, 227 U. S. 267, it was held that the Arkansas statute imposing a penalty for failing to deliver cars had been superseded by the provisions of the Hepburn Act, although the provisions of the two statutes were not identical. In *Northern Pacific Ry.* v. *Washington*, 222 U. S. 371, it was held that congressional legislation as to hours-of-service so completely occupied the field as to prevent state legislation on that subject. In *Erie R. R.* v. *New York*, 233 U. S. 671, a like ruling was made in a case where the New York law punished a Railroad Company for allowing an employé to work more than eight hours when the Federal statute

punished the Company for employing him for more than nine hours—even though it was argued that the state legislation was not in conflict with the Federal act, but rather in aid of it. The same contention is made here inasmuch as the Indiana law requires hand-holds on sides *or* ends of cars, while the Federal statute requires hand-holds to be placed both on the sides *and* ends of cars.

The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control. The Safety Appliance Act having superseded the Indiana statute the judgment imposing the penalty must be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

LEHMAN, STERN & COMPANY, LIMITED, *v.* S. GUMBEL & COMPANY, LIMITED.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 146. Argued January 22, 1915.—Decided February 23, 1915.

This court cannot entertain argument based on the theory that the decision of the highest court of the State is in conflict with the law of the State.

The ruling of the highest court of the State as to enforcement of a vendor's statutory lien is a matter of state law not reversible by this court.

Where the vendor attached within four months, alleging a vendor's lien under the state statute, and the state court holds that the proceedings under the vendor's lien failed for want of possession, the lien is simply that created by ordinary attachment and garnishment and is dissolved by the express provisions of § 67f of the Bankruptcy Act.

Where an inferior state court attempts to proceed under attachment based on a vendor's statutory lien filed within four months of the petition and the Supreme Court of the State holds there is no vendor's lien but only ordinary attachment, a peremptory writ of prohibition against the state court and relegating the parties to the Bankruptcy Court is the proper practice.

132 Louisiana, 231, affirmed.

THE facts, which involve the effect of bankruptcy proceedings on attachments in the state court, are stated in the opinion.

Mr. Henry H. Chaffe, with whom *Mr. George Denegre* and *Mr. Victor Leovy* were on the brief, for plaintiff in error:

Section 67 of the Bankruptcy Act is not directed at the writ of attachment itself, but only at the lien obtained thereby. *Austin* v. *O'Reilly*, 2 Wood, 670; *Henderson* v. *Mayer*, 225 U. S. 631.

A judgment or decree in enforcement of an otherwise valid preëxisting lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. *Metcalf* v. *Barker*, 187 U. S. 175.

The name of the writ is of no concern, as Congress was dealing with liens obtained by judicial proceedings and not with the writs which might be employed to enforce valid preëxisting statutory liens by holding the property within the grasp of the state court. The court below erred in holding that because the seizure of the state court was constructive and not actual and physical, the adjudication in bankruptcy of the defendant divested the state court of jurisdiction to determine the validity, *vel non*, of plaintiff's lien on the cotton seized.

By garnishment process the property is placed in *custodia legis* and under the control of the court. And this is all that is necessary to maintain its jurisdiction. *Scholefield* v. *Bradlee*, 8 Martin, O. S., p. 510; *Dennistown* v.

N. Y. Faucet Co., 12 La. Ann. 732; *Grief* v. *Betterson*, 18 La. Ann. 349; *Goslan* v. *Powell*, 38 La. Ann. 522; *Buddig* v. *Simpson*, 33 La. Ann. 375; *Gomilla* v. *Millikin*, 41 La. Ann. 123; *Lehman & Co.* v. *Rivers*, 110 Louisiana, 1079.

In order to give the court jurisdiction over property, it is not necessary that it be in the possession of one of its officers bearing the title of sheriff, constable, receiver or the like; it is merely necessary that the property be under its control and subject to its order. *Cooper* v. *Reynolds*, 10 Wall. 308, 317; *Metcalf* v. *Barker*, 187 U. S. 165; *Eyster* v. *Gaff*, 91 U. S. 521; *In re Seebold*, 105 Fed. Rep. 910; *Carling* v. *Seymore Lumber Co.*, 113 Fed. Rep. 490; *In re Kane*, 152 Fed. Rep. 587.

Until the position of garnishee with regard to the cotton seized in the hands of the railroad company, and that in their hands, if any was so caught by the writ of attachment, it cannot be said that the plaintiff's rights have been transferred to and will have to be asserted, in the United States courts, as it may very well be that the rights have never been transferred and could in no event be asserted there. The trustee is a party to these proceedings and can, therefore, fully protect the interests of the general creditors.

The state court does not lose all and every character of jurisdiction over the bankrupt's assets and property, no matter how or where situated. This court has on several occasions taken the opposite view. *Bardes* v. *Harwarden Bank*, 178 U. S. 524; *Eyster* v. *Gaff*, 91 U. S. 521; *Louisville Trust Co.* v. *Cominger*, 184 U. S. 18; *First National Bank of Chicago* v. *Chicago Title & Trust Co.*, 198 U. S. 280.

The lien sought to be enforced is one granted by the law of Louisiana; prior to the adjudication in bankruptcy the state court seized and took under its control the property on which the lien is asserted, and, there-

fore, its jurisdiction was not divested or the suit in any way affected by the adjudication in bankruptcy of the defendants, in so far as enforcing the statutory lien is concerned.

Mr. Monte M. Lemann, with whom *Mr. J. Blanc Monroe* was on the brief, for the defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

On March 12, 1912, Lehman, Stern & Company sold to Martin & Company, 392 bales of cotton for the sum of $19,238. The checks given in payment were not honored when presented to the bank, and, on the day after the sale, the Lehman Company brought suit in a state court to obtain a general judgment against Martin & Company and to foreclose the lien, given by the Louisiana statute, on agricultural products "to secure the payment of the purchase money for and during the space of five days only after the day of delivery; within which time the vendor shall be entitled to seize the same in whatsoever hands or place it may be found and his claim for the purchase money shall have preference over all others."

Writs of sequestration and of attachment issued requiring the sheriff to seize the cotton in whatsoever place it might be found, and to attach other property of Martin & Co. and the individual members thereof and hold the same subject to the further judgment and order of the court. The New Orleans Railway Company, Gumbel & Co., and the Hibernia Bank were served with summons of garnishment.

On March 19th the defendants, Martin & Co., were adjudged voluntary bankrupts. On the next day Thompson was appointed Receiver of the bankrupts' estate. Shortly afterwards the New Orleans Railway Company, garnishee, in the state suit, answered that it had in its

possession 83 bales of the cotton mentioned in the pleadings—stating, however, that the cotton was claimed by Thompson, Receiver of Martin & Co., bankrupts, and that he had notified the Railroad Company not to surrender the same.

By virtue of an order of the bankrupt court Thompson, Receiver, thereafter intervened in the suit pending in the state court. Calling attention to the fact that the attachment proceedings had been commenced within four months prior to the petition in bankruptcy, and averring that the action did not involve property within the possession of the court, the Receiver filed a motion "to dismiss the proceedings herein, relegating the parties to the proper court of bankruptcy to determine their conflicting claims." Gumbel & Co., garnishees, also excepted to the jurisdiction of the court on the ground that Martin & Co. had been adjudicated bankrupts. Both of these motions were overruled by the judge presiding in the state court who held that the Bankruptcy Act did not dissolve the vendor's lien; nor did it prevent the court from enforcing that lien against the cotton which had been brought into the custody of the court by means of garnishments served before the bankruptcy proceedings were filed.

Thereupon Gumbel & Co. applied to the Supreme Court of Louisiana for a writ of Prohibition forbidding the Judge of the Civil District Court of the Parish of New Orleans from proceeding further in the cause. The petition set out the history of the litigation, and averred that although § 67f dissolved the attachment, the court below had retained jurisdiction; that the Receiver had given notice that he claimed title to any property of Martin & Co. in the hands of Gumbel & Co. and would proceed to enforce the same by proceedings in the bankrupt court. By reason of these facts, and to avoid conflicts of jurisdiction between the courts, Gumbel & Co. claimed to be entitled to the benefit of the writ of Prohibition forbidding the

judge of the Parish Court from proceeding further in the case as against them, garnishees, and claimants of the cotton under bills of lading issued by the Railway Co. A rule *nisi* issued and was served upon the judge of the Civil District Court. He answered and after argument the Supreme Court of Louisiana ordered that the peremptory writ be issued 'on the ground that as § 67f dissolved the attachment the state court had no jurisdiction to enforce the garnishment process under the writ of attachment for the purpose of subjecting the property to the vendor's lien claimed by the plaintiff.'

A petition for a rehearing having been granted, the court, one judge dissenting, held that unless the state court had possession of the *res* its jurisdiction was destroyed by the bankruptcy proceedings; and as the summons of garnishment did not operate to transfer the cotton from the possession of the garnishee into the possession of the court, there was no jurisdiction to foreclose the vendor's lien. It also held that the state court was without power to afford relief to the attaching creditors who would, therefore, be obliged to have their rights adjudicated in the bankrupt court.

The case having been brought here by writ of error, the plaintiffs cited Louisiana cases in support of the contention that, in their suit for the recovery of the purchase price of agricultural products, they were entitled to an attachment, not only to secure a fund out of which to satisfy a general judgment, but also as a means by which to bring the cotton into court so as to have the vendor's lien foreclosed. In the light of those cases the plaintiffs further insisted that the garnishment operated as a seizure of the cotton; and that while § 67f may have dissolved the lien created by the attachment it did not affect the lien given by statute on the cotton which the garnishment had brought into the legal possession, custody and control of the Civil District Court of the Parish of Orleans.

But this court cannot entertain an argument based on the theory that the decision of the Supreme Court of Louisiana was in conflict with the law of the State. Its opinion in this case is to be taken as conclusively establishing that, in Louisiana, the vendor's lien can only be enforced against property in the possession of the court and also that such possession was not acquired by means of the service of the summons of garnishment.

From this ruling,—on a matter of state law, not subject to review here—it follows that the proceedings in the Civil District Court to foreclose the vendor's lien failed for want of possession of the cotton. That then left the case an ordinary suit for purchase money against Martin & Company, in which an attachment had been levied, on property in the hands of the certain garnishees. But the lien thus created by attachment and garnishment was dissolved by the express provisions of § 67f of the Bankruptcy Act. The judgment granting the peremptory writ of prohibition and relegating the parties to the Bankruptcy Court is therefore

Affirmed.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY *v.* SLAVIN.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 147. Submitted January 20, 1915.—Decided February 23, 1915.

Where the ruling of the trial court in an action for personal injuries against a railroad company, that the state statute abolishing assumption of risk and contributory negligence applied, was reversed by the intermediate appellate court on the ground that the Federal Employers' Liability Act, which does not abolish such defenses, applied, and the highest court of the State reversed this judgment

without opinion, a controlling Federal question was necessarily involved and this court has jurisdiction to review under § 237, Judicial Code.

When the evidence shows that although the case was brought under the state statute plaintiff was injured while engaged in interstate commerce, the objection that he cannot recover under the Federal Employers' Liability Act is not a technical rule of pleading, but a matter of substance, and where there are substantive differences between the state and Federal statutes in regard to defences of assumption of risk and contributory negligence, proceeding under the former is reversible error.

88 Oh. St. 536, reversed.

THE facts, which involve the validity of a judgment for personal injuries obtained in the state court under the state statute and the application and effect of the Federal Employers' Liability Act, are stated in the opinion.

Mr. Clarence Brown and *Mr. Charles A. Schmettau* for plaintiff in error.

Mr. Walter G. Kirkbride and *Mr. C. H. Masters* for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

In the Court of Common Pleas of Lucas County, Ohio, Otto Slavin brought suit against the Railroad Company for injuries received by him on the night of August 19, 1910, while he was at work on a train in the Company's yard at Toledo. His declaration alleged that in the performance of his duty, and in pursuance of a custom known to the Defendant, he was riding on the side of a gondola car with his foot in the "stirrup" and his hands holding the grab-irons. He averred that while in that position and without fault on his part, he was struck by another car standing on the adjoining track which he did not and could not see in time to avoid the injury. He alleged that

the Company was guilty of negligence in laying and maintaining the yard tracks in close and dangerous proximity to each other; and that it was further negligent in failing to give him notice that the freight car was standing on the adjoining track. The defendant denied the charge of negligence. It contended that Slavin's duty did not require him to ride on the side of the car, but that, with a safe place in which to work, he voluntarily and unnecessarily rode, in a dangerous position, on the outside of a car passing through a railroad yard where he knew, or ought to have known, that trains and cars would be standing.

There was evidence that the plaintiff had been employed by the Company for about ten years—for much of that time being in charge of the switching engine which operated over every part of the yard—and that he was thoroughly familiar with the condition, situation and location of the tracks at the point where the injury occurred. Neither the plaintiff's complaint nor the defendant's answer contained any reference to the Employers' Liability Act. But, over plaintiff's objection, evidence was admitted which showed that the train on which the plaintiff was riding, at the time of the injury was engaged in interstate commerce. Thereupon the Railroad Company insisted that the case was governed by the provisions of the Employers' Liability Act and moved the court to direct a verdict in its favor. That motion having been overruled the defendant asked the court to give in charge to the jury several applicable extracts from that Federal statute.

All these requests were refused, the trial judge being of the opinion that the proximity of the tracks constituted a defect in "rail, track or machinery" within the meaning of the Ohio statute; and that, although the plaintiff had notice of such defect, he was not debarred of the right to recover, in view of §§ 9017 and 9018 of the Ohio Code,

changing the common law rule as to contributory negligence and assumption of risks. There was a verdict for the plaintiff. The defendant's motion for a new trial was overruled. On writ of error the Circuit Court of Lucas County held that inasmuch as the plaintiff was injured while engaged in interstate commerce the case was governed by the Federal statute which did not repeal the common law rule of assumption of risks under circumstances like those set out in the record and that the defendant's motion for a directed verdict should have been granted. This judgment was reversed and that of the Court of Common Pleas affirmed, without opinion, by the Supreme Court of Ohio.

The case having been brought here by writ of error, counsel for the plaintiff, Slavin, insists that the judgment of reversal, without opinion, should not be construed as meaning that the state court decided the Federal question adversely to the Company's claim; but rather as holding that the defendant's failure to plead the Employers' Liability Act made it improper to consider evidence that the plaintiff had been engaged in interstate commerce and, hence, that there was nothing properly in this record to support the contention that the defendant had been deprived of a Federal right.

But a controlling Federal question was necessarily involved. For, when the plaintiff brought suit on the state statute the defendant was entitled to disprove liability under the Ohio Act, by showing that the injury had been inflicted while Slavin was employed in interstate business. And, if without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal statute, it was error not to apply and enforce the provisions of that law.

In this respect the case is much like *St. Louis &c. Ry.* v. *Seale*, 229 U. S. 156, 161, where the suit was brought

under the Texas statute, but the testimony showed that the plaintiff was injured while engaged in interstate commerce. The court said: "When the evidence was adduced it developed that the real case was not controlled by the state statute but by the Federal statute. In short, the case pleaded was not proved and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the state courts erred in overruling it." The principle of that decision and others like it is not based upon any technical rule of pleading but is matter of substance, where, as in the present case, the terms of the two statutes differ in essential particulars. Here the Ohio statute abolished the rule of the common law as to the assumption of risks in injuries occasioned by defects in tracks, while the Federal statute left that common law rule in force, except in those instances where the injury was due to the defendant's violation of Federal statutes, which,—like the Hours of Labor Law and the Safety Appliance Act,—were passed for the protection of interstate employés. *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 503.

In all other respects this case is exactly within the ruling in the case last cited, where the employé's knowledge of the existence of the defect and the terms of the state statute relied on were substantially the same as those in the present case. There the judgment of the state court—applying the state statute—was reversed because it appeared, as it does here, that the plaintiff had been injured while engaged in interstate commerce and, consequently, the case should have been tried and determined according to the Federal Employers' Liability Act.

The judgment of the Supreme Court of Ohio is reversed and the case remanded for further proceedings not inconsistent with this opinion.

UNITED STATES *v.* MIDWEST OIL COMPANY.

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

No. 278. Argued January 9, 12, 1914; restored to docket April 20, 1914; reargued May 7, 1914.—Decided February 23, 1915.

Prior to initiation of some right given by law, the citizen has no enforceable interest in the public statutes and no private right in land which is the property of the people.

The practice of the withdrawal of public lands, both mineral and non-mineral, from private acquisition by the President without special authorization from Congress, after Congress has opened them to occupation, dates from an early period in the history of the Government, and the power so exercised has never been repudiated by Congress although it has always been subject to disaffirmance thereby.

The Land Department charged with the administration of the public domain has constantly asserted the power of the Executive to withdraw lands opened for occupation so long as they remain unappropriated.

Government is a practical affair intended for practical men, and the rule that long acquiescence in a governmental practice raises a presumption of authority applies to the practice of executive withdrawals by the Executive of lands opened by Congress for occupation.

While the Executive cannot by his course of action create a power, a long continued practice to withdraw lands from occupation after they have been opened by Congress, known to and acquiesced in by Congress, does raise a presumption that such power is exercised in pursuance of the consent of Congress or of a recognized administrative power of the Executive in the management of the public lands.

Laws and rules for the disposal of public lands are necessarily general in their nature, and Congress may by implication grant a power to the Executive to administer the public domain.

The power of Congress over the public domain is not only that of a legislative domain but also that of a proprietor, and it may deal with it as an individual owner may deal with his property and may grant powers to the Executive as an owner might grant powers to an agent, either expressly or by implication.

There is no distinction in principle between the power of the Executive

to make reservation of portions of the public domain and the power to withdraw them from occupation.

The validity of withdrawal orders made by the President in aid of future legislation has heretofore been expressly recognized by this court. *Bullard* v. *Des Moines R. R.*, 122 U. S. 170.

No action which Congress may have taken in any particular case can be construed as a denial of powers of the Executive to make temporary withdrawals of public land in the public interest, and the orders made and remaining in force are proof of congressional recognition of that power.

Silence of Congress after consideration of a practice by the Executive may be equivalent to acquiescence and consent that the practice be continued until the power exercised be revoked.

Nothing in the act of June 25, 1910, 36 Stat. 847, authorizing the President to withdraw lands and requiring lists of the same to be filed with Congress, can be construed as repudiating withdrawals already made.

Congress did not, by the act of June 25, 1910, take any rights from locators who had initiated rights prior to the withdrawal order of September 27, 1909, nor did it validate any location made after that date.

Quære whether, as an original question raised before any practice had been established, the President can withdraw from private acquisition land which Congress had made free and open to occupation and purchase. This case has been determined on other grounds and in the light of long continued practice.

THE facts, which involve the power of the President of the United States to withdraw public lands from entry under Rev. Stat., §§ 2319, 2329, and the act of February 11, 1897, and the effect of the withdrawal order No. 5 contained in the Proclamation of President Taft of September 27, 1909, are stated in the opinion.

Mr. Assistant Attorney General Knaebel and *The Solicitor General* for the United States.

Mr. Joel F. Vaile, with whom *Mr. Henry McAllister, Jr.*, *Mr. William N. Vaile*, *Mr. Karl C. Schuyler*, *Mr. Walter F. Schuyler*, *Mr. A. M. Stevenson* and *Mr. Lee Champion* were on the brief, for the Midwest Oil Company *et al.*:

The withdrawal order of September 27, 1909, was not an appropriation of specific lands for naval, or other public use, but was avowedly for the purpose of preventing acquisition of public oil lands by qualified citizens under existing statutes, pending efforts to obtain a change of law. This was beyond the power of the President. *Kendall* v. *United States*, 12 Pet. 524, 612; *Marbury* v. *Madison*, 1 Cr. 137, 166; *United States* v. *Nicoll*, 1 Paine, 464; *Ex parte Merryman*, 17 Fed. Cas. No. 9487; *Deffeback* v. *Hawke*, 115 U. S. 392, 406; *Shaw* v. *Kellogg*, 170 U. S. 312.

The Executive cannot limit the rights given to the public lands by Congress. *United States* v. *United Verde Copper Co.*, 196 U. S. 207; *Morrill* v. *Jones*, 106 U. S. 466; *United States* v. *Eaton*, 144 U. S. 677; *Williamson* v. *United States*, 207 U. S. 425, 462; *United States* v. *George*, 228 U. S. 14.

The executive power is dependent on congressional authority. *United States* v. *Gratiot*, 14 Pet. 526, 536, 537; *United States* v. *Fitzgerald*, 15 Pet. 407, 421; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 168; *Wisconsin R. R.* v. *Price County*, 133 U. S. 496, 504; *Gibson* v. *Chouteau*, 13 Wall. 92, 99.

Except for certain doctrines first announced during the administration of President Roosevelt, the view of executive officers has been that the power to withdraw public lands from the operation of existing laws depended upon some authority of Congress. *Nor. Pac. R. R.* v. *Davis*, 19 L. D. 87, 88; *Atlantic & Pacific R. R.*, 6 L. D. 84, 87, 88.

President Taft himself doubted his authority when he said in his special message of January 14, 1910, that the power to withdraw from the operation of existing statutes, lands the disposition of which would be detrimental to the public interests was not clear and satisfactory; that unfortunately Congress had not fully acted on the recommendations of the executive; that the question as to what the executive should do was full of dif-

ficulty; and that he thought it the duty of Congress by statute to validate withdrawals made by the Secretary of Interior and the President, and to authorize the Secretary temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet conditions of emergencies as they arise.

The Executive does not possess the power to withdraw public lands from the operative effect of existing laws, without the authority of some law of Congress which, by direct expression or by necessary implication, shall give such power of withdrawal. *Hewitt* v. *Schultz*, 180 U. S. 139; *Southern Pacific R. R.* v. *Bell*, 183 U. S. 675, 685, 686; *Brandon* v. *Ard*, 211 U. S. 11, 21; *Wolsey* v. *Chapman*, 101 U. S. 755, 769; *Lockhart* v. *Johnson*, 181 U. S. 516, 520; *Leecy* v. *United States*, 190 Fed. Rep. 289; *Nelson* v. *Nor. Pac. R. R.*, 188 U. S. 108, 133; *Sjoli* v. *Dreschel*, 199 U. S. 564, 566; *Osborn* v. *Froyseth*, 216 U. S. 571, 574; *Hoyt* v. *Weyerhaeuser*, 161 Fed. Rep. 324; *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380.

Although especially urged by the Government the Des Moines river cases do not militate against the contention of appellees. *Bullard* v. *Des Moines R. R.*, 122 U. S. 167; *Dubuque & Pacific Ry.* v. *Litchfield*, 23 How. 66; *Wolcott* v. *Des Moines Co.*, 5 Wall. 681, 688, 689; *Williams* v. *Baker*, 17 Wall. 144, 147; *Wolsey* v. *Chapman*, 101 U. S. 755, 769; 5 Stat. 456; 9 Stat. 77; 11 Stat. 10.

The authority of the President to make the withdrawal of lands now under consideration is not sustained by the fact that he has the power to make reservations for military purposes and for Indian reservations. *Wilcox* v. *Jackson*, 13 Pet. 496; *McConnell* v. *Wilcox*, 1 Scam. 344; *Grisar* v. *McDowell*, 6 Wall. 363; *United States* v. *Tichenor*, 12 Fed. Rep. 415, 423; *Florida Imp. Co.* v. *Bigalsky*, 44 Florida, 771; 17 Ops. Atty. Genl. 160, 163; 17 Ops. Atty. Genl. 258, 260; *United States* v. *Payne*, 8 Fed. Rep. 883,

888; *Gibson* v. *Anderson*, 131 Fed. Rep. 39, 41, can all be distinguished.

The expression "public uses" involved in those cases, refers to governmental uses rendered necessary for the proper discharge of the functions committed to the executive branch of the Government in its various departments. It does not apply to any broad exercise of power, independent of an immediately intended governmental use. *Covington* v. *Kentucky*, 173 U. S. 231, 242; *Williams* v. *Lash*, 8 Gilfillan (Minn.), 496; *Orr* v. *Quimby*, 54 N. H. 590; *United States* v. *Leathers*, 6 Sawyer, 17; *United States* v. *Martin*, 14 Fed. Rep. 817; *McFadden* v. *Mountain View M. & M. Co.*, 97 Fed. Rep. 670; *United States* v. *Grand Rapids and Ind. Ry.*, 154 Fed. Rep. 131; *In re Wilson*, 140 U. S. 575; *Spalding* v. *Chandler*, 160 U. S. 394.

The President's power to reserve public lands for public uses finds its sanction in acts of Congress. Even where no specific statute directly authorizes the executive act, it nevertheless derives its authority from an assumed grant by Congress, manifested by frequent enactments of statutes giving like authority in like cases. Its extent is limited to the setting apart of particular tracts of land for public uses, as the exigencies of the public service may require.

The words contained in certain acts providing for agricultural entries or making grants of land, which except therefrom lands reserved "by proclamation of the President," or "by order of the President," or "by competent authority," will not sustain an order which withdraws the public mineral domain from the operation of existing statutes. *Grisar* v. *McDowell*, 6 Wall. 381; Black on Interpretation of Laws, p. 191; *The Paulina's Cargo*, 7 Cranch, 52, 60; *Cantwell* v. *Owens*, 14 Maryland, 215, 226; *Rich* v. *Keyser*, 54 Pa. St. 86, 89; *Dickenson* v. *Fletcher*, L. R. 9 C. P. 1, 8; *Edrich's Case*, 5 Rep. 118, 77 English Rep. 238; *Moser* v. *Newman*, 6 Bingham, 556, 130 English Rep. 1395; *Johnson* v. *United States*, 225

U. S. 405, 415, 416; *United States* v. *Perry*, 50 Fed. Rep. 743, 748; 1 C. C. A. 648.

Prior to June 25, 1910, neither the President nor the Secretary of the Interior had any power to withdraw public mineral-oil lands from location or entry under the existing mining laws.

Prior to 1866 Congress itself had reserved all mineral lands from sale, and this congressional reservation left no opportunity during that period for and withdrawal of mineral lands by executive authority. *United States* v. *Gratiot*, 14 Pet. 526; *United States* v. *Gear*, 3 How. 120; *Deffeback* v. *Hawke*, 115 U. S. 392, 400; Barringer & Adams on the Law of Mines and Mining, page 194; Curtis H. Lindley on Mines, § 47, 2d ed.; *Newhall* v. *Sanger*, 92 U. S. 761, 763.

Since July, 1866, the mining laws have contained complete and exclusive provisions as to the control and disposition of public mineral lands.

The act of February 11, 1897, must, therefore, continue to be the law until repealed by some other act of Congress, or by the enactment of some other law which has the effect of repealing it. There has been no such repeal, and no repugnant law has been enacted. *United States* v. *Gear*, 3 How. 120, 131; *McConnell* v. *Wilcox*, *supra; Fort Boise Hay Reservation*, 6 L. D. 16, 18; *Kendall* v. *United States*, *supra; Cotting* v. *Kansas &c. Co.*, 183 U. S. 79, 84; *Marbury* v. *Madison*, 1 Cranch, 166; *The Floyd Acceptances*, 7 Wall. 666, 676, 677.

There has been no long-continued practice or customary usage to support the withdrawal of mineral lands from the operation of existing laws, although some appropriations of land for military reservations, or some setting apart of specific lands for occupancy by the Indians, may have contained mineral deposits. *Gibson* v. *Anderson*, 131 Fed. Rep. 39; *Behrends* v. *Goldsteen*, 1 Alaska, 518, 524.

There has, however, never been a practice and never

been a usage on the part of executive officers of withdrawing public mineral lands from location or entry under existing laws.

To withdraw large tracts of the public mineral domain from the operation of the acts of May 10, 1872, and of February 11, 1897, was to suspend the operation of those laws. To so suspend the operation of laws is legislation—not regulation.

The act of June 25, 1910, did not validate any previous withdrawal, it did not authorize the ratification or confirmation of any such previous withdrawal, and the withdrawal order of July 2, 1910, did not affect any rights previously acquired under existing mining laws.

This enactment speaks only *in futuro*. It is not in any respect retroactive. *Murray* v. *Gibson*, 15 How. 420, 423; *McEwen* v. *Lessee*, 24 How. 242, 244; *Harvey* v. *Tyler*, 2 Wall. 328, 347; *Sohn* v. *Waterson*, 17 Wall. 596, 599; *Twenty Per Cent Cases*, 20 Wall. 179, 187; *Chew Heong* v. *United States*, 112 U. S. 536, 559.

The attempted ratification of previous withdrawals contained in the order of July 2, 1910, is void.

Prior to the approval of the act of June 25, 1910, appellees' grantors had acquired vested rights in the property in controversy, and on June 25, 1910, these rights could not be affected even by act of Congress, much less by an executive order. *Belk* v. *Meagher*, 104 U. S. 279, 283; *Gwillim* v. *Donnellan*, 115 U. S. 45, 49; *Noyes* v. *Mantle*, 127 U. S. 348, 353; *Manuel* v. *Wulff*, 152 U. S. 505, 510, 511; 1 Lindley on Mines, §§ 169, 539; 1 Snyder on Mines, §§ 451, 466; 25 Land Decisions, 48, 51.

The decision and opinion of this court will determine for the future the proper constitutional exercise of governmental functions of greatest importance.

By leave of court, *Mr. Aldis B. Browne*, *Mr. Alexander Britton*, *Mr. Evans Browne*, *Mr. Francis W. Clements*,

Mr. Frederic R. Kellogg, Mr. E. S. Pillsbury and *Mr. Oscar Sutro* filed briefs as *amici curiæ.*

By leave of court, *Mr. Frank H. Short* filed a brief as *amicus curiæ.*

MR. JUSTICE LAMAR delivered the opinion of the court.

All public lands containing petroleum or other mineral oils and chiefly valuable therefor, have been declared by Congress to be "free and open to occupation, exploration and purchase by citizens of the United States . . . under regulations prescribed by law." Act of February 11, 1897, c. 216, 29 Stat. 526; R. S. 2319, 2329.

As these regulations permitted exploration and location without the payment of any sum, and as title could be obtained for a merely nominal amount, many persons availed themselves of the provisions of the statute. Large areas in California were explored; and petroleum having been found, locations were made, not only by the discoverer but by others on adjoining land. And, as the flow through the well on one lot might exhaust the oil under the adjacent land, the interest of each operator was to extract the oil as soon as possible so as to share what would otherwise be taken by the owners of nearby wells.

The result was that oil was so rapidly extracted that on September 17, 1909, the Director of the Geological Survey made a report to the Secretary of the Interior which, with enclosures, called attention to the fact that, while there was a limited supply of coal on the Pacific coast and the value of oil as a fuel had been fully demonstrated, yet at the rate at which oil lands in California were being patented by private parties it would "be impossible for the people of the United States to continue ownership of oil lands for more than a few months. After that the

Government will be obliged to repurchase the very oil that it has practically given away. . . ." "In view of the increasing use of fuel by the American Navy there would appear to be an immediate necessity for assuring the conservation of a proper supply of petroleum for the Government's own use . . ." and "pending the enactment of adequate legislation on this subject, the filing of claims to oil lands in the State of California should be suspended."

This recommendation was approved by the Secretary of the Interior. Shortly afterwards he brought the matter to the attention of the President who, on September 27, 1909, issued the following Proclamation:

"Temporary Petroleum Withdrawal No. 5."

"In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination." The list attached described an area aggregating 3,041,000 acres in California and Wyoming—though, of course, the order only applied to the public lands therein, the acreage of which is not shown.

On March 27, 1910, six months after the publication of the Proclamation, William T. Henshaw and others entered upon a quarter section of this public land in Wyoming so withdrawn. They made explorations, bored a well, discovered oil and thereafter assigned their interest to the Appellees, who took possession and extracted large quantities of oil. On May 4, 1910, they filed a location certificate.

As the explorations by the original claimants, and the

subsequent operation of the well, were both long after the date of the President's Proclamation, the Government filed, in the District Court of the United States for the District of Wyoming, a Bill in Equity against the Midwest Oil Company and the other Appellees, seeking to recover the land and to obtain an accounting for 50,000 barrels of oil alleged to have been illegally extracted. The court sustained the defendant's demurrer and dismissed the bill. Thereupon the Government took the case to the Circuit Court of Appeals of the Eighth Circuit which rendered no decision but certified certain questions to this court, where an order was subsequently passed directing the entire record to be sent up for consideration.

The case has twice been fully argued. Both parties, as well as other persons interested in oil lands similarly affected, have submitted lengthy and elaborate briefs on the single and controlling question as to the validity of the Withdrawal Order. On the part of the Government it is urged that the President, as Commander-in-Chief of the Army and Navy, had power to make the order for the purpose of retaining and preserving a source of supply of fuel for the Navy, instead of allowing the oil land to be taken up for a nominal sum, the Government being then obliged to purchase at a great cost what it had previously owned. It is argued that the President, charged with the care of the public domain, could, by virtue of the executive power vested in him by the Constitution (Art. 2, § 1), and also in conformity with the tacit consent of Congress, withdraw, in the public interest, any public land from entry or location by private parties.

The Appellees, on the other hand, insist that there is no dispensing power in the Executive and that he could not suspend a statute or withdraw from entry or location any land which Congress had affirmatively declared should be free and open to acquisition by citizens of the United States. They further insist that the withdrawal

order is absolutely void since it appears on its face to be a mere attempt to suspend a statute—supposed to be unwise,—in order to allow Congress to pass another more in accordance with what the Executive thought to be in the public interest.

1. We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of the legal consequences flowing from a long continued practice to make orders like the one here involved. For the President's proclamation of September 27, 1909, is by no means the first instance in which the Executive, by a special order, has withdrawn land which Congress, by general statute, had thrown open to acquisition by citizens. And while it is not known when the first of these orders was made, it is certain that "the practice dates from an early period in the history of the government." *Grisar* v. *McDowell*, 6 Wall. 381. Scores and hundreds of these orders have been made; and treating them as they must be (*Wolsey* v. *Chapman*, 101 U. S. 769), as the act of the President, an examination of official publications will show that (excluding those made by virtue of special congressional action, *Donnelly* v. *United States*, 228 U. S. 255) he has during the past 80 years, without express statutory authority—but under the claim of power so to do—made a multitude of Executive Orders which operated to withdraw public land that would otherwise have been open to private acquisition. They affected every kind of land—mineral and nonmineral. The size of the tracts varied from a few square rods to many square miles and the amount withdrawn has aggregated millions of acres. The number of such instances cannot, of course, be accurately given, but the extent of the practice can best be appreciated by a consideration of what is believed

to be a correct enumeration of such Executive Orders mentioned in public documents.[1]

They show that prior to the year 1910 there had been issued

99 Executive Orders establishing or enlarging Indian Reservations;

109 Executive Orders establishing or enlarging Military Reservations and setting apart land for water, timber, fuel, hay, signal stations, target ranges and rights of way for use in connection with Military Reservations;

44 Executive Orders establishing Bird Reserves.

In the sense that these lands may have been intended for public use, they were reserved for a public purpose. But they were not reserved in pursuance of law or by virtue of any general or special statutory authority. For, it is to be specially noted that there was no act of Congress providing for Bird Reserves or for these Indian Reservations. There was no law for the establishment of these

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[1] Departmental Ruling as to the existence of the power.

Report, Commissioner of the Land Office, February 28, 1902, p. 3. 17 Senate Doc. 57th Cong.

Appendix to Call's "Military Reservations," 495.

Decisions of Department of the Interior relating to Public Lands. 702, 31, 552; 13 *Id.* 426, 607, 628; 1 L. D. 553; 29 *Id.* 33; 31 *Id.* 195; 34 *Id.* 145; 6 *Id.* 317.

Indian Reservations:

"Executive Orders relating to Indian Reservations" (1912).

Public Domain, 243.

Report of Commissioner of Indian Affairs, 70–87 (1913).

Military Reservations:

Public Domain, 247.

14 House Doc. 217 (1898–99).

18 House Doc. 387 (1905–6).

Call's "Military Reservations" (1910).

Bird Reservations:

42 House Doc. 93 (1908).

43 House Doc. 44 (1909).

Military Reservations or defining their size or location. There was no statute empowering the President to withdraw any of these lands from settlement or to reserve them for any of the purposes indicated.

But when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the Government already owned. And in making such orders, which were thus useful to the public, no private interest was injured. For prior to the initiation of some right given by law the citizen had no enforceable interest in the public statute and no private right in land which was the property of the people. The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large. Congress did not repudiate the power claimed or the withdrawal orders made. On the contrary it uniformly and repeatedly acquiesced in the practice and, as shown by these records, there had been, prior to 1910, at least 252 Executive Orders making reservations for useful, though non-statutory purposes.

This right of the President to make reservations,—and thus withdraw land from private acquisition,—was expressly recognized in *Grisar* v. *McDowell*, 6 Wall. 364 (9), 381, where (1867) it was said that "from an early period in the history of the Government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses."

But notwithstanding this decision and the continuity of this practice, the absence of express statutory authority was the occasion of doubt being expressed as to the power

of the President to make these orders. The matter was therefore several times referred to the law officers of the Government for an opinion on the subject. One of them stated (1889) (19 Op. 370) that the validity of such orders rested on "a long-established and long-recognized power in the President to withhold from sale or settlement, at discretion, portions of the public domain." Another reported that "the power of the President was recognized by Congress and that such recognition was equivalent to a grant" (17 Op. 163) (1881). Again, when the claim was made that the power to withdraw did not extend to mineral land, the Attorney General gave the opinion that the power "must be regarded as extending to any lands which belong to the public domain, and capable of being exercised with respect to such lands so long as they remain unappropriated." (17 Op. 232) (1881).

Similar views were expressed by officers in the Land Department. Indeed, one of the strongest assertions of the existence of the power is the frequently quoted statement of Secretary Teller made in 1881:

"That the power resides in the Executive from an early period in the history of the country to make reservations has never been denied either legislatively or judicially, but on the contrary has been recognized. It constitutes in fact a part of the Land Office law, exists *ex necessitati rei*, is indispensable to the public weal and in that light, by different laws enacted as herein indicated, has been referred to as an existing undisputed power too well settled ever to be disputed." 1 L. D., 338 (1881–3.)

2. It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so

often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

This principle, recognized in every jurisdiction, was first applied by this court in the often cited case of *Stuart* v. *Laird*, 1 Cranch, 299, 309. There, answering the objection that the act of 1789 was unconstitutional in so far as it gave Circuit powers to Judges of the Supreme Court, it was said (1803) that, "practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."

Again, in *McPherson* v. *Blacker*, 146 U. S. 1 (4), where the question was as to the validity of a state law providing for the appointment of Presidential electors, it was held that, if the terms of the provision of the Constitution of the United States left the question of the power in doubt, the "contemporaneous and continuous subsequent practical construction would be treated as decisive" (36). *Fairbank* v. *United States*, 181 U. S. 307; *Cooley* v. *Board of Wardens*, 12 How. 315; *The Laura*, 114 U. S. 415. See also *Grisar* v. *McDowell*, 6 Wall. 364, 381, where, in 1867, the practice of the Executive Department was referred to as evidence of the validity of these orders making reservations of public land, even when the practice was by no means so general and extensive as it has since become.

3. These decisions do not, of course, mean that private rights could be created by an officer withdrawing for a Rail Road more than had been authorized by Congress in the land grant act. *Southern Pacific* v. *Bell*, 183 U. S.

685; *Brandon* v. *Ard*, 211 U. S. 21. Nor do these decisions mean that the Executive can by his course of action create a power. But they do clearly indicate that the long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands. This is particularly true in view of the fact that the land is property of the United States and that the land laws are not of a legislative character in the highest sense of the term (Art. 4, § 3) "but savor somewhat of mere rules prescribed by an owner of property for its disposal." *Butte City Water Co.* v. *Baker*, 196 U. S. 126.

These rules or laws for the disposal of public land are necessarily general in their nature. Emergencies may occur, or conditions may so change as to require that the agent in charge should, in the public interest, withhold the land from sale; and while no such express authority has been granted, there is nothing in the nature of the power exercised which prevents Congress from granting it by implication just as could be done by any other owner of property under similar conditions. The power of the Executive, as agent in charge, to retain that property from sale need not necessarily be expressed in writing. *Lockhart* v. *Johnson*, 181 U. S. 520; *Bronson* v. *Chappell*, 12 Wall. 686; *Campbell* v. *City of Kenosha*, 5 Wall. 194 (2).

For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein. Congress "may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale." *Camfield* v. *United States*, 167 U. S. 524; *Light* v. *United States*, 220 U. S. 536. Like any other owner it may provide when, how and to whom its land can be sold. It can permit it to be withdrawn from sale. Like any other owner, it can waive its strict rights,

as it did when the valuable privilege of grazing cattle on this public land was held to be based upon an "implied license growing out of the custom of nearly a hundred years." *Buford* v. *Houtz*, 133 U. S. 326. So too, in the early days the "Government, by its silent acquiescence, assented to the general occupation of the public lands for mining." *Atchison* v. *Peterson*, 20 Wall. 512. If private persons could acquire a privilege in public land by virtue of an implied congressional consent, then for a much stronger reason, an implied grant of power to preserve the public interest would arise out of like congressional acquiescence.

The Executive, as agent, was in charge of the public domain; by a multitude of orders extending over a long period of time and affecting vast bodies of land, in many States and Territories, he withdrew large areas in the public interest. These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power in view of the fact that its exercise was not only useful to the public but did not interfere with any vested right of the citizen.

4. The appellees, however, argue that the practice thus approved, related to Reservations—to cases where the land had been reserved for military or other special public purposes—and they contend that even if the President could reserve land for a public purpose or for naval uses, it does not follow that he can withdraw land in aid of legislation.

When analyzed, this proposition, in effect, seeks to make a distinction between a Reservation and a Withdrawal—between a Reservation for a purpose, not provided for by existing legislation, and a Withdrawal made in aid of future legislation. It would mean that a Permanent Reservation for a purpose designated by the President, but not provided for by a statute, would be valid, while a merely Temporary Withdrawal to enable Congress to

legislate in the public interest would be invalid. It is only necessary to point out that, as the greater includes the less, the power to make permanent reservations includes power to make temporary withdrawals. For there is no distinction in principle between the two. The character of the power exerted is the same in both cases. In both, the order is made to serve the public interest and in both the effect on the intending settler or miner is the same.

But the question need not be left solely to inference, since the validity of withdrawal orders, in aid of legislation, has been expressly recognized in a series of cases involving a number of such orders, made between 1850 and 1862. *Dubuque & Pac. R. R.* v. *Litchfield*, 23 How. 66; *Wolcott* v. *Des Moines Co.*, 5 Wall. 681; *Wolsey* v. *Chapman*, 101 U. S. 755; *Litchfield* v. *Webster County*, 101 U. S. 773; *Bullard* v. *Des Moines &c. R. R.*, 122 U. S. 167.

It appears from these decisions, and others cited therein, that in 1846 Congress made to the Territory of Iowa, a grant of land on both sides of the Des Moines, for the purpose of improving the navigation from the mouth of the river to Raccoon Fork, 5 Wall. 681. There was from the outset a difference of opinion as to whether the grant extended throughout the entire course of the river or was limited to the land opposite that portion of the stream which was to be improved. In *Dubuque & Pac. R. R.* v. *Litchfield*, 23 How. 66, decided in 1861, it was held that the grant only included the land between the mouth of the river and Raccoon Fork. But for eleven years prior to that decision there had been various and conflicting rulings by the Land Department. It was first held that the grant included land *above* the Fork and certificates were issued to the Territory as the work progressed. That ruling was shortly followed by another that the grant extended only *up to* the Fork.

"On April 6, 1850, Secretary Ewing, while concurring with Attorney General Crittenden in his opinion that the

grant of 1846 did not extend above the Raccoon Fork, issued an order withholding all the land then in controversy from market until the close of the then session of Congress, which order has been continued ever since," (we italicize) "*in order to give the State the opportunity of petitioning for an extension of the grant by Congress.*" *Bullard* v. *Des Moines R. R.*, 122 U. S. 170.

The withdrawal was made in 1851. The hoped-for legislation was not passed until several years later. Between those dates various private citizens made settlements by which, under various statutes they initiated rights and acquired an interest in the land—if the withdrawal order was void. But by such settlements they obtained no rights if the withdrawal order was valid. A subsequent ratification could have related back to 1851, but if the withdrawal was originally void, the ratification of course, could not cut out intervening rights of settlers. *Cook* v. *Tullis*, 18 Wall. 338.

There was litigation between settlers claiming, as here, under existing land laws, and those whose title depended upon the original validity of the *withdrawals made in aid of legislation.* (*Riley* v. *Welles*, 154 U. S. 578; *Bullard* v. *Des Moines R. R.*, 122 U. S. 173; *Wolcott* v. *Des Moines*, 5 Wall. 681.) In those suits, the withdrawal orders were not treated as having derived their validity from the legislation subsequently passed in aid of Iowa and its assignees, but they were treated as having been effective from their dates, regardless of the fact that the land included therein had not originally been granted to Iowa. In one of them it was said that:

"*This Court has decided in a number of cases, in regard to these lands, that this withdrawal operated to exclude from sale, purchase, or preëmption all the lands in controversy. . . .*" *Bullard* v. *Des Moines R. R.*, 122 U. S. 170.

5. Beginning in 1850 with this order of Secretary

Ewing, in aid of legislation on behalf of Iowa, and its continuance even after this Court had decided that no land above the Fork passed to the Territory (23 How. 66), the practice of making withdrawals continued down to 1910. The reasons for making the withdrawal orders varied but the power exerted was the same and was supported by the same implied consent of Congress.

For, if any distinction can be drawn between the principle decided in the *Iowa* cases and this; or if the power involved in making a Reservation could differ from that exercised in making a Withdrawal—then the Executive practice and congressional acquiescence, which operated as a grant of an implied power to make Permanent Reservations, are also present to operate as a grant of an implied power to make Temporary Withdrawals. It may be well to refer to some of the public records showing the existence and extent of the practice.

Withdrawals in aid of legislation were made in particular cases (26 L. D. 347; 28 L. D. 361; 35 L. D. 11), and many others more general in their nature and much more extensive in their operation.

For example: The Land Department passed an order suspending the location and settlement of certain islands and all isolated tracts containing less than 40 acres "with a view to submitting to Congress" the question as to whether legislation on the subject was not needed. 34 L. D. 245.

Reports to the 56th and 57th Congresses (26 Sen. Doc. 87; 22 House Doc. 108, 445) contained a list of "Temporary Withdrawals" made to prevent the disposal of land pending the consideration of the question of the advisability of setting the same apart as forest reservations."

Phosphate land was "temporarily withdrawn, pending action by Congress." House Doc. 43, 10, 61st Cong., 2d Sess.

There were also temporary withdrawals of oil land from

agricultural entry, in aid of subsequent legislation. 26 Sen. Doc. 75; 43 House Doc. 8, 9, 10, 13 (61st Cong.).

In pursuance of a like practice and power, public land containing coal was withdrawn "pending the enactment of new legislation" 35 L. D. 395; 43 H. Doc. 8, 13. In the Message of the President to the 2d session of the 59th Congress attention was called to the withdrawal of coal lands in aid of legislation. There was no repudiation of the order or of the practice either at that session or at any succeeding session of Congress. It was claimed in the argument that the act of 1908 (35 Stat. 424) was the legislation contemplated by the Executive when coal lands were temporarily withdrawn by the order of 1906; and reference has already been made to the act of 1861 concerning the Iowa lands withdrawn in 1849. There were other instances in which there was congressional action at a more or less remote period after the order of temporary withdrawal. The land for the Wind Cave Park was withdrawn in 1900 and the Park was established in 1903 (32 Stat. 765); Bird Reserves were established in 1903 and, in 1906 (34 Stat. 536), an act was passed making it an offense to interfere with birds on Reserves established by law, proclamation or *Executive Order*. See also 35 L. D. 11; 34 Stat. 517. But in the majority of cases there was no subsequent legislation in reference to such lands, although the withdrawal orders prevented the acquisition of any private interest in such land until after the order was revoked.

Whether, in a particular case, Congress acted or not, nothing was done by it which could, in any way, be construed as a denial of the right of the Executive to make temporary withdrawals of public land in the public interest. Considering the size of the tracts affected and the length of time they remained in force, without objection, these orders by which *islands, isolated tracts, coal, phosphate and oil lands were withdrawn in aid of legislation,*

furnish, in and of themselves, ample proof of congressional recognition of the power to withdraw.

But that the existence of this power was recognized and its exercise by the Executive assented to by Congress, is emphasized by the fact that the above-mentioned withdrawals were issued after the Report which the Secretary of the Interior made in 1902, in response to a resolution of the Senate calling for information "as to what, if any, of the public lands have been withdrawn from disposition under the settlement or other laws by order of the Commissioner of the General Land Office and *what, if any, authority of law exists for such order of withdrawal.*"

The answer to this specific inquiry was returned March 3, 1902, (Senate Doc. 232, 57th Cong., 1st Sess., Vol. 17). On that date the Secretary transmitted to the Senate the elaborate and detailed report of the Commissioner of the Land Office, who in response to the inquiry as to the authority by which withdrawals had been made, answered that:

"the power of the Executive Department of the Government to make reservations of land for public use, and to temporarily withdraw lands from appropriation by individuals as exigencies might demand, to prevent fraud, to aid in proper administration and in aid of pending legislation is one that has been long recognized both in the acts of Congress and the decisions of the court; . . . that this power has been long exercised by the Commissioner of the General Land Office is shown by reference to the date of some of the withdrawals enumerated. . . . The attached list embraces only such lands as were withdrawn by this office, acting on its own motion, in cases where the emergencies appeared to demand such action in furtherance of public interest and does not include lands withdrawn under express statutes so directed."

The list, which is attached, refers to withdrawal orders about 100 in number, issued between 1870 and 1902.

Many of them were in aid of the administration of the land laws: to correct boundaries; to prevent fraud; to make a classification of the land, and like good—but non-statutory—reasons. Some were made to prevent settlements while the question was being considered as to whether the lands might not be included in a forest reservation to be thereafter established. One in 1889 (referred to also in 28 L. D. 358) was made in order to afford the State of Nebraska an opportunity to procure legislative relief, as in the *Iowa* cases above cited.

This report refers to *Withdrawals* and not to *Reservations*. It is most important in connection with the present inquiry as to whether Congress knew of the practice to make temporary withdrawals and knowingly assented thereto. It will be noted that the Resolution called on the Department to state the extent of such withdrawals and the authority by which they were made. The officer of the Land Department in his answer shows that there have been a large number of withdrawals made for good but for non-statutory reasons. He shows that these 92 orders had been made by virtue of a long-continued practice and under claim of a right to take such action in the public interest "as exigencies might demand. . . ." Congress with notice of this practice and of this claim of authority, received the Report. Neither at that session nor afterwards did it ever repudiate the action taken or the power claimed. Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress.

6. Nor is the position of the appellees strengthened by the act of June 25, 1910 (36 Stat. 847), to authorize the President to make withdrawals of public lands and requiring a list of the same to be filed with Congress.

It was passed after the President's Proclamation of September 27, 1909, and months after the occupation

and attempted location by virtue of which the Appellees claim to have acquired a right to the land. This statute expressly provided that it should not "be construed as a recognition, abridgment or enlargement of any asserted rights or claims initiated upon any oil or gas-bearing lands after any withdrawal of such lands made prior to the passage of this act."

True, as argued, the act provides that it shall not be construed as an "*abridgment* of asserted rights initiated in oil lands after they had been withdrawn." But it likewise provides that it shall not be considered as a "recognition of such rights." There is however nothing said indicating the slightest intent to repudiate the withdrawals already made.

The legislative history of the statute shows that there was no such intent and no purpose to make the Act retroactive or to disaffirm what the agent in charge had already done. The proclamation of September 27, 1909, withdrawing oil lands from private acquisition was of far-reaching consequence both to individuals and to the public. It gave rise to much discussion and the old question as to the authority of the President to make these orders was again raised. Various bills were introduced on the subject and the President himself sent a message to Congress calling attention to the existence of the doubt and suggesting the desirability of legislation to expressly grant the power and ratify what had been done. A bill passed the House containing such ratification and authorizing future withdrawals. When the bill came to the Senate it was referred to a committee and, as its members did not agree in their view of the law, two reports were made. The majority, after a review of the practice of the Department, the acquiescence of Congress in the practice and the decisions of the courts, reported that the President already had a general power of withdrawal and recommended the passage of the pending bill inasmuch

as it operated to restrict the greater power already possessed. Sen. Rep. 171 (61st Cong. 2d Session). But having regard to the fact that private persons, on withdrawn land, had raised a question as to the validity of the order and that such question presented a matter for judicial determination, Congress was studious to avoid doing anything which would affect either the public or private rights. It therefore used language which showed not only that the statute was not intended to be retrospective but was not to be construed either as a recognition, enlargement or repudiation of rights like those asserted by Appellees.

In other words, if, notwithstanding the withdrawal, any locator had initiated a right which, however, had not been perfected, Congress did not undertake to take away his rights. On the other hand, if the withdrawal order had been legally made under the existing power, it needed no ratification and if a location made after the withdrawal gave the Appellees no right, Congress, by this statute, did not legislate against the public and validate what was then an invalid location. The act left the rights of parties in the position of these Appellees, to be determined by the state of the law when the proclamation was issued. As heretofore pointed out the long-continued practice, the acquiescence of Congress, as well as the decisions of the courts, all show that the President had the power to make the order. And as was said in *Wolsey* v. *Chapman*, 101 U. S. 769, the "*withdrawal would be sufficient to defeat a settlement . . . while the order was in force. . . .*"

The case is therefore remanded to the District Court with directions that the decree dismissing the Bill be

Reversed.

MR. JUSTICE MCREYNOLDS took no part in the decision of this case.

MR. JUSTICE DAY with whom concurred MR. JUSTICE MCKENNA and MR. JUSTICE VAN DEVANTER, dissenting.

This case originated in a bill filed by the United States in the United States District Court for the District of Wyoming to restrain trespasses on a certain tract of public petroleum lands in the State of Wyoming and to obtain an accounting for petroleum claimed to have been wrongfully extracted therefrom. The bill sets up ownership in the United States of the land in question, being a tract of 160 acres, and alleges that the land is chiefly valuable for petroleum; that on September 27, 1909, the tract in controversy in common with many others was withdrawn from mineral exploration and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral public land laws of the United States; and that this was done by an order promulgated on that day by the Secretary of the Interior pursuant to the direction of the President. The order listed townships and sections aggregating more than 3,000,000 acres situated in the States of Wyoming and California. The terms of this order, styled "Temporary petroleum withdrawal No. 5," are:

"In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination."

It appears from the averments of the bill that the lands were originally located by certain individuals after the order of withdrawal and on March 27, 1910; that they were entered upon, explored and a well drilled, thereby

rendering subject to ready extraction large deposits of petroleum of great value; and that the original claimants caused to be filed and recorded in the records of Natrona County, Wyoming, a certain location certificate evidencing claim and location by them of the land as a petroleum placer-mining claim under and in pursuance of the mining laws of the United States. These parties subsequently assigned their rights to the defendant, The Midwest Oil Company, and certain other persons named. The bill also avers that after the withdrawal order of September 27, 1909, on July 2, 1910, a further order of withdrawal described as "Order of withdrawal. Petroleum reserve No. 8," was made by the President, expressly affirming the order of September 27, 1909.

The law under which the location in question was made (29 Stat. 526) reads:

"That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims."

Under Rev. Stat., § 2329 provision was made for entering and patenting placer mining claims in like manner as vein or lode claims; and by Rev. Stat., § 2319 "all valuable mineral deposits" were opened to exploration and purchase and the lands containing them to occupation and purchase under regulations prescribed by law and according to the local customs or rules of miners.

While the allegations of the bill do not set out all the steps which led up to the President's order of withdrawal of September 27, 1909, we may not only look to its allegations but read them in the light of public documents embodying the history of the transaction, of which we may take judicial notice. On September 27, 1909, the Secretary of the Interior by direction of the President issued the temporary petroleum withdrawal order No. 5, above set forth.

The making of this order was preceded by certain correspondence leading up to it. On February 24, 1908, the Director of the Geological Survey addressed a letter to the Secretary of the Interior, setting forth his opinion as to the superiority of liquid fuel for the Navy, the inadequacy of the coal supply on the Pacific coast and the fact that the demand for oil was greater than the supply and that but little oil land remained under governmental control and that this was being rapidly patented, and his recommendation that the filing of claims to oil lands in California be suspended in order that the Government might continue the ownership of the valuable supplies of liquid fuel. On the seventeenth of September, 1909, the Director sent another letter to the Secretary of the Interior, enclosing a copy of his earlier letter, and saying, in substance, that the arguments contained in that letter had been reinforced by the Survey's Conservation Report on the petroleum resources of the United States, which showed that at that time the production exceeded the demand of the trade, and inasmuch as the disposal of the public petroleum lands at nominal prices encouraged overproduction, legislation providing for the sane development of such resources should be enacted. He also stated that the conservation of the petroleum supply demanded a law providing for the disposal of the oil remaining in the public lands in terms of barrels of oil rather than in acres of land; and further that, considering the use of lubricating oil and of fuel oil for the navy, there was an immediate necessity for conserving a proper supply of petroleum for the Government's use, and he recommended the suspension of the filing of claims to oil lands in California pending legislation on the subject. He also called attention to the fact that the Commissioner of the General Land Office, acting upon his report classifying certain oil lands in California, had issued instructions withholding such oil lands from agricultural entry pending considera-

tion of legislation. And on the same day the Secretary of the Interior addressed a letter to the President calling his attention to the subject of conservation of the petroleum resources of the public domain, especially with reference to the requirements of the Navy, repeating the substance of the Director's letter and stating that other lands than those mentioned in the Director's letter had also been withdrawn from entry in California, and concluding that legislation was needed which would assure conservation of an adequate supply of petroleum for the Government's needs, but which, he believed, would not interfere with the private development of the California oil pools, and therefore the necessity for temporary withdrawals of the land from entry. Shortly thereafter, on September 26, 1909, the Secretary of the Interior telegraphed to the Acting Secretary from Salt Lake City where he had seen the President, as follows:

"Have conferred with President respecting temporary withdrawals covering oil lands. If present withdrawals permit mining entries being made of such lands wish the withdrawals modified at once to prohibit such disposition pending legislation."

The following day the Acting Secretary telegraphed to the Secretary at Helena, Montana:

"Telegram 26th received. California and Wyoming petroleum withdrawals heretofore made permit mining locations. Following your direction I have temporarily withdrawn from all forms of location and entry 2,871,000 acres in California and 170,000 acres in Wyoming, all heretofore withdrawn for classification. My withdrawal prevents all forms of acquisition in future and holds the land in statu quo pending legislation."

And thereupon the withdrawal order of September 27, 1909, above set forth, was promulgated.

It is to be observed that the lands here in controversy are situated in the State of Wyoming. There was no

suggestion that such lands would ever be needed as a basis of oil supply for the Navy. They were withdrawn solely upon the suggestion that a better disposition of them could be made than was found in the existing acts of Congress controlling the subject.

From this statement it is evident that the first question to be decided concerns the validity of the President's withdrawal order of September 27, 1909, and it is necessary to determine whether that order was within the authority of the President and had the effect to withdraw the land in controversy from location under the mineral land law, or whether, as held in the court below, that order had no force and effect to prevent persons from acquiring rights under the then existing statutes of the United States concerning the subject.

The Constitution of the United States in Article IV, § 3, provides: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." In this section the power to dispose of lands belonging to the United States is broadly conferred upon Congress, and it is under the power therein given that the system of land laws for the disposition of the public domain has been enacted. *United States* v. *Gratiot*, 14 Pet. 526, 536–7; *United States* v. *Fitzgerald*, 15 Pet. 407, 421; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 168; *Wisconsin R. R.* v. *Price County*, 133 U. S. 496, 504. In the last case this court said:

"The Constitution vests in Congress the power to 'dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise."

It is contended on behalf of the Government that the power of the President to make such orders as are here in

question has grown up from the authorization of Congress in its legislation and because of its long sanction by acquiescence in the exercise of such executive authority, so that, if it be admitted that the authority of the President to deal with the public lands must come from Congress, the sanction which such action of the Executive has received in the course of many years of legislation and congressional acquiescence is as effective as though the express authority had been conferred by law. In aid of this argument the general course of legislation is pointed to, and the decisions of this court and opinions of Attorneys General in connection with certain acts are cited. Upon the other hand it is contended that if these acts are to be taken as the general declaration of congressional intent upon the subject, they contain express authorization of the President to make withdrawals when Congress wishes to confer such power. Some of the instances referred to are set out in the margin.[1]

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[1] The Government asserts that reservations by the Executive for Indian purposes, irrespective of the existence of statutory authority, are found collected in The Public Domain, pp. 727, 1252; 1 Kappler's Laws and Treaties, p. 801; and for military purposes in The Public Domain, pp. 748, 1258; Laws of the United States of a Local and Temporary Character, vol. 2, p. 1171. (Whether or not these orders were preceded by Congressional authority does not definitely appear.) It also recites several executive withdrawals of land for uses related to military purposes, such as lands supplying fuel, water, etc., to military posts, and also a withdrawal to conserve a supply of building stone for harbor improvements. Another instance cited: Where Congress by an appropriation act of June 18, 1878 (20 Stat. 152), had directed the Secretary of War to cause an examination to be made of the sources of the Mississippi River, among others, to determine the practicability and cost of reservoirs for improving its navigation, the Secretary it is said made his report and withdrew certain lands in aid of his report, in the hope that they would be "affected in the event of affirmative congressional action upon said report"; and additional lands were withdrawn subsequently for the same purpose, but after appropriations for the construction of the reservoirs had been made

It is thus explicitly recognized, as was already apparent from the terms of the Constitution itself, that the sole authority to dispose of the public lands was vested in

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by the act of June 14, 1880 (21 Stat. 180). Attention is also called to withdrawals for a number of purposes, as to correct surveys; to avoid conflicts with private claims; to prevent frauds; to ascertain character of land, etc., shown by a letter from the Acting Secretary of the Interior, dated March 3, 1902, found at p. 7463 of vol. 45, Congressional Record. The reports of the Secretary of the Interior and the Commissioner of the General Land Office are cited to the effect that supposed oil lands in California were withdrawn from agricultural entry in aid of an investigation of their character and to prevent unlawful application of lieu sections (1900, pp. LI, 75, and 1901, pp. LXIII, 87); that large quantities of coal land were withdrawn to verify the existence of coal deposits because of serious frauds (1907, pp. 13, 251); that temporary reservation was made of the "Petrified Forest" in Arizona for a proposed national park (Commissioner's Report 1900, p. 87); and that temporary withdrawals were made for state parks in California and Michigan (Commissioner's Report, 1902, p. 319), all of which were reported to Congress. The land including the Wind Cave in South Dakota was reserved (Commissioner's Report, 1900, p. 91) and later made a national park by the act of January 9, 1903 (32 Stat. 765). The President had created certain reservations for the protection of birds (Rep. Sec. Int. 1909, p. 43), and subsequently an act was passed making it an offense to interfere with birds or their eggs "on any lands of the United States which have been set apart or reserved as breeding grounds for birds by any law, proclamation, or Executive order" (34 Stat. 536). The Secretary of the Interior had directed that all applications to purchase certain isolated tracts should be suspended (34 L. D. 245), and subsequently an act providing for the disposition of disconnected tracts was approved by Congress (34 Stat. 517). In aid of a bill to authorize Wisconsin to select certain lands, the President withdrew a large area in that State, and the bill was later passed (35 L. D. 11; 34 State. 517). Coal lands in Alaska were withdrawn from entry by direction of the President (35 L. D. 572), which had been thrown open to entry by Congress (33 Stat. 525), and the propriety of this withdrawal was approved by Congress (35 Stat. 424). To support its statement that general recognition of the executive authority is found in a number of statutes the Government cited: The townsite law of March 2, 1867 (14 Stat. 541), which contained a proviso that "the provisions of this act shall not apply to military or other reservations

the Congress and in no other branch of the Federal Government. The right of the Executive to withdraw lands which Congress has declared shall be open and free to settlement upon terms which Congress has itself prescribed, is said to arise from the tacit consent of Congress in long acquiescence in such executive action resulting in an implied authority from Congress to make such withdrawals in the public interest as the Executive deems proper and necessary. There is nothing in the Constitution suggesting or authorizing such augmentation of executive authority or justifying him in thus acting in aid of a power which the framers of the Constitution saw

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heretofore made by the United States, nor to reservations for lighthouses, customhouses, mints, or such other public purposes as the interests of the United States may require, whether held under reservations through the land office by title derived from the Crown of Spain, or otherwise"; and the act of February 8, 1887 (24 Stat. 388), providing for the allotment of lands in severalty to Indians on the various reservations and for other purposes, the opening paragraph of which read: "That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized. . . ."

The Government says, however, that "there is no publication which can be relied on in determining whether a given Executive order was preceded by statutory authority," and admits that it is possible that in some of the cases cited there was antecedent statutory authority.

The defendant appends to its brief a list of statutes giving discretionary power to the Executive to make withdrawals, those relating to military or analogous purposes being, 1 Stat. 252; 1 Stat. 352; 1 Stat. 555; 2 Stat. 453; 2 Stat. 547; 2 Stat. 750; 4 Stat. 687; 9 Stat. 500; 10 Stat. 27; 10 Stat. 608; those for Indian purposes being, 4 Stat. 411; 10 Stat. 238; 11 Stat. 401; 12 Stat. 819; 13 Stat. 40; for a lighthouse, 1 Stat. 54; with reference to salt springs, 2 Stat. 235; 2 Stat. 280; 2 Stat. 394; and lead mines, 2 Stat. 449; for town sites, 3 Stat. 375; 12 Stat. 754; for reservoirs, 25 Stat. 526; and irrigation work, 32 Stat. 388; for lands containing timber for naval purposes, 3 Stat. 347; and for forest reserves, 26 Stat. 1103; 30 Stat. 36.

fit to vest exclusively in the legislative branch of the Government.

It is true that many withdrawals have been made by the President and some of them have been sustained by this court, so that it may be fairly said that, within limitations to be hereinafter stated, executive withdrawals have the sanction of judicial approval, but, as we read the cases, in no instance has this court sustained a withdrawal of public lands for which Congress has provided a system of disposition, except such withdrawal was—(a) in pursuance of a policy already declared by Congress as one for which the public lands might be used, as military and Indian reservations for which purposes Congress has authorized the use of the public lands from an early day, or (b) in cases where grants of Congress are in such conflict that the purpose of Congress cannot be known and therefore the Secretary of the Interior has been sustained in withdrawing the lands from entry until Congress had opportunity to relieve the ambiguity of its laws by specifically declaring its policy.

It is undoubtedly true that withdrawals have been made without specific authority of an act of Congress, but those which have been sustained by this court, it is believed, will be found to be in one or the other of the categories above stated. On the other hand, when the executive authority has been exceeded this court has not hesitated to so declare, and to sustain the superior and exclusive authority of Congress to deal with the public lands.

The first decision of this court which has come to our attention in which this matter was dealt with is *Wilcox* v. *Jackson*, 13 Pet. 498, decided in 1839. That case involved a controversy concerning the lands occupied by the military post called Fort Dearborn in Cook County, Illinois. The lands had been used for many years as a military post and an Indian agency, and in 1824 were reserved by

the Commissioner of the General Land Office at the request of the Secretary of War for military purposes. It also appears that prior to May 1, 1834, the Government built a lighthouse on part of the land. When the suit was brought by Jackson to recover them they were in the possession of Wilcox, commander of the post, who claimed the right to hold them as an officer of the United States under the orders of the Secretary of War. The claim asserted by Jackson arose from the preëmption allowed to his lessor's predecessor in title under the act of June 19, 1834 (c. 54, 4 Stat. 678), which revived the act of May 29, 1830 (c. 208, 4 Stat. 420), which provided that "no entry or sale of any land shall be made, under the provisions of this act, which shall have been reserved for the use of the United States, or either of the several states, . . . or which is reserved from sale by act of Congress, or by order of the President, or which may have been appropriated, for any purpose whatsoever." The court, after stating that lands which had been appropriated for any purpose whatsoever were exempt from preëmption and that the lands in question had been in fact appropriated, reviewed legislation authorizing the President to erect fortifications and to establish trading houses and, in concluding that the appropriation had been made by authority of law, said (p. 512):

"We thus see that the establishing [*of*] trading houses with the Indian tribes, and the erection of fortifications in the west, are purposes authorized by law; and that they were to be established and erected by the President. But the place in question is one at which a trading house has been established, and a fortification or military post erected. It would not be doubted, we suppose, by any one, that if Congress had by law directed the trading house to be established and the military post erected at Fort Dearborn, by name; that this would have been by authority of law. But instead of designating

the place themselves, they left it to the discretion of the President, which is precisely the same thing in effect. Here then is an appropriation, not only for one but for two purposes, of the same place by authority of law. But there has been a third appropriation in this case by authority of law. Congress, by law, authorized the erection of a lighthouse at the mouth of Chicago river, which is within the limits of the land in question, and appropriated $5000 for its erection; and the case agreed states that the lighthouse was built on part of the land in dispute before the 1st of May, 1834. We think, then, that there has been an appropriation, not only in fact but in law."

The court, after remarking that Congress must have known of the authority which had been given to the President by former laws to establish trading houses and military posts and that a military post had long been established at Fort Dearborn, said (p. 514): "They seem therefore to have been studious to use language of so comprehensive a kind, in the exemption from the right of preëmption, as to embrace every description of reservation and appropriation which had been previously made for public purposes."

With reference to the reservation of 1824 the court merely said (p. 512): "We consider this, too, as having been done by authority of law; for amongst other provisions in the act of 1830, all lands are exempted from preemption which are reserved from sale by order of the President." (And the court held that the act of the Secretary of War was that of the Executive.) But the court later laid down the rule that when lands have been legally appropriated, they immediately become severed from the mass of public lands and that no subsequent law or proclamation would embrace them, although no reservation had been made of them. From that case, therefore, the following propositions are deduced: That where there

is a legal appropriation, reservation is unnecessary, but that the reservation in that case had been ratified by a subsequent act of Congress. And that the appropriation of the land in controversy in that case had been by authority of law, *i. e.*, power placed in the President by Congress by acts passed before and after the exertion of such power by the President.

Grisar v. *McDowell*, 6 Wall. 363, is another case relied upon. There had been a controversy between the City of San Francisco and the United States with reference to the extent of the pueblo lands belonging to the former, which had been determined by an order of court confirming the title of the City subject to the exception of lands "reserved or dedicated to public uses by the United States" and by the Act of Congress of March 8, 1866 (c. 13, 14 Stat. 4), relinquishing the claim of the United States subject to the reservation in the decree. Grisar, claiming title from the City, sought to recover possession of land which had been reserved by order of the President for public purposes and which was held by the defendant, an officer in the army of the United States, commanding the military department of California, who had entered upon the premises and held them under the order of the Secretary of War as part of the public property of the United States reserved for military purposes. In dealing with the right of the President to make the reservation the court first held that it made no difference whether or not the President possessed sufficient authority to make the reservation, because being a part of the public domain they were excluded from lands affirmed to the State under which the plaintiff claimed. In dealing with the power of the President the court said (6 Wall., p. 381):

"But further than this: from an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to

the United States to be reserved from sale and set apart for public uses."

In this connection the court cited acts of Congress recognizing the authority of the President, among others, the preëmption act of May 29, 1830, *supra*, in which it was provided that the right of preëmption should not extend to lands reserved from sale by act of Congress or by order of the President, and the act of September 4, 1841 (c. 16, 5 Stat. 453, 456), exempting lands reserved by any treaty, law or proclamation of the President, and of March 3, 1853 (c. 143, 10 Stat. 244, 246), excepting lands appropriated under authority of the act or reserved by competent authority, and held that this reservation by competent authority meant the authority of the President, and those acting under his direction. Furthermore, the court held that the action of the President in making the reservations had been indirectly approved by Congress by appropriating moneys for the construction of fortifications and other public works upon them, and that the reservations embraced lands upon which public buildings had been erected. The language of Mr. Justice Field above quoted as to the authority of the President has been frequently quoted in subsequent opinions of Attorneys General, and has been made the basis of opinions for broad authority in the President. It is to be observed, however, that in that case the law, recited in the opinion as giving the power of reservation, contained congressional authority directly to the President or competent authority, which it was held meant the President, and the statement was added that the action of the President had been approved by Congress appropriating money for fortifications and other public works.

The Government also relied upon a series of cases in this court which may be called the *Des Moines River Cases*, beginning with *Wolcott* v. *Des Moines Co.*, 5 Wall. 681, and followed by *Riley* v. *Welles*, 154 U. S. 578; *Williams* v.

Baker, 17 Wall. 144; *Homestead Co.* v. *Valley Railroad*, 17 Wall. 153; *Wolsey* v. *Chapman*, 101 U. S. 755; *Litchfield* v. *Webster County*, 101 U. S. 773; *Dubuque & Pac. R. R.* v. *Des Moines Valley R. R.*, 109 U. S. 329; *Bullard* v. *Des Moines &c. R. R.*, 122 U. S. 167; *United States* v. *Des Moines Nav. &c. Co.*, 142 U. S. 510. In the original case, 5 Wall. 681, it is shown that the cases grew out of an act of Congress of August 8, 1846 (c. 103, 9 Stat. 77), granting to the then Territory of Iowa for the purpose of aiding it in improving the navigation of the Des Moines River from its mouth to the Raccoon Fork, "one equal moiety, in alternate sections, of the public lands, in a strip five miles in width on each side of said river." This ambiguous description gave rise to the controversy which appeared from time to time in the cases mentioned and arose from the doubt whether the grant to Iowa included lands above the Raccoon Fork. Early in the year 1848 the Commissioner of the General Land Office decided that the grant extended beyond Raccoon Fork, but later in that year the President by proclamation ordered the sale of some of this land above the Fork in the following October. On June 16, 1849, however, the Secretary of the Treasury, having construed the grant to include the lands above the Fork, directed that they should be reserved from the sale. The control of the General Land Office having passed to the Secretary of the Interior, on April 6, 1850, he reversed the decision of the Secretary of the Treasury, but directed that the lands embraced within the State's selections should be reserved from sale. The matter was before two Presidents and their cabinets, with different results, and finally, on October 29, 1851, the Secretary of the Interior held that in view of the great conflict among executive officers of the Government and in view of the opinion of eminent jurists which had been presented to him in favor of the construction contended for by the State, he was willing to recognize the claim of the

State and approve the selections, without prejudice to the rights, if any there be, of other parties. The history of subsequent legislation, not necessary to now recite, is given in the opinion, and then the act of May 15, 1856 (c. 28, 11 Stat. 9), upon which the plaintiff relied was considered, in which was found the provision that "any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever," were reserved from the operation of the act. This was a grant made to the railroads which it was admitted covered the tract in controversy, unless excluded by the proviso. It was held that the lands had been reserved by competent authority, the court saying (5 Wall., p. 688):

"It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory. As we have seen, they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines River—first, by the Secretary of the Treasury, when the Land Department was under his supervision and control, and again by the Secretary of the Interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the President and Cabinet. Besides, if this power was not competent, which we think it was ever since the establishment of the Land Department, and which has been exercised down to the present time, the grant of 8th August, 1846, carried along with it, by necessary implication, not only the power, but the duty, of the Land Office to reserve from sale the lands embraced in the grant. Otherwise its object might be utterly defeated. Hence, immediately upon a grant being made by Congress for any of these public purposes to a State, notice is given by the commissioner of the land office to the registers and receivers to

stop all sales, either public or by private entry. Such notice was given the same day the grant was made, in 1856, for the benefit of these railroads. That there was a dispute existing as to the extent of the grant of 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of."

It is therefore apparent that this reservation was sanctioned, because it had become the duty of the officers, who were by law charged with the administration of the grants and required to give effect to them, to withhold the lands from sale and reserve them because of the doubt of the extent of the grant of 1846. In other words, if the lands had been granted to the State of Iowa, it could not possibly have been the intention of Congress to subject them to selection or grant under other laws, and this court said that the power to reserve them arose by necessary implication from the grant of 1846.

In *Riley* v. *Welles*, *supra*, involving a claim of title under the preëmption section of the act of September 4, 1841, to land covered by the withdrawal under the act of 1846, this court followed *Wolcott* v. *Des Moines Co.*, *supra*, and repeated its decision as to the effect of the reservation.

In *Williams* v. *Baker*, 17 Wall. 144, and *Homestead Co.* v. *Valley Railroad*, 17 Wall. 153, both involving title to lands claimed under the grant of 1856, as against titles founded on the 1846 act, as did the *Wolcott Case*, the court affirmed the validity of the reservation under the act of 1846, for the reason that the proviso in the act of 1856 prevented the railroad from acquiring the land.

In *Wolsey* v. *Chapman*, 101 U. S. 755, where the controversy was, whether the grant to the Territory of Iowa, by the act of September 4, 1841, *supra*, of the right to select a quantity of lands for internal improvement pur-

poses, excepting such as were or might be "reserved from sale by any law of Congress or proclamation of the President," permitted the selection of certain lands covered by the reservation in these cases, it was held (pp. 768–9):

"They were reserved also in consequence of the act of 1846. The proper executive department of the government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the State above the Raccoon Fork until the differences were settled, either by Congress or judicial decision. For that purpose an authoritative order was issued, directing the local land-officers to withhold all the disputed lands from sale. This withdrew the lands from private entry, and, as we held in *Riley* v. *Wells*, was sufficient to defeat a settlement for the purpose of preemption while the order was in force, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal.

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"The truth is, there can be no reservation of public lands from sale except by reason of some treaty, law, or authorized act of the Executive Department of the government."

Litchfield v. *Webster County, supra,* involved the question as to whether the title to the lands above the Fork vested in the State by the act of 1846, for purpose of taxation, and, affirming the previous cases, the court held that the action of the Executive Department of the General Government reserved the land above the Fork so that it "did not pass to the State when selected as school lands under the act of 1841, or as railroad lands by the grant of 1856, and were not open to preëmption entry," and the Executive order "simply retained the ownership in the United States."

The case of *Dubuque &c. R. R.* v. *Des Moines Valley*

R. R., supra, also involved a controversy as to whether title vested under the river or railroad grant, and the court held that the validity of the reservation was no longer an open question.

The history of the matter was restated in *Bullard* v. *Des Moines &c. R. R., supra*, it being made to appear especially that the order withdrawing the land was in effect during all the time up to the passage of the act of July 12, 1862 (c. 161, 12 Stat. 543), and that after the decision in the case of *Dubuque & Pacific R. R.* v. *Litchfield*, 23 Howard, 66, had determined that Congress had not by the act of 1846 granted the land above the Fork to Iowa, the Commissioner of the General Land Office by notice of May 18, 1860, continued the reservation, notwithstanding the decision just referred to. And it was held that the resolution of Congress of March 2, 1861 (12 Stat. 251), did not end the reservation and that claims inaugurated after that resolution and before the passage of the act of July 12, 1862 were subject to the reservation. The court said (122 U. S., p. 170):

"This court has decided in a number of cases, in regard to these lands, that this withdrawal operated to exclude from sale, purchase, or preëmption all the lands in controversy, and unless the case we are about to consider constitutes an exception, it has never been revoked.

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"During all this controversy there remained the order of the Department having control of the matter, withdrawing all the lands in dispute from public sale, settlement or preëmption. This withdrawal was held to be effectual against the grant made by Congress to the railroad companies in 1856, because that act contained the following proviso:

"'That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aid-

ing in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.'"

The court quoted the notice of the Commissioner of the General Land Office of May 18, 1860, that the land above the Fork "which has been reserved from sale heretofore on account of the claim of the State thereto, will continue reserved, for the time being, from sale or from location, by any species of script or warrants, notwithstanding the recent decision of the Supreme Court against the claim. This action is deemed necessary to afford time for Congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers holding under titles from the State, and to make such provision, by confirmation or adjustment of the claims of such settlers, as may appear to be right and proper." And the court said (p. 173):

"It will thus be seen that, notwithstanding the decision of the Supreme Court of the United States in the winter of 1860, the land office determined that the reservation of these lands should continue for the purpose of securing the very action by Congress which the State of Iowa was soliciting, and it is not disputed by counsel for the appellant in this case that this was a valid continuation of such reservation and that during its continuance the preemptions under which the plaintiff claims could not have been made. . . .

"We do not think the joint resolution had the effect to end the reservation of these lands from public entry. . . .

"This is not the way in which a reservation from sale or preëmption of public lands is removed. In almost

every instance, in which such a reservation is terminated, there has been a proclamation by the President that the lands are open for entry or sale, and in most instances they have first been offered for sale at public auction. It cannot be seen, from anything in the joint resolution, that Congress either considered the controversy ended or intended to remove the reservation instituted by the Department. Its immediate procedure at the next session to the full consideration of the whole subject shows that it had not ceased to deal with it; that the reason for this withdrawal or reservation continued as strongly as before, and it cannot be doubted that the subject was before Congress, as well as before its committees, and that the act of July 12, 1862, was, for the first time, a conclusion and end of the matter so far as Congress was concerned."

The last of the *Des Moines River Cases, United States* v. *Des Moines &c. Co., supra,* was a suit instituted by the United States to quiet its title to certain of the lands conveyed by the State of Iowa to the Navigation Company and others, claiming that the trust had not been performed, and, after reviewing the history of the matter and the previous cases at considerable length, the court again stated the effect of the reservation (142 U. S., p. 528):

"The validity of this reservation was sustained in the case of *Wolcott* v. *Des Moines Company,* 5 Wall. 681, decided at December term, 1866. In that case it was held that, even in the absence of a command to that effect in the statute, it was the duty of the officers of the Land Department, immediately upon a grant being made by Congress, to reserve from settlement and sale the lands within the grant; and that, if there was a dispute as to its extent, it was the duty to reserve all lands which, upon either construction, might become necessary to make good the purposes of the grant. This ruling as to the power

and duty of the officers of the Land Department has since been followed in many cases. *Bullard* v. *Des Moines & Fort Dodge Railroad*, 122 U. S. 167, and cases cited in the opinion."

In the case now before us Congress in the statutes referred to had expressly subjected these lands to the operation of the placer mining law and had authorized their exploration for oil and their location, entry and purchase as mineral lands. Congress had in this way exercised its power and manifested its will and such was the situation when the withdrawal in question was made. Deriving the aim of the Executive from the various documents to which we have referred it may be fairly deduced that the prevailing purpose (and that was the sole purpose so far as the lands here involved were concerned) in making the withdrawal was to anticipate that Congress, having the subject-matter brought to its attention, might and would provide a better and more economical system for the disposition of such public lands, and secondarily to preserve some of the oil lands in California as a basis of naval supply in the future, the latter purpose not at that time declared or recognized by Congress. For these purposes the President had no express authority from Congress; in fact, such is not claimed. The authority which may arise by implication, we think, must be limited to those purposes which Congress has itself recognized by either direct legislation or long continued acquiescence as public purposes for which such withdrawals could be made by the Executive. That the President might by virtue of his executive authority take action to preserve public property or in aid of the execution of the laws reserve tracts of land for definitely fixed public purposes, declared by Congress, such as military or Indian reservations, may be conceded; but we are unable to find sanction for the action here taken in withdrawing a large part of the public domain from the operation of the public land laws in the

power inherent in this office as created and defined by the Constitution or in any way conferred upon him by the legislation of Congress or in that long acquiescence in the exercise of authority sanctioned by Congress in such manner as to be the equivalent of a grant to the President.

The constitutional authority of the President of the United States (Art. II, §§ 1, 3), includes the executive power of the Nation and the duty to see that the laws are faithfully executed. "The President 'shall take care that the laws be faithfully executed.' Under this clause his duty is not limited to the enforcement of acts of Congress according to their express terms. It includes 'the rights and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.'" Cooley's Principles of Constitutional Law, p. 121; *In re Neagle*, 135 U. S. 1. The Constitution does not confer upon him any power to enact laws or to suspend or repeal such as the Congress enacts. *Kendall* v. *United States*, 12 Pet. 524, 613. The President's powers are defined by the Constitution of the United States, and the Government does not contend that he has any general authority in the disposition of the public land which the Constitution has committed to Congress, and freely concedes the general proposition as to the lack of authority in the President to deal with the laws otherwise than to see that they are faithfully executed.

As we have said, while this court has sustained certain withdrawals made by the Executive, in carrying out a policy for which the use of the public lands had been indicated by congressional legislation, and has sustained the right of withdrawal where conflicting grants had been made by Congress and additional legislation was needed to expressly declare the purpose of Congress, the court has refused to sustain withdrawals made by the Executive branch of the Government when in contravention of the

policy for the disposition of the lands declared in acts of Congress. In *Southern Pacific R. R.* v. *Bell*, 183 U. S. 675, it was held that the Secretary of the Interior had no authority to withdraw lands within the indemnity limits of a grant from sale or preëmption, when Congress had indicated its purpose that such lands might be taken up by settlers before the road had exercised its right of selection. In *Brandon* v. *Ard*, 211 U. S. 11, the conflict was between an attempted withdrawal in aid of a land grant and a homestead settlement three years later, and this court held that the withdrawal of the lands from sale or settlement prior to the definite location of the road, and before they were selected to supply deficiencies in place or granted limits, was without authority of law, and that the homestead settlement, under existing laws of Congress, must prevail over such attempted withdrawal. The same principle was declared and enforced in *Osborn* v. *Froyseth*, 216 U. S. 571.

In *Lockhart* v. *Johnson*, 181 U. S. 516, 520, Mr. Justice Peckham, speaking for the court, tersely stated the rule:

"Public lands belonging to the United States, for whose sale or other disposition Congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by Congressional authority or by an executive withdrawal under such authority, either expressed or implied."

We think the rule thus stated is the result of the previous decisions of this court, when properly construed, and is consistent with the authority over the public lands given to Congress under the Constitution, and properly rests with the executive power to deal with such lands by way of withdrawal upon the express or implied authority of the Congress. In other words, it may be fairly said that a given withdrawal must have been expressly authorized by Congress or there must be that clear implication of

congressional authority which is equivalent to express authority; and when such authority is wanting there can be no executive withdrawal of lands from the operation of an act of Congress which would otherwise control.

The message of the President of January 14, 1910, indicates that he doubted his authority to make such withdrawals. In that message, after referring to the lax manner in which the Government had been disposing of the public lands under the mining and other acts and the need of properly classifying lands and revising the mode of disposing of the oil and other deposits in them with greater regard to the public interests, but without hindering development, he said:

"The power of the Secretary of the Interior to withdraw from the operation of existing statutes tracts of land, the disposition of which under such statutes would be detrimental to the public interest, is not clear or satisfactory. This power has been exercised in the interest of the public with the hope that Congress might affirm the action of the executive by laws adapted to the new conditions. Unfortunately, Congress has not thus far fully acted on the recommendations of the Executive, and the question as to what the Executive is to do is, under the circumstances, full of difficulty. It seems to me that it is the duty of Congress now by statute to validate the withdrawals that have been made by the Secretary of the Interior and the President, and to authorize the Secretary of the Interior temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet conditions or emergencies as they arise. . . .

"I earnestly recommend that all the suggestions which he [the Secretary of the Interior] has made with respect to these lands shall be embodied in statutes, and, especially, that the withdrawals already made shall be validated so far as necessary and that the authority of the Secretary of the Interior to withdraw lands for the pur-

pose of submitting recommendations as to future dispositions of them where new legislation is needed shall be made complete and unquestioned."

After the receipt of this message a considerable number of bills being before the Senate and House of Representatives upon the subject, the matter was taken up and in the House of Representatives a bill was passed providing for withdrawals under certain conditions and providing that "All withdrawals heretofore made and now existing are hereby ratified and confirmed as if originally made under this act." The bill in that form did not pass the Senate. It was, however, adopted in a materially modified form in the act of June 25, 1910 (c. 421, 36 Stat. 847); which reads:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

"SEC. 2. That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: Provided, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: And provided further, That this act shall not be construed as a

recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this Act: And provided further, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made. And provided further, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado or Wyoming, except by Act of Congress.

"SEC. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals."

The reports of the Senate Committee show that its members were divided as to the authority of the President to make the withdrawal order in question. The majority report stated that in any view the President had the authority without additional legislation; the minority reached the opposite conclusion.

It is to be noted that the act of June 25, 1910, conferred specific authority for the future upon the President, but gave no approval to the withdrawal of September 27, 1909, containing instead an express provision that the act should not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after the withdrawal of such lands made prior to the passage of the act. While the order of

September 27, 1909, withdrew the lands from all form of settlement, location, sale, entry or disposal under the mineral or nonmineral public land laws, the act of June 25, 1910, excepts from the power of withdrawal conferred upon the President lands embraced in any lawful homestead or desert-land entry theretofore made or upon which any valid settlement had been made and was being maintained and perfected pursuant to law. Furthermore, the act provides that the rights of a bona fide occupant or claimant of oil or gas bearing lands complying with the provisions of the statute relating thereto shall not be affected or impaired by a subsequent order of withdrawal. In this statute there certainly is no congressional assent to the executive withdrawal of September 27, 1909. The validation or ratification asked in the President's message was withheld and only restricted authority for the future was granted in the act of June 25, 1910; not only so, but the rights of the locators involved in this case were preserved to whatever extent they existed in the absence of a ratification of the withdrawal. When express ratification is thus asked and refused, in our view no power by implication can be fairly inferred. *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, 317; *Durousseau* v. *The United States*, 6 Cranch, 307, 318; *Eyster* v. *Centennial Board of Finance*, 94 U. S. 500, 503. The act of June 25, 1910, neither ratified the withdrawal of September 27, 1909, nor empowered the President so to do by his order of July 2, 1910.

The Government of the United States is one of limited powers. The three coördinate branches of the Government are vested with certain authority, definite and limited, in the Constitution. This principle has often been enforced in decisions of this court, and the apt words of Mr. Justice Miller, speaking for the court in *Kilbourn* v. *Thompson*, 103 U. S. 168, 190, have been more than once quoted with approval:

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or National, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

These principles ought not to be departed from in the judicial determinations of this court, and their enforcement is essential to the administration of the Government, as created and defined by the Constitution. The grant of authority to the Executive, as to other departments of the Government, ought not to be amplified by judicial decisions. The Constitution is the legitimate source of authority of all who exercise power under its sanction, and its provisions are equally binding upon every officer of the Government, from the highest to the lowest. It is one of the great functions of this court to keep, so far as judicial decisions can subserve that purpose, each branch of the Government within the sphere of its legitimate action, and to prevent encroachments of one branch upon the authority of another.

In our opinion, the action of the Executive Department in this case, originating in the expressed view of a subordinate official of the Interior Department as to the desirability of a different system of public land disposal than that contained in the lawful enactments of Congress,

did not justify the President in withdrawing this large body of land from the operation of the law and virtually suspending, as he necessarily did, the operation of that law, at least until a different view expressed by him could be considered by the Congress. This conclusion is reinforced in this particular instance by the refusal of Congress to ratify the action of the President, and the enactment of a new statute authorizing the disposition of the public lands by a method essentially different from that proposed by the Executive.

For the reasons expressed, we are constrained to dissent from the opinion and judgment in this case.

UNITED STATES *v.* UNITED STATES FIDELITY & GUARANTY COMPANY.

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

No. 125. Argued January 15, 1915.—Decided February 23, 1915.

Under the terms of the contract involved in this case for a completed building on which partial payments were to be made as work progressed, but which was destroyed by fire during construction and never rebuilt by the contractor who had received several payments on account and who accepted notice of default and abandoned the contract, *held* that:

Where the Government relets a contract with substantial differences, the liability of the surety is not released from all obligation nor is his liability measured by the difference between the two contracts, but his liability is measured by the actual loss sustained by the Government, in this case represented by the partial payments made as work progressed and for which it received nothing in return.

The liability of the surety became fixed on occurrence of default and was not released by failure of the Government to have the same kind of a building erected in place of the one not delivered by the contractor.

The contractor's right under the contract to retain partial payments was conditioned on his subsequent fulfilment of the contract and when he wholly defaulted and gave nothing in return, he was obligated to repay the amounts received.

Under the contract in this case, the Government, while authorized to complete the work at the expense of the contractor, was not confined to that remedy, but could recover from the contractor or the surety the actual damages sustained.

The rule that a party suffering loss from breach of contract must do what a reasonable man would do to mitigate the loss does not apply where, as in this case, a fixed loss has been sustained that cannot be mitigated.

Under Rev. Stat., §§ 649, 700, and 1011 as amended by act of February 18, 1875, findings of fact have the same effect as the verdict of a jury, and this court does not revise them but merely determines whether they support the judgment.

Delay on the part of the Government in pressing its claim against a contractor who has accepted partial payments, knowing that he was not entitled thereto, does not amount to a waiver of interest.

An exception furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court.

The weight of authority in England is adverse to the recovery of interest from the surety in addition to the penalty of the bond, but that rule has not invariably been followed in this country.

A surety, if answerable at all for interest beyond the amount of the penalty of the bond, can only be held for such interest as accrues from unjustly withholding payment after notice of default of the principal. *United States* v. *Hills*, 4 Cliff. 618, approved.

194 Fed. Rep. 611, reversed.

THIS action was brought by the United States in the Circuit Court for the Southern District of California against Augustus W. Boggs and the United States Fidelity & Guaranty Company of Baltimore, Maryland (which may be called, for convenience, the "Guaranty Company"), to recover damages for the failure of Boggs to perform his contract to construct for plaintiff a stone

mess-hall and kitchen at the Rice Station Indian School in Arizona, for the performance of which the Guaranty Company was his surety upon a bond in the penal sum of $6,500. Upon plaintiff's complaint and the answer of the Guaranty Company (Boggs having failed to appear and his default having been entered), the case came on for trial before the Circuit Court, trial by jury being formally waived under § 649, Rev. Stat. Elaborate findings of fact were made, the substance of which is as follows: By the contract, which was in writing and dated February 23, 1905, Boggs agreed to furnish all materials and perform all work required for the construction and completion of the building in strict and full accordance with the requirements of the plans and specifications which were annexed; covenanting that the entire work should be completed and turned over to the United States on or before September 1; and that (Article 4) if he failed to complete the work in accordance with the agreement within that time "the said party of the first part [the United States] may withhold all payments for work in place until final completion and acceptance of same, and is authorized and empowered, after eight days' notice thereof, in writing, to the party of the second part, and the said party of the second part having failed to take such action within the said eight days as will, in the judgment of the party of the first part, remedy the default for which said notice was given, to take possession of the said work in whole or in part and of all machinery and tools employed thereon and all materials belonging to the said party of the second part delivered on the site, and, at the expense of said party of the second part, to complete or have completed the said work, and to supply or have supplied the labor, materials, and tools of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event the said party of the second part and

his sureties of the bond to be given for the faithful performance of this agreement shall be further liable for any damages incurred through such default and any and all other breaches of this contract." By Article 9 the United States agreed to pay to the contractor on the presentation of proper receipts or vouchers the sum of $12,709, "in consideration of the herein recited covenants and agreements made by the party of the second part, as follows: Eighty (80) per centum of the value of the work executed and actually in place to the satisfaction of the party of the first part at the expiration of each thirty (30) days during the progress of the work, the amount of each payment to be computed upon the actual amount of labor and materials expended during the said period of thirty (30) days for which partial payment is to be made, (the said value to be ascertained by the party of the first part); and the balance thereof will be retained until the completion of the entire work, and the approval and acceptance of the same by the party of the first part, which amount shall be forfeited by the said party of the second part in the event of the non-fulfillment of this contract; it being expressly covenanted and agreed that said forfeiture shall not relieve the party of the second part from liability to the party of the first part for any and all damages sustained by reason of any breach of this contract." Attached to the contract as a part of the specifications were certain "general conditions" which (*inter alia*) required the contractor to be responsible for all damages to the building, whether from fire or other causes, during the prosecution of the work and until its acceptance, and declared that partial payments were not to be considered as an acceptance of any work or material. On or about April 12, Boggs commenced operations and furnished certain materials and did certain work, but he did not at any time complete the building in accordance with the contract, and on the contrary wilfully, intentionally, and

fraudulently disregarded the terms of the contract from the beginning of his operations under it. On June 10 plaintiff paid him $4,356.24 on account, and on July 21 the further sum of $3,539.16, both payments being "pursuant to the terms of said contract," and aggregating $7,895.40, no part of which has been repaid to plaintiff. He not only failed to complete the work on or before the first of September, but failed after that date to take such action as would remedy his default. On or about October 27 plaintiff rejected the work and materials and the building as offered for acceptance by Boggs. On November 4, while the structure was still in his possession, it was completely destroyed by fire. Thereafter he did not in accordance with the provisions of the contract commence the construction or reconstruction of the building, and anything he did thereafter was outside of the contract and without plaintiff's consent. On or about December 28, by reason of his failure and refusal to perform the terms of the contract, or to complete and turn over the building as therein required, or to remedy his default, plaintiff took possession of the site, and notified Boggs and his representatives to vacate the premises and leave the Indian Reservation, which they immediately did. At the same time plaintiff seized and confiscated certain building materials, tools, and implements, of the value of $2,418.58, then upon the premises and belonging to Boggs. It is further found that Boggs wilfully, intentionally, and fraudulently failed, neglected, and refused to erect a structure in accordance with the plans and specifications that were a part of his contract, although plaintiff performed all conditions and obligations on its part; and there are specific findings that plaintiff did not change or abrogate the terms of the contract in any particular, nor extend the time of performance, nor consent to the failure and delay on the part of Boggs. In December, 1906, the United States advertised for the construc-

tion of a new mess-hall and kitchen upon the same site, and in January, 1907, entered into a written contract with one Owen for the construction of such building for the sum of $16,600, in lieu of the building that had been agreed to be built by Boggs; but the contract with Owen was different in substantial respects from that made between the plaintiff and Boggs, and the building actually erected by Owen was likewise different; $1,200 of the contract price agreed to be paid and actually paid to him had reference to work wholly outside of the work provided for in the Boggs contract, and $500 of the contract price agreed to be paid and actually paid to Owen was for work and materials in excess of what was included in the Boggs contract. Moreover, the cost of labor and building supplies had materially increased between the time of Boggs' default and the time of making the new agreement. Hence, the trial court found that a comparison between the two contracts furnished no basis for estimating plaintiff's damages.

Upon these findings judgment was rendered in favor of the United States for the amount of the two sums advanced to Boggs during the progress of the work ($7,895.40), from which, however, $2,418.58 was deducted as a set-off and counter-claim in favor of defendants for the value of the materials confiscated. Interest was allowed to plaintiff at 7% upon the amount of the "progress payments" from September 1, 1905, until the date of judgment, and interest at the same rate was allowed to defendants upon the amount of the offset from December 28, 1905, the difference, which plaintiff was held entitled to recover, being $7,403.09; but the recovery against the Guaranty Company was limited to $6,500, besides costs.

Upon cross-writs of error this judgment was reviewed by the Circuit Court of Appeals, with the result that it was reversed for error assigned by the Guaranty Company, and the cause remanded with directions to enter

judgment in its favor on the findings. 194 Fed. Rep. 611. The present writ of error was then sued out.

The Solicitor General, with whom *Mr. W. C. Herron* was on the brief, for the United States:

The surety was not released by the changes in the relet contract, but was liable to the extent, at least, of the progress payments. *United States* v. *Axman*, 234 U. S. 36; *S. C.*, *American Bonding Co.* v. *United States*, 167 Fed. Rep. 910, distinguished. As under the contract in that case the Government was limited in its recovery to such sum as was expended by it in completing the contract, and the decision went against it because of its failure to observe an express stipulation relating to the determination of damages.

In this case the contract expressly provided that both the contractor and the surety should be liable for any damages incurred through the default and any other breaches of the contract.

The doctrine that a surety is released by material changes made without his consent has no application to changes made in a relet contract after a default on the original.

Because of insolvency of contractor, the Government waives assignment of error relating to refusal of lower court to allow damages on amounts of excess cost in relet contract.

The Government was damaged to full amount of the progress payments, which it is entitled to recover.

The other defenses urged by the surety in the court below are without merit. They were not specially pleaded, and defense of release must be specially pleaded by the surety, and the burden of proof is upon him to establish such defense. *Randle* v. *Barnard*, 99 Fed. Rep. 348, 350; *Howard County* v. *Baker*, 119 Missouri, 397, 407; *Sachs* v. *Am. Surety Co.*, 72 N. Y. App. Div. 60, 66.

The same rule obtains in California, where the case at bar was tried. Code Civ. Proc., 1907, § 437; *Piercy* v. *Sabin*, 10 California, 22, 27; *Bull* v. *Coe*, 77 California, 54, 62.

It is not anywhere pleaded or proved that the surety was damaged in any way.

While this was immaterial under the old law relating to the voluntary surety, the rule of *strictissimi juris* has been relaxed as to professional bonding companies. *Atlantic Trust Co.* v. *Laurinburg*, 163 Fed. Rep. 690, 695; *Hill* v. *Am. Surety Co.*, 200 U. S. 197, 202; *U. S. Fidelity Co.* v. *United States*, 178 Fed. Rep. 692.

None of these defenses of the surety has any merit.

The progress payments are governed by Article 9 of the contract, and the evidence shows a substantial compliance with the contract.

The claim of the surety that it was released because of the Government's failure properly to inspect the work during its progress is also without merit. *United States* v. *Kirkpatrick*, 9 Wheat. 720, 736; *Dox* v. *Postmaster General*, 1 Pet. 318, 325.

The United States is entitled to interest on the penalty of the bond from September 1, 1905, the date of default, or at least from January 16, 1906, when the surety was notified of such default. *Probate Judge* v. *Heydock*, 8 N. H. 491, 494; *Perit* v. *Wallis*, 2 Dall. 252; *United States* v. *Quinn*, 122 Fed. Rep. 65.

Mr. J. Kemp Bartlett for defendants in error:

The improper payment by the United States to the contractor released the surety. *Fidelity Co.* v. *Agnew*, 152 Fed. Rep. 955; *Shelton* v. *Am. Surety Co.*, 131 Fed. Rep. 210; *Shelton* v. *Am. Surety Co.*, 127 Fed. Rep. 736; *National Surety Co.* v. *Long*, 125 Fed. Rep. 887; *Commissioners* v. *Branham*, 57 Fed. Rep. 179; *Glenn County* v. *Jones*, 146 California, 518; *Kiessig* v. *Allspaugh*, 91

California, 231; *Bragg* v. *Shain*, 49 California, 131; *Queal* v. *Stradley*, 90 N. W. Rep. 588; *Electric Appliance Co.* v. *U. S. Fidelity Co.*, 85 N. W. Rep. 648; *Backus* v. *Archer*, 67 N. W. Rep. 912; *St. Mary's College* v. *Meagher*, 11 S. W. Rep. 618; *First Nat. Bk.* v. *Fidelity Co.*, 40 So. Rep. 415; *Gato* v. *Warrington*, 19 So. Rep. 883.

Plaintiff in error is concluded by its payment to the contractor by the certificates authorizing the same, and by its permitting the completion of the building. 16 Cyc. 721-805; *United States* v. *Hurley*, 182 Fed. Rep. 776; *Quinn* v. *New York*, 45 N. Y. Supp. 7; *Katz* v. *Bedford*, 77 California, 319; *Toppan* v. *Railroad Co.*, 24 Fed. Cas. 56, 59, Case No. 14099.

Disregard of the provisions relating to the time of payment releases the surety. *Commissioners* v. *Branham*, 57 Fed. Rep. 181; *Bank* v. *Fidelity Co.*, 40 So. Rep. 418; *Shelton* v. *Am. Surety Co.*, 131 Fed. Rep. 210; *Coughran* v. *Bigelow*, 164 U. S. 301.

Requiring and permitting the contractor to retain possession and reconstruct the building after rejection constituted a departure from the contract, abrogated the same, waived the contractor's previous breaches, extended his time for performance, contributed to loss by fire, surrendered a valuable security, enlarged the surety's risk and discharged the bond. *United States* v. *De Visser*, 10 Fed. Rep. 642, 657; *Earnshaw* v. *Boyer*, 60 Fed. Rep. 528; *United States* v. *Gleason*, 175 U. S. 588; *Mundy* v. *Stevens*, 61 Fed. Rep. 77, 83; *Roberts* v. *Donovan*, 70 California, 108; *Aetna Ins. Co.* v. *Fowler*, 66 N. W. Rep. 470.

The Government prevented the contractor, without notice and without cause, from completing the work; and the bond was thereby discharged. *Mundy* v. *Stevens*, 61 Fed. Rep. 77, 82; *Fidelity Co.* v. *United States*, 137 Fed. Rep. 886; *Clark* v. *Dalziel*, 3 Cal. App. 121; *Clark* v. *United States*, 6 Wall. 543; *United States* v. *Smith*, 94 U. S. 214.

The making of a new and materially different contract after the lapse of more than a year from the date of the ejection of Boggs, the original contractor, from the reservation, with changed conditions in the building market and for a substantially different building, to be constructed according to plans and specifications differing in more than two hundred respects from the plans and specifications under the Boggs contract, furnishes no basis of estimating the damages of the plaintiff in error. *United States* v. *Axman*, 234 U. S. 36; 3 Page on Contracts, § 1580; *Lonergan* v. *Waldo*, 179 Massachusetts, 135; *United States* v. *Freel*, 92 Fed. Rep. 299; *S. C.*, 99 Fed. Rep. 237; *S. C.*, 186 U. S. 309; *Alcatraz Ass'n* v. *Fidelity Co.*, 3 Cal. App. 338.

As no measure of damage is shown, and none can be shown, no recovery is possible. *United States* v. *Axman*, 234 U. S. 36; *Am. Surety Co.* v. *Woods*, 105 Fed. Rep. 741; *Am. Bonding Co.* v. *Gibson Co.*, 127 Fed. Rep. 671; *United States* v. *Freel*, 186 U. S. 309; *Miller* v. *Stewart*, 9 Wheat. 680; *Reese* v. *United States*, 9 Wall. 13; *United States* v. *Stone, Gravel Co.*, 177 Fed. Rep. 321; *Chesapeake Transit Co.* v. *Walker*, 158 Fed. Rep. 850; *United States* v. *Grosjean*, 184 Fed. Rep. 593.

The retention by the Government of the contractor's materials for more than a year, and surrender of them to the new contractor at less than half price, released the surety. *Montgomery* v. *Sayre*, 100 California, 182, 185.

The Government's failure to notify surety discharged the bond. *United States* v. *Freel*, 186 U. S. 309; *United States* v. *McIntyre*, 111 Fed. Rep. 590, 597; *Mundy* v. *Stevens*, 61 Fed. Rep. 77, 85; *Tuohy* v. *Woods*, 122 California, 665, 667; *Alcatraz Ass'n* v. *U. S. Fidelity Co.*, 3 Cal. App. 338, 342; *Moses* v. *United States*, 116 Fed. Rep. 526, 529; *United States* v. *Smith*, 94 U. S. 214; *Clark* v. *United States*, 6 Wall. 543; *Ætna Ins. Co.* v. *Fowler*, 66 N. W. Rep. 470; *Roberts* v. *Donovan*, 70 California, 108.

The contractor's offer to perform released the surety under the California Civil Code. *Daneri* v. *Grazzola*, 139 California, 416; Cal. Civil Code, § 2839.

The Government's claim for interest is without merit. *Stephens* v. *Bridge Co.*, 139 Fed. Rep. 248; *Krasilnikoff* v. *Dundon*, 8 Cal. App. 406, 411, 412; Cal. Civil Code, § 1504; *Wadleigh* v. *Phelps*, 149 California, 627, 642; *Ferrea* v. *Tubbs*, 125 California, 587, 690; *United States* v. *Quinn*, 122 Fed. Rep. 65; *United States* v. *Sanborn*, 135 U. S. 271; *Redfield* v. *Iron Co.*, 110 U. S. 174; *Redfield* v. *Bartels*, 139 U. S. 694.

The sureties' defenses were well pleaded.

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

The Circuit Court of Appeals held, in substance, that because after the default of Boggs in the performance of his contract the Government waited more than a year before entering into a new contract, during which time there was a material change in the cost of labor and building supplies, and because the new contract then made between the Government and Owen was different in substantial particulars from that upon which the Guaranty Company became surety, the second contract furnished no proper basis for estimating the damages sustained by plaintiff by reason of the breach of the first, and therefore the Guaranty Company was wholly released from liability.

For present purposes we assume the entire correctness of the court's view that because of the substantial differences between the work that was the subject of the Boggs contract and the work that was afterwards let to Owen, the latter contract furnished no proper basis for ascertaining the damages accruing to the Government by reason of the default of Boggs. The court rested its decision

to this effect upon the language of Article 4 of the Boggs agreement and its own previous decision in *American Bonding Co.* v. *United States,* 167 Fed. Rep. 910, since affirmed by this court in *United States* v. *Axman,* 234 U. S. 36.

But the question whether, by the letting of the Owen contract, or by whatever else was done or omitted by the Government about rebuilding after the default of Boggs, the responsibility of his surety was wholly discharged, is a very different question, not concluded by the decision in the case cited. There the Government, upon Axman's default, "annulled" his contract pursuant to its fourth paragraph; that is, undertook to complete it in his stead and charge him with the excess cost. As appears from the reports of the case (167 Fed. Rep. 915; 234 U. S. 42, 43), it was "not a suit to recover generally whatever damages the United States would have sustained had Axman abandoned his contract, but a suit for damages under the express stipulations of the contract;" that is to say, under its fourth paragraph. No other question was considered or decided.

In the present case, Boggs wholly failed to construct the building called for by his contract, either within the time prescribed or at any time. His work and materials, and the building as he offered it for acceptance, were rejected by the Government, and thereafter, while remaining in his possession, the structure was completely destroyed by fire. He then took no steps to construct or reconstruct the building in accordance with the contract, but continued to wilfully disregard its obligations, so that after waiting for an additional month and more the Government took possession of the site and required him and his representatives to vacate the premises, which they immediately did. His default was complete, and upon the findings it cannot be deemed to have resulted from anything done or omitted by the Government. Nor did the Government receive

anything of value from him or as a result of his work, except the building materials, tools, and implements that were confiscated and for which allowance was made in the judgment. Upon this state of facts, the Guaranty Company's liability clearly became fixed upon the occurrence of the default; and it was not released by the failure of the Government to have the same work completed in accordance with Article 4, unless by the fair meaning of the agreement the Government was obliged to rebuild or at least was excluded from recovering damages upon any other basis than a completion of the building, as permitted by that Article. For it is plain, we think, that the making of the new contract cannot be regarded as an alteration of the Boggs contract to the exoneration of his surety. The very fact that the differences were so material as to exclude the Owen contract from consideration as a thing done by the Government under the Boggs contract, leaves it without any relation to the rights of the present parties. Their rights and liabilities between themselves, being already fixed by the complete breach of the Boggs agreement, were not to be affected by any subsequent and independent transaction between the Government and third parties.

Is the Government, then, remediless against the Guaranty Company for the default of its principal? The contract was entire and indivisible; a completed building was the thing bargained for; the partial payments were not to be considered as an acceptance of any work or material; they were to be "eighty per centum of the value of the work executed, . . . the amount of each payment to be computed upon the actual amount of labor and materials expended"; the balance was to be "retained until the completion of the entire work," and forfeited in the event of non-fulfillment of the contract, but such forfeiture was not to relieve the contractor from liability for any and all damages by reason of any breach of the contract. Aside

from the particular effect of Article 4, which will be considered presently, the true intent and meaning are plain: the "progress payments" were not to be treated as payments for parts of a building, but as partial payments advanced on account of a building to be completed thereafter as agreed. The contractor's right to retain them was conditioned upon his subsequent fulfillment of the contract. And when he wholly defaulted, and in effect abandoned the contract, the most direct and immediate loss sustained by the Government was the moneys it had paid him on account, and for which he had given nothing in return. Conceding that there was not, technically, a failure of consideration, because his promise and not its performance was in strictness the consideration (*United & Globe Rubber Mfg. Co.* v. *Conard*, 80 N. J. L. 286, 293), still the substance of the matter is the same, so far as concerns the measure of the detriment to the promisee.

The general rule, that a contract for the complete construction of a building for an entire price, payable in instalments as the work progresses, is an entire contract, and that a wilful refusal by the contractor to complete the building entitles the owner to a return of the instalments paid, has been declared by the state courts in a number of cases. *School Trustees* v. *Bennett*, 27 N. J. L. 513, 517; 72 Am. Dec. 373, 374; *Tompkins* v. *Dudley*, 25 N. Y. 272; 82 Am. Dec. 349; *Bartlett* v. *Bisbey*, 27 Tex. Civ. App. 405, 408; 66 S. W. Rep. 70; and cases cited. This court, in a case that has been often cited and followed, where a government contractor, without fault of his own, was prevented from performing his contract owing to the abandonment of the project, held that he was entitled to recover from the United States what he had expended towards performance (less the value of his materials on hand), although he failed to establish that there would have been any profits. *United States* v. *Behan*, 110 U. S.

338, 344. And see *Holt* v. *United Security Life Ins. Co.*, 76 N. J. L. 585, 597.

We do not think Article 4 can properly be so construed as to restrict the Government to the remedy there indicated in the event of default by the contractor, or to exclude recovery of the actual damages directly attributable to such default if, in the reasonable exercise of its rights, the Government determines not to complete the building. In the language of the Article, the Government is "authorized and empowered"—not "obliged"—to complete the work at the expense of the contractor; "*in which event*" the contractor and his sureties shall be "*further* liable for *any* damages incurred through such default and *any and all other breaches* of this contract." The phraseology indicates a purpose to give to the Government a right additional to those it would otherwise have; the stipulation is made for its benefit, and, being optional in form, cannot be construed into a covenant in favor of the defaulting contractor or his surety. Even in case the option is exercised, the language quoted leaves contractor and surety liable for other damages; *a fortiori*, the intent is to preserve their liability in case the option is not exercised.

We have not overlooked the familiar rule that a party suffering loss from breach of contract ought to do what a reasonable man would to mitigate his loss. *Wicker* v. *Hoppock*, 6 Wall. 94, 99; *Warren* v. *Stoddart*, 105 U. S. 224, 229. But there is nothing in the facts as found to call for the application of this rule; for there is nothing to show that the Government acted unreasonably in not exercising its option to rebuild under Article 4. Nor does it appear that the loss would probably have been lessened by rebuilding; the "progress payments" would of course have remained as a part of the loss, in addition to the cost of new construction.

In our opinion, therefore, the Court of Appeals erred

in holding that, because of the failure of the Government to complete Boggs' agreement in accordance with Article 4, the surety was released.

The Guaranty Company insists, however, that there are other grounds upon which the decision in its favor may be sustained: that the representatives of the Government were grossly negligent in making advance payments to Boggs, in view of the supposed fact that the building contract was then being openly and flagrantly violated, and the defects in the work were conspicuously evident; that the Government is concluded by the fact of making these payments, or, if not, then by its alleged disregard of the provisions of the contract relating to the time of making them; and that in these and other respects the Government departed from the contract, waived breaches by the contractor, extended his time for performance, surrendered valuable security, and enlarged the surety's risk, thereby releasing it from liability. Assuming these defences were properly pleaded, we still need spend no time upon them, since the argument made here to support them is based, not upon the findings, but upon a general review of the evidence and a series of inferences drawn from it that are inconsistent with the facts as found by the trial court. The findings have the same effect as the verdict of a jury, and this court does not revise them, but merely determines whether they support the judgment. Rev. Stat., §§ 649, 700, 1011 (amended by Act of February 18, 1875, c. 80, § 1, 18 Stat. 318); *Norris* v. *Jackson*, 9 Wall. 125, 128; *St. Louis* v. *Ferry Co.*, 11 Wall. 423, 428; *Dickinson* v. *Planters' Bank*, 16 Wall. 250, 257; *Insurance Co.* v. *Folsom*, 18 Wall. 237, 248; *British Queen Mining Co.* v. *Baker Silver Mining Co.*, 139 U. S. 222.

It results, from what has been said, that the judgment of the Circuit Court of Appeals discharging the Guaranty Company from liability must be reversed. And we next consider what judgment ought to have been rendered by

that court upon the record and bill of exceptions brought up from the trial court, in view of the assignments and cross-assignments of error. *Baker* v. *Warner*, 231 U. S. 588, 593; *Baer Bros.* v. *Denver & R. G. R. R.*, 233 U. S. 479, 490; *Fort Scott* v. *Hickman*, 112 U. S. 150, 164, 165; *Allen* v. *St. Louis Bank*, 120 U. S. 20, 30, 40; *Cleveland Rolling Mill* v. *Rhodes*, 121 U. S. 255, 264.

In addition to the questions already disposed of, it is contended in behalf of the Guaranty Company that the Government's claim for interest is without merit and ought to have been overruled. Interest was allowed upon the advance payments, not from the respective dates upon which they were made but from the date when by the terms of the contract the building ought to have been completely finished. In view of the facts, we think there was here no error. The findings make it clear that Boggs not only wilfully and persistently but fraudulently departed from the requirements of his contract, and refused to perform its obligations. He therefore accepted the money well knowing that he had no just right to it; and certainly when the time fixed for complete performance expired, without any attempt on his part to perform it, then, if not sooner, his obligation to return the money to the Government was clear, and he was not under the circumstances entitled to await a demand from the Government before repaying it. The suggestion that the Government has waived interest by delay in pressing its claim is untenable. The cases cited under this head (*Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174; *United States* v. *Sanborn*, 135 U. S. 271, 281; *Redfield* v. *Bartels*, 139 U. S. 694, 702), are plainly distinguishable.

On the other hand, the Government insists that it is entitled to recover as against the Guaranty Company, in addition to the penal sum named in the bond, interest thereon from September 1, 1905, the date of Boggs' default, or at least from January 16, 1906, when it is said

the surety was notified of the default. We are referred to nothing, and have observed nothing, in the findings to the effect that such notice was given to the surety at or about the date mentioned. The action was commenced more than two years thereafter. But, aside from this, the only exception taken in the trial court to furnish support for the present contention was: "To the failure of said court to . . . decide that plaintiff is entitled to interest on the sum of $6,500 from the first day of September, 1905, and to the failure of the court to enter judgment against defendant for such interest." We do not think this is sufficient to attribute error to the trial court as for overruling a claim for interest on the penalty of the bond from the time of demand made upon the surety, or notice to it of the principal's default. No such point was raised. The claim that was made and overruled was for interest from the time of the default, irrespective of notice to the surety; and that presents a very different question of law.

The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court. *Beaver* v. *Taylor*, 93 U. S. 46, 55; *Robinson & Co.* v. *Belt*, 187 U. S. 41, 50; *Addis* v. *Rushmore*, 74 N. J. L. 649, 651; *Holt* v. *United Security Life Ins. Co.*, 76 N. J. L. 585, 593. And the practice respecting exceptions in the Federal courts is unaffected by the Conformity Act, § 914, Rev. Stat. *Chateaugay Iron Co., Petitioner*, 128 U. S. 544, 553; *St. Clair* v. *United States*, 154 U. S. 134, 153.

We merely consider, therefore, whether (where the actual damages exceed the amount of the penalty), the

United States is entitled, as against the surety, to interest upon the penal sum from the time of the principal's default, in the absence of notice of the default given to the surety, or any demand made upon it. There has been much contrariety of opinion upon the question whether, in any case, the obligee in a penal bond can recover interest in addition to the penalty. The weight of authority in England is adverse to the recovery. 1 Wms. Saunders, 58; *note; White* v. *Sealy*, 1 Doug. 49; *Wilde* v. *Clarkson*, 6 Term. Rep. 303 (disapproving *Ld. Lonsdale* v. *Church*, 2 Term Rep. 388); *Tew* v. *Winterton*, 3 Bro. C. C. 489; 29 Eng. Reprint, 660, 663, *note*. In this country the tendency of the decisions in the state courts seems to be in favor of the allowance of such interest. *Perit* v. *Wallis* (Pa. Sup. Ct.), 2 Dall. 252, 255; *Williams* v. *Willson*, 1 Vermont, 266, 273; *Judge of Probate* v. *Heydock*, 8 N. H. 491, 494; *Wyman* v. *Robinson*, 73 Maine, 384, 387; *Carter* v. *Thorn*, 18 B. Mon. (Ky.) 613, 619. The bond in suit appears to have been made in California, but the contract was to be performed upon a Government reservation within what was then the Territory of Arizona. (See *Scotland County* v. *Hill*, 132 U. S. 107, 117.) We are referred to nothing in the law of that State or Territory indicating a local rule. In this court, although the question seems not to have frequently arisen, the English rule has usually but not invariably been followed. *McGill* v. *Bank of United States*, 12 Wheat. 511, 515; *Farrar* v. *United States*, 5 Pet. 373, 385; *Ives* v. *Merchants' Bank*, 12 How. 159, 164, 165; *United States* v. *Broadhead*, 127 U. S. 212.

In the state of the decisions, we may safely apply the rule followed by Mr. Justice Clifford in a case at the circuit, and we need go no further in order to overrule the contention raised by the Government at the trial of the present case: "Sureties, if answerable at all for interest beyond the amount of the penalty of the bond given by their principal, can only be held for such an amount as

accrued from their own default in unjustly withholding payment after being notified of the default of the principal." *United States* v. *Hills*, 4 Cliff. 618; Fed. Cas. No. 15,369. This is, in effect, the same rule followed by this court in *Ives* v. *Merchants' Bank*, *supra*. See also *United States* v. *Quinn*, 122 Fed. Rep. 65.

We find nothing else in the record requiring discussion. The result is that the judgment of the Circuit Court of Appeals should be reversed, and that of the Circuit Court affirmed.

Judgment reversed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

JOPLIN MERCANTILE COMPANY *v.* UNITED STATES.

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

No. 648. Argued January 11, 1915.—Decided February 23, 1915.

A mere conspiracy without overt acts done to effect its object is not indictable under § 37, Judicial Code, and where the averment respecting the formation of the conspiracy refers to no other clause of the indictment for certainty, it must be interpreted as it stands, and in the absence of a distinct averment that the conspiracy was formed to introduce liquors into Indian country within Oklahoma from without the State, the indictment must be construed as relating only to intrastate transactions; it cannot be construed as including interstate transactions because of other averments as to the overt acts of some of the conspirators.

Where concurrent State and Federal control, although not necessarily exclusive of each other, would be productive of serious inconvenience

and confusion, this court may be, as in construing the act of Mareh 1, 1895, and the Oklahoma Enabling Act, constrained to hold that the active exercise of Federal authority in suppressing the introduction of liquor into Indian country under the former was intended to be suspended pending the exertion of state authority on the same subject as prescribed by the Enabling Act.

Pending the continuance of state prohibition as prescribed by the Oklahoma Enabling Act, the provisions of the Act of March 1, 1895, c. 145, 28 Stat. 693, respecting intrastate transactions in regard to introducing intoxicating liquors into that part of the State which was the Indian Territory are unenforceable, although the statute has not been expressly repealed.

The Oklahoma Enabling Act did not repeal the acts of 1892 and 1897, prohibiting the introduction of liquor into Indian country within Oklahoma either as to interstate or intrastate shipments, *Ex parte Webb*, 225 U. S. 663, and *United States* v. *Wright*, 229 U. S. 226, and in this case the indictment sufficiently charges a conspiracy to commit an offense against those acts.

213 Fed. Rep. 926, affirmed.

THE facts, which involve the construction and application of the Federal statutes relating to the introduction of liquor into Indian country within the State of Oklahoma, are stated in the opinion.

Mr. Paul A. Ewert, with whom *Mr. C. H. Montgomery* was on the brief, for petitioners.

Mr. Assistant Attorney General Wallace for the United States.

By leave of court, *Mr. E. G. McAdams*, *Mr. Norman R. Haskell*, *Mr. C. B. Stuart*, *Mr. A. C. Cruce* and *Mr. M. K. Cruce* filed a brief as *amici curiæ:*

Unless construed as relinquishing Federal control of intrastate commerce in intoxicating liquors between other parts of Oklahoma and the former Indian Territory, § 3 of the Oklahoma Enabling Act is repugnant to Art. I, § 8, Const. U. S., as an unconstitutional attempt to

authorize concurrent regulation of commerce which must be exclusively regulated either by State or Nation.

If susceptible of a reasonable construction, which will avoid constitutional question, the statute will be so construed.

The statute may be reasonably construed as remitting to the State exclusive control of intrastate transactions.

The State and the Nation cannot regulate the same commerce at the same time, but Congress may relinquish exclusive control to State. It has done so by the Oklahoma Enabling Act, as to intrastate commerce in liquors.

The act of March 1, 1895, having been superseded as to intrastate transactions by the Enabling Act, Const. U. S., Art. I, § 9, forbids its continuance in force as to interstate transactions.

This contention is not foreclosed by *Ex parte Webb*, 225 U. S. 663.

The act of March 1, 1895, is entitled to be called a regulation of Congress.

Art. 1, § 9 of the Constitution forbids the giving of a preference by any regulation of commerce to one State over another; it applies to commerce on land as well as by sea.

Treated as a regulation of commerce with Indian tribes, the statute gives a preference to Oklahoma, by permitting that State to regulate for itself the commerce in intoxicating liquors between its people and the former Indian Territory, while denying to the people of other States the right to engage in such commerce, under pain of Federal prosecution.

Treated as a regulation of interstate commerce, the act discriminates against Oklahoma by forbidding interstate commerce with a large part of Oklahoma, while not forbidding the introduction of liquor into any other State.

In support of these contentions see, *Bank of Alexandria* v. *Dyer*, 14 Peters, 141; *Bowman* v. *Chicago &c. Ry.*, 125

U. S. 465; *Boyd* v. *Alabama*, 94 U. S. 645; *Ex parte Cain*, 20 Oklahoma, 125; *The Cherokee Tobacco*, 11 Wall. 616; *C., R. I. & P. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426; *Cohens* v. *Virginia*, 6 Wheat. 264; *Re Debs*, 158 U. S. 564; *Dooley* v. *United States*, 183 U. S. 168; *Gibbons* v. *Ogden*, 9 Wheat. 1, 189; *Grafton* v. *United States*, 206 U. S. 333; *Re Heff*, 197 U. S. 488; *L. S. & M. S. Ry.* v. *Ohio*, 173 U. S. 285; *Leisy* v. *Hardin*, 136 U. S. 100; *Murray's Lessee* v. *Baker*, 3 Wheat. 541; *N. Y. C. & H. R. R.* v. *Freeholders*, 227 U. S. 248; *Pennsylvania* v. *Wheeling Bridge*, 18 How. 421; *Pensacola Telegraph Co.* v. *West. Un. Tele. Co.*, 96 U. S. 1; *Perrin* v. *United States*, 232 U. S. 478; Prentice & Egan on Commerce Clause; *Shelby* v. *Guy*, 11 Wheat. 361; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Thomas* v. *Gay*, 169 U. S. 264; *Tiger* v. *Western Invest. Co.*, 221 U. S. 286; *United States* v. *43 Gallons Whiskey*, 93 U. S. 188; *United States* v. *Holliday*, 3 Wall. 407; *United States* v. *Wright*, 229 U. S. 226; *United States* v. *Del. & Hud. Co.*, 213 U. S. 366; *Ward* v. *Race Horse*, 163 U. S. 504; *Ex parte Webb*, 225 U. S. 663; *Whitney* v. *Robertson*, 124 U. S. 190; *Worcester* v. *Georgia*, 6 Peters, 515.

Mr. Justice Pitney delivered the opinion of the court.

In the District Court of the United States for the Southwestern Division of the Western District of Missouri the petitioners, Joplin Mercantile Company and Joseph Filler, with others, were indicted, under § 37 of the Criminal Code (Act of March 4, 1909, c. 321, 35 Stat. 1088, 1096), formerly § 5440, Rev. Stat.; the charge being that at Joplin, Missouri, within the jurisdiction of the court, the defendants did unlawfully, feloniously, etc., "conspire together to commit an offense against the United States of America, to wit, to unlawfully, knowingly, and feloniously introduce and attempt to introduce malt, spirituous,

vinous, and other intoxicating liquors into the Indian country which was formerly the Indian Territory and now is included in a portion of the State of Oklahoma, and into the City of Tulsa, Tulsa County, Oklahoma, which was formerly within and is now a part of what is known as the Indian country, and into other parts and portions of that part of Oklahoma which lies within the Indian country." Overt acts are alleged, each of which consisted in delivering to an express company in Joplin certain packages of intoxicating liquors to be transported thence to Tulsa, Oklahoma, alleged to be within the Indian country. A demurrer and a motion to quash having been overruled, petitioners pleaded to the indictment, were tried and found guilty. A motion in arrest of judgment having been denied, they sued out a writ of error from the Circuit Court of Appeals, where the only question raised was whether the indictment charged an offense against the laws of the United States; neither the evidence nor the charge of the trial court being brought up. The judgment of the District Court was affirmed (213 Fed. Rep. 926), and the present writ of certiorari was applied for, principally upon the ground that the decision of the Court of Appeals was to some extent in conflict with the views expressed by this court in *Ex parte Webb*, 225 U. S. 663, and *United States* v. *Wright*, 229 U. S. 226.

That clause of the indictment which sets forth the conspiracy does not in terms allege, as a part of it, that the liquor was to be brought from without the State of Oklahoma; nor does this clause refer, for light upon its meaning, to the clauses that set forth the overt acts. Hence, we do not think the latter clauses can be resorted to in aid of the averments of the former. It is true, as held in *Hyde* v. *Shine*, 199 U. S. 62, 76; and *Hyde* v. *United States*, 225 U. S. 347, 359; that a mere conspiracy, without overt act done to effect its object, is not punishable criminally under § 37 of the Criminal Code. But the averment

of the making of the unlawful agreement relates to the acts of all the accused, while overt acts may be done by one or more less than the entire number, and although essential to the completion of the crime, are still, in a sense, something apart from the mere conspiracy, being "an act to effect the object of the conspiracy." For this reason, among others, it seems to us that where, as here, the averment respecting the formation of the conspiracy refers to no other clause for certainty as to its meaning, it should be interpreted as it stands. *United States* v. *Britton*, 108 U. S. 199, 205. We therefore think the Court of Appeals properly treated this indictment as not charging that the liquors were to be introduced from another State, and correctly assumed in favor of the accused (supposing the law makes a distinction), that the design attributed to them looked only to intrastate commerce in intoxicants. The suggestion of the Government that the omission of a distinct averment that the conspiracy was to introduce the liquors from without the State did not prejudice petitioners, and should be regarded after verdict as a defect in form, to be ignored under § 1025, Rev. Stat., cannot be accepted, since we have before us only the strict record, and therefore cannot say that the trial proceeded upon a different theory from that indicated by the indictment, or that its averments were supplemented by the proofs.

The offense against the laws of the United States that was the object of the conspiracy must have had reference to one or the other of two distinct prohibitions. The one is that arising from the Act of July 23, 1892, c. 234, 27 Stat. 260, amending § 2139, Rev. Stat., and amended in its turn by the Act of January 30, 1897, c. 109, 29 Stat. 506. The other is § 8 of the Act of March 1, 1895, c. 145, 28 Stat. 693. These are set forth in chronological order in 225 U. S. 671. The distinction now pertinent is that, under the act of 1897: "Any person who shall introduce

or attempt to introduce any malt, spirituous, or vinous liquor . . . or any ardent or intoxicating liquor of any kind whatsoever *into the Indian country, which term shall include any Indian allotment* while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished," etc.; while the Act of 1895 declares: "That any person, . . . who shall, in said [Indian] Territory, manufacture . . . any vinous, malt, or fermented liquors, or any other intoxicating drinks . . . or who shall carry, or in any manner have carried, *into said Territory* any such liquors or drinks . . . shall, upon conviction thereof, be punished," etc. The former has to do with the introduction of liquor into the "Indian country"; the latter relates not to the Indian country as such, but to the Indian Territory as a whole, irrespective of whether it, or any particular part of it, remained "Indian country."

In *Ex parte Webb, supra,* we dealt with the effect of the Oklahoma Enabling Act, and the admission of the State thereunder, upon the prohibitions contained in the act of 1895, and held that this act remained in force so far, as it prohibited the carrying of liquor from without the new State into that part of it which was formerly the Indian Territory. In *United States* v. *Wright, supra,* we held that the prohibition against the introduction of intoxicating liquors into the Indian country found in the act of 1897 was not repealed with respect to intrastate transactions by the Enabling Act and the admission of the State. In the present case, the Court of Appeals held that transportation of intoxicating liquors from the westerly portion of Oklahoma to that part which was formerly Indian Territory was prohibited not only by the act of 1897 but by the act of 1895; holding that this act remained unrepealed as to intrastate commerce in intoxicating liquors, notwithstanding the intimations of

this court to the contrary in the *Webb* and *Wright Cases*. In behalf of the Government it is now insisted that the indictment is clearly sustainable under the act of 1897, and that it is therefore unnecessary to pass upon the question raised about the Act of 1895. But, in view of its importance, and the confusion that would probably result if the matter were left in uncertainty, we deemed it proper to allow the writ of certiorari, and now deem it proper to pass upon the merits of the question with respect to both Acts.

The Court of Appeals correctly considered that the question whether the act of 1895 remains in force respecting intrastate transactions was not concluded by our decision in either the *Webb* or the *Wright Cases*. The declaration upon the subject in 225 U. S. at p. 681 was based upon a concession by the Government, and was stated in unqualified form in order to emphasize that the concession was fully accepted for the purposes of the decision. In the *Wright Case* (229 U. S. at p. 236) we saw no reason to recall it, and so stated; but here again the point was not involved in the question to be decided. It was accepted *arguendo*, rather as an obstacle in the way of reaching the conclusion that the court did reach, upon grounds that held good, as we thought, notwithstanding the point conceded. As was well said by Mr. Chief Justice Marshall, in one of his great opinions, *Cohens* v. *Virginia*, 6 Wheat. 264, 399: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." And if this be true with respect to mere *dicta*, it is no less true of concessions made for the purpose of narrowing the range of discussion, or of testing, by assumed obstacles, the validity of the reasoning by which

the court reaches its conclusions upon the point submitted for decision.

The Court of Appeals declared that the effect of holding that the Enabling Act and the admission of the State repealed the law of 1895 as to importations from parts of Oklahoma not in Indian Territory, would be that importations would remain prohibited from the north, south, and east of the Territory, while those from the west would be turned over to the State; and that the provision of the Enabling Act requiring the constitution of the new State to provide a scheme of liquor prohibition is of no validity if Oklahoma sees fit to repeal the prohibition, as it is said she is at liberty to do, being equal in power with the original States and entitled to set aside all restrictions placed upon her that are not obligatory under the Constitution. Citing *Coyle* v. *Oklahoma*, 221 U. S. 559. As indicating that the act was passed in part as an exertion of the power of guardianship over the Indians, and in part under the power to regulate commerce with them, the court pointed to the pledges of the Federal Government, contained in repeated treaties, to protect the Indians of the Civilized Tribes against the evils of intercourse with people of the white race, especially with respect to the sale of intoxicating liquors; emphasizing the fact that Indian Territory contains the largest body of Indian population in the United States, from which the inference was drawn that Congress could not turn them over to the protection of the local authorities without running counter to the uniform practice of the Federal Government in such matters; that § 1 of the Enabling Act expressly reserves full authority to the National Government for the protection of the Indians and their property, and that protection against the liquor traffic has always been their greatest need; and that numerous statutes, passed about the time Oklahoma was admitted, to protect the Indians against the evils of intoxicating liquor, showed that Con-

gress intended to exercise this protection itself and not to remit it to the State. The conclusion was reached that the liquor prohibition imposed upon the State by § 3 of the Enabling Act (quoted at large 225 U. S. 677) was intended to secure the coöperation of the state authorities, and not to remit to the State the whole subject of the guardianship of the Indians so far as approach to them from the west was concerned. That since, even after admission of the State, there was nothing to prevent Congress from prohibiting importation of liquors into the Indian Territory, peopled, as it was, so largely by Indians, there was no reason to believe that the admission of the State was intended to repeal the 1895 law with respect to the western boundary of the Indian Territory; that under the circumstances of that Territory the acts of 1892 and 1897 were inefficient for the protection of the Indians in this regard, while with the act of 1895 alone in force, prohibiting the carrying of liquor within the Indian Territory, it would not be unlawful to transport liquor from a point within that Territory to an allotment therein; hence the necessity of maintaining in force at the same time the provisions of the acts of 1892 and 1897 prohibiting the introduction of liquor into the Indian country.

The argument has much weight. This court, when deciding the *Webb* and *Wright Cases*, fully appreciated the force of the considerations referred to, as will be manifest, we think, by reference to the opinions, especially that delivered in the former case. But it seems to us that the views expressed by the court below in the present case merely question the reasonableness of implying a repeal of the act of 1895, and hardly attribute full force to the very clear language of the Enabling Act. Upon the question of reasonableness, the fact that importations of liquor into the Territory from the north, east, and south should remain subject to the interdict of the Federal law, while importations from the west (unless originating

without the State) were remitted to state control, is not an anomalous result but one rather characteristic of the inter-action of our Federal and state governments.

We pass on to state, in outline, the grounds upon which the judgment is assailed by counsel for petitioners, and in a separate argument by friends of the court. It is insisted that the provision of the Enabling Act requiring the State to forbid, under penalties, the introduction of intoxicating liquors from other parts of the State into the former Indian Territory can be upheld only by construing it as repealing the provisions of the act of 1895 so far as they deal with such intrastate transactions, because otherwise the Enabling Act would be repugnant to the Commerce Clause of the Constitution of the United States as an attempt to authorize concurrent regulation by state and Federal authority of commerce with the Indians, which it is said, must be exclusively regulated either by State or by Nation; that the Enabling Act may be reasonably construed as relinquishing to the State the exclusive control over commerce in intoxicating liquors between other parts of the State and the former Indian Territory, but not as a regulation of commerce with Indians, because, it is insisted, under the Constitution, Congress cannot delegate to a State the power to regulate commerce with the Indians, any more than the power to regulate interstate commerce, and hence the prohibition clause of the Enabling Act is to be sustained as a surrender to the State of jurisdiction over its own citizens, thereby declared by Congress to be no longer members of Indian tribes so far as commerce in intoxicating liquors is concerned; the Enabling Act being thus treated as in effect a determination by Congress that the tribal relations and guardianship of the Indians should cease, at least as to traffic in liquor between them and the citizens of other portions of the State, leaving the State to regulate this by means of the legislation that the Enabling Act re-

quired it to enact on the subject. It is next argued that, the act of 1895 having been superseded as to intrastate transactions by the Enabling Act, it is beyond the power of Congress to continue it in force as to interstate transactions, and this for two reasons, both based upon the provision of § 9 of Article I of the Constitution that "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another": (a) that the prohibition cannot be maintained as an exercise of the power to regulate interstate commerce, because in that aspect it *discriminates against* the State of Oklahoma by forbidding transportation of liquor into that State from without, while permitting the unrestricted transportation of liquor into the other States; and (b) that it cannot be sustained as an exercise of the power of Congress to regulate commerce with the Indian tribes because it gives a *preference to* the State of Oklahoma by permitting that State to regulate for itself the commerce in intoxicating liquors between the people of other parts of the State and the former Indian Territory, while denying to the people of all the other States the right to engage in such commerce with the same Territory. The result sought to be deduced is that, by reason of the passage of the Enabling Act and the admission of the State thereunder, the act of 1895 cannot be sustained at all. It is said this does not impute to Congress the purpose to pass an act in excess of its powers under the Constitution; that the act when passed was justified not only as a regulation of commerce with the Indian tribes but as an exercise of jurisdiction over territory then within the exclusive jurisdiction of the United States; and that it is now unconstitutional as to interstate transactions, not because of the want of power in Congress to originally pass it, but because of the changed conditions growing out of the admission of the State under an Enabling Act inconsistent with the continuance in force of the act of

1895. And it is said that this question is not foreclosed by the decision in the *Webb Case* sustaining the act as to interstate transactions, because—and this is true—the question under § 9 of Article I of the Constitution was not then raised. Citing *Boyd* v. *Alabama*, 94 U. S. 645, 648.

The reasoning, like the opposed reasoning of the court below, has force; but we think it has also elements of weakness. Thus,—to mention only one or two of these—it is not easy to see how any practical preference is given to the State of Oklahoma in the way of permitting commerce in intoxicating liquors to be conducted between other portions of the State and the former Indian Territory while denied to the people of other States, when the very clause of the Enabling Act that operates, if any does, to destroy the former universality of the act of 1895 does not permit but prohibits commerce in liquors between the one part of the State and the other; the only difference here important being that as to internal commerce the State enforces the prohibition, while as to interstate commerce it is enforced by the United States. Nor is the suggestion convincing that the act of 1895 (if repealed as to intrastate commerce only) remains as a discriminatory regulation of commerce between the States unfavorable to Oklahoma; for in this aspect it forbids not the introduction of liquors from other States into Oklahoma, but only their introduction into that particular part of it which, because of the larger population of Indians that it contains, and because of the previous treaties and the other circumstances pointed out in the *Webb Case*, Congress deemed to be properly entitled to that protection. Moreover, supposing that unconstitutional preferences must be deemed to arise from a partial repeal of the act of 1895 by the prohibitory provision of the Enabling Act, it would, we think, be more logical to avoid the constitutional difficulties by giving less force to that provision of the Enabling Act than by giving to it a force quite beyond

the expressed purpose of Congress. The result would be, if the argument of petitioners as to the impossibility of concurrent regulation of intrastate transactions in liquors with the former Indian Territory by State and Nation is sound, that the state prohibition of the liquor traffic in the Territory and between the other parts of the State and the Territory would have to remain in abeyance until Congress should expressly repeal the act of 1895.

Enough has been said to show the principal grounds of the respective contentions. And it is curious to observe that on each side the argument rests largely upon the supposition that the implied repeal of the act of 1895, if deduced from the inconsistent provisions of the Enabling Act upon the same subject, operated in effect to legalize commerce in intoxicating liquors between the eastern and the western portions of the State. But since the principal inconsistency is that in one case the prohibition of the traffic is to be enforced by the United States and in the other case by the State, many of the difficulties disappear as soon as clearly stated. We need not further analyze the constitutional argument submitted in behalf of petitioners, and must not be understood as committed respecting it.

Conceding that the question with which we have to deal is by no means easy of solution, we think a right solution may be had by considering the terms of the Enabling Act in the light of the situation that was presented to Congress, and in view of its constitutional powers. The situation of the Indians and the Indian lands at the time is so familiar that it need not be here rehearsed. In addition to what has been said upon the subject in our recent decisions, reference may be made to the Committee Report that accompanied the bill in the House of Representatives (H. R. Report No. 496, January 23, 1906, 59th Cong., 1st Sess., Vol. 1). There was a large population of Indians in the Indian Territory, but a much larger

population of whites. Under the provisions of the Curtis Act (June 28, 1898, c. 517, 30 Stat. 495), towns had been organized and were growing rapidly, and much of the land had been allotted. Congress no doubt had in mind the existing agreements with the Five Civilized Tribes, some of them recently made, by which, in one form or another, the United States had agreed to maintain laws against the introduction, sale, etc., of liquors within the territory of the tribes (225 U. S. 684-686). In the first section of the Enabling Act (June 16, 1906, c. 3335, 34 Stat. 267) a reservation was made of the authority of the United States "to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed." The authority of Congress to preserve in force existing laws or enact new ones after statehood with reference to traffic or intercourse with the Indians, including the liquor traffic, was well established; the power of Congress over such commerce being plenary, and independent of state boundaries. *United States* v. *Holliday*, 3 Wall. 407, 418; *United States* v. *Forty-Three Gallons of Whiskey*, 93 U. S. 188, 195, 197; *S. C.*, 108 U. S. 491; *United States* v. *Kagama*, 118 U. S. 375, 383; *Dick* v. *United States*, 208 U. S. 340, 353; *Hallowell* v. *United States*, 221 U. S. 317, 323; *Ex parte Webb*, 225 U. S. 663, 683; *United States* v. *Wright*, 229 U. S. 226, 237; *Perrin* v. *United States*, 232 U. S. 478, 483; *Johnson* v. *Gearlds*, 234 U. S. 422, 438.

Still, the Territory was to be erected into a State, and the Indians themselves were to have the rights of citizens. As we have already held in the *Wright Case*, *supra*, it was the purpose to maintain in full force the acts of 1892 and 1897 the same in this State as in other States where Indian country or Indian allotments held in trust by the Government or Indians as wards of the Government were

found. And while we intimate no question that Congress could have maintained the more sweeping internal prohibition of the 1895 act, this would have interfered to a greater extent with the control of the new State over its internal police.

Reading the Enabling Act as a whole in the light of this situation, including the declaration in its first section of the continued authority of the Government of the United States respecting the Indians, the specific requirement in the third section that the state constitution should contain a stringent prohibition of the manufacture, sale, etc., of intoxicating liquors within the Indian Territory and the Reservations for a period of twenty-one years from the date of admission, and thereafter until amendment of the constitution, and the express provision that any person who should manufacture, etc., or should ship or convey such liquors from other parts of the State into the Indian Territory or Reservations should be punished both by fine and imprisonment, we think the inference is irresistible that it was the purpose of Congress that the people of the State should be entrusted with actual power and control over the liquor traffic between the other portions of the State and the Territory and Reservations, and that, for the time at least, they should have the same control that is enjoyed by other States, it being, of course, subject to the effect of the acts of 1892 and 1897.

Without deciding that such control must necessarily be exclusive of co-existing Federal jurisdiction over the same subject-matter, it seems to us that concurrent jurisdiction would be productive of such serious inconvenience and confusion, that, in the absence of an express declaration of a purpose to preserve it, we are constrained to hold that the active exercise of the Federal authority was intended to be at least suspended pending the exertion by the State of its authority in the manner prescribed by the Enabling Act.

Still, the act of 1895 was not expressly repealed; and it must have been in contemplation that the State might amend its constitution and laws upon the subject, at least upon the expiration of twenty-one years; and we do not intend to hold, nor even to intimate, that the effect and operation of the act of 1895 upon intrastate commerce in liquors would still remain in abeyance after a repeal or material modification of the state prohibition upon the subject. The subject-matter of this legislation is quite different from that which was under consideration in *Coyle* v. *Oklahoma,* 221 U. S. 559; and it does not follow from what was there decided that the plan of intrastate prohibition proposed to the State by Congress in the Enabling Act and accepted by the State, would be subject to repeal by the State within the prescribed period. Nor does it follow from anything we have said that Congress may not, during that period, by reënacting in substance the act of 1895, or by appropriate affirmative legislation in some other form, resume the Federal control over the liquor traffic in and with what was Indian Territory, by virtue of its general authority over Indian relations. These and kindred questions may be dealt with if and when occasion arises.

Our opinion upon this branch of the case is that, pending the continuance of state prohibition as prescribed by the Enabling Act, the provisions of the act of 1895 respecting intrastate transactions are not enforceable.

But, as already held in *United States* v. *Wright, supra,* the Acts of 1892 and 1897 have not been repealed by the Enabling Act with respect to intrastate commerce in intoxicants, any more than with respect to commerce that crosses state lines. And it remains to be considered whether the indictment sufficiently sets forth a conspiracy to commit an offense against these acts. This turns upon the destination of the liquors as intended by the conspirators. It is averred that three several destinations

were in contemplation: (a) the Indian country which was formerly the Indian Territory and now is included in a portion of the State of Oklahoma; (b) the city of Tulsa, Tulsa County, Oklahoma, which was formerly within and is now a part of what is known as the Indian country; and (c) other parts and portions of that part of Oklahoma which lies within the Indian country. It is said by petitioners that Tulsa was established as a town under the Curtis Act of June 28, 1898, and the Creek Agreement (act of March 1, 1901, c. 676, 31 Stat. 861), and that we ought to take judicial notice of what is said to appear upon the records of the Department of the Interior, that on February 21, 1901, the exterior limits of the town were approved and the tract thus reserved from allotment and set aside for town site purposes, that unrestricted patents have since been issued, and that at the time of the alleged offense Tulsa was a city of 30,000 people. For the sake of simplicity we assume the facts to be so, without deciding that we may take judicial notice of them. But we think the third clause, "other parts and portions of that part of Oklahoma which lies within the Indian country," is sufficient to sustain the indictment in this respect. It is objected by petitioners that this is vague and indefinite, and does not apprise the defendants with certainty of the offense with which they stand charged so as to enable them to prepare the defense; that there were more than 100,000 allotments made to Indians of the Five Civilized Tribes alone, and that the courts should take judicial notice of the fact that the restrictions upon three-fourths of the allotments of mixed bloods have been removed by direct legislation of Congress, not to speak of the lands taken out of Indian country by being included within established town sites. But upon this record we are bound to assume that the indictment sets forth the agreement as it was made by the convicted defendants. That agreement looked to the introduction of intoxicating

liquors into those portions of the State that lie within the Indian country. Presumably the defendants did not, at the time of conspiring, specify the particular points in the Indian country to which the liquor should be shipped; nevertheless, the conspiracy could not be carried out as made without violating the act of 1897.

The indictment is therefore sufficient, and the judgment should be affirmed.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

WILLIAMS *v.* UNITED STATES FIDELITY AND GUARANTY COMPANY.

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

No. 80. Argued January 18, 1915.—Decided February 23, 1915.

Statutes should be sensibly construed, with a view to effectuating the legislative intent.

It is the purpose of the Bankruptcy Act to convert the assets of the bankrupt into cash for distribution among creditors and then relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from obligations and responsibilities consequent upon business misfortunes.

Within the intendment of the bankruptcy law provable debts include all liabilities of the bankrupt founded on contract, express or implied, which at the time of the bankruptcy were fixed in amount or susceptible of liquidation.

Under the provisions of the Bankrupt Act, the surety of the bankrupt either shares, or enjoys due opportunity to share, in the principal's

estate, and, therefore, the discharge of the bankrupt acquits the obligation between them incident to the relationship.

A discharge in bankruptcy acquits the express obligation of the principal to indemnify his surety against loss by reason of their joint bond conditioned to secure his faithful performance of a building contract broken prior to the bankruptcy although the surety did not pay the consequent damage until thereafter.

11 Ga. App. 635, reversed.

THE facts, which involve the construction of the Bankruptcy Act and effect of a discharge in bankruptcy, are stated in the opinion.

Mr. J. Howell Green and *Mr. Alex. C. King* for plaintiff in error.

Mr. Alex. W. Smith, Jr., with whom *Mr. Alex. W. Smith* was on the brief, for defendant in error:

A discharge in bankruptcy shall release a bankrupt from all his provable debts, and the "provable debt" from which the bankrupt is released means an obligation susceptible of being presented in such form as to come within some one or more of the classes of debts designated in § 63-*a*. 1 Remington on Bankruptcy, § 628.

The question whether or not a debt is provable turns upon its status at the time of the filing of the petition. *Id.*, § 629; *Zavelo* v. *Reeves*, 227 U. S. 625.

Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Section 63-*b* adds nothing to the class of debts prescribed under 63-*a*. It merely permits the liquidation of an unliquidated claim provable under the latter provision. *Dunbar* v. *Dunbar*, 190 U. S. 340; *Coleman Co.* v. *Withoft*, 195 Fed. Rep. 250; *In re Roth & Appel*, 181 Fed. Rep. 673; *In re Adams*, 130 Fed. Rep. 381.

Contingent claims are not provable under the act of

1898. 1 Remington, § 640; *In re Roth*, 181 Fed. Rep. 673; *Coleman* v. *Withoft*, 195 Fed. Rep. 250.

Contingent is the quality of being casual; the possibility of coming to pass; an event which may occur; a possibility.

All anticipated future events, which are not certain to occur are contingent events, and may be properly denominated mere possibilities, more or less remote.

A contingent claim is one which has not accrued and which is dependent upon the happening of some future event. 2 Words & Phrases, p. 1498.

Sureties and endorsers on commercial paper and others similarly situated have a provable claim against their bankrupt principal even though at that time there has been no default on the part of the bankrupt. 1 Remington, §§ 642–645, and cases cited.

There is a very clear distinction between this class of cases and the case at bar, involving a surety for the "faithful performance" of a contract or duty by the bankrupt. 1 Remington, § 647.

Such claims are contingent: First, on a breach by bankrupt of the contract or duty.

Second, on actual pecuniary loss suffered by the surety as a consequence of said breach by the bankrupt.

The existence of either or both of said contingencies at the time of the filing of the petition in bankruptcy renders the claim of the surety non-provable, and therefore unaffected by the bankrupt's discharge. *Goding* v. *Rosenthal*, 6 A. B. R. 641 (Note); *Clemmons* v. *Brinn*, 7 A. B. R. 714; *Insley* v. *Garside*, 121 Fed. Rep. 699.

The distinction which reconciles the positions of both sides of this case and the authorities cited by them respectively, is that which exists between a contract assuming liability, and one indemnifying against loss. The terms of such contracts fix the law applicable to them respectively.

The distinction is clearly pointed out in the following cases: Contracts assuming liability: *Fenton* v. *Fidelity Co.*, 36 Oregon, 283; *Anoka Lumber Co.* v. *Fidelity Co.*, 3 Minnesota, 286; *Tucker* v. *Murphy*, 114 Georgia, 662; *Thomas* v. *Richards*, 124 Georgia, 942; *Mills* v. *Dows Adm'r*, 133 U. S. 423, 432; *Johnson* v. *Risk*, 137 U. S. 300, 308.

Contracts indemnifying against loss: *Carter* v. *Ætna Ins. Co.*, 76 Kansas, 275; *Allen* v. *Ætna Ins. Co.*, 145 Fed. Rep. 881; *Connelly* v. *Bolster*, 187 Massachusetts, 266; *Harvey* v. *Daniel*, 36 Georgia, 562; *Wicker* v. *Hoppock*, 6 Wall. 94; *Insley* v. *Garside*, 121 Fed. Rep. 699; *National Bank* v. *Bigler*, 83 N. Y. 62.

The contract recovered on in the case at bar is a contract of indemnity and falls within the latter class in all of which it is well-nigh universally held that to recover for a breach, loss or damage must be sustained by actual payment of money, or its equivalent under the law. 16 Am. & Eng. Encyc., 2d ed., 178 (a) and notes; 22 Cyc. 79–92.

Indemnity means an obligation to make good a loss; no loss, no obligation.

Mr. Justice McReynolds delivered the opinion of the court.

This cause presents the following question: Does a discharge in bankruptcy acquit an express obligation of the principal to indemnify his surety against loss by reason of their joint bond conditioned to secure his faithful performance of a building contract broken prior to the bankruptcy when the surety paid the consequent damage thereafter?

R. P. Williams and J. B. Carr, as partners, entered into a contract with certain school trustees—April, 1900,—to construct a building in Florida, and, with defendant in error company as surety, gave a bond guaranteeing its

faithful performance. Contemporaneously with the execution of the bond and as a condition thereto, the partners made a written application to the company in which they obligated themselves "to indemnify the said United States Fidelity & Guaranty Company against all loss, costs, damages, charges and expenses whatever, resulting from any act, default, or neglect of ours that said United States Fidelity & Guaranty Company may sustain or incur by reason of its having executed said bond or any continuation thereof."

November 9, 1900, the partners abandoned the contract; the trustees took possession and completed the structure April 13, 1901, and on May 14 following they made adequate demands for payment of the amount expended beyond the contract price. This being refused they brought suit and recovered a judgment against the company July 1, 1904, which it satisfied February 20, 1905, by paying $5,475.36.

Voluntary petitions were filed by partnership and members May 28, 1901, and all were immediately adjudged bankrupt. The schedules specified the building contract, its breach and the bond, and their adequacy is not now questioned. In due time the school trustees proved their claim and it was allowed. October 5, 1901, the petitioners received their discharges. No dividend was declared, all the assets being required for administration expenses.

Defendant in error brought suit in the City Court of Atlanta against the firm and its members—August, 1911,—setting up the written promise made to it when the bond was executed and asking judgment for the amount paid in satisfaction of the recovery thereon, together with attorneys' fees. The matter was submitted upon an agreed statement of facts and judgment went in favor of the company; this was affirmed by the Court of Appeals of Georgia (11 Ga. App. 635) and the cause is here upon writ of error.

The state court treated the written contract of indemnity between the bankrupts and the surety company as the expression of what would have been implied and declared (p. 644): "The bankrupts owed the surety nothing at the time the petition in bankruptcy was filed, because the surety had paid nothing for their benefit and the relation of debtor and creditor did not exist between them until after actual payment by the surety. . . . The surety had no claim against the bankrupts which it could file in its own name. . . . The liability to the surety by the bankrupts was altogether contingent and might never have arisen. Indeed, we hold that at the time the petition in bankruptcy was filed the surety had no claim or debt against the bankrupts which could have been proved in the bankrupt court under § 63 of the bankrupt act."

Counsel for the company "contend that the claim at bar was subject to two contingencies, one of which, to wit, the sustaining or incurring of actual pecuniary loss, resultant to the principal's act, had not arisen at the time of the filing of the petition. Therefore said claim was not an unliquidated claim upon an express contract absolutely owing at the time. It was a contingent claim, and as such not provable and therefore not affected by the bankrupt principal's discharge."

If the doctrine announced by the court below and maintained here by counsel is correct, a discharge in bankruptcy may have very small value for the luckless debtor who has faithfully tried to secure his creditors against loss; and, in effect, a demand against him may be kept alive indefinitely according to the interest or caprice of his surety.

It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to

start afresh free from the obligations and responsibilities consequent upon business misfortunes. *Wetmore* v. *Markoe*, 196 U. S. 68, 77; *Zavelo* v. *Reeves*, 227 U. S. 625, 629; *Burlingham* v. *Crouse*, 228 U. S. 459, 473. And nothing is better settled than that statutes should be sensibly construed, with a view to effectuating the legislative intent. *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59; *In re Chapman*, 166 U. S. 661, 667.

The statute (July 1, 1898, c. 541, 30 Stat. 544), as amended in 1903 (February 5, 1903, c. 487, 32 Stat. 797), provides: Section 17. "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (2) are liabilities for obtaining property by false pretenses or false representations." Section 63. "Debts of the bankrupt may be proved and allowed against his estate which are . . . (4) founded upon an open account, or upon a contract express or implied; . . . Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." Section 1. (11). "Debt shall include any debt, demand, or claim provable in bankruptcy." Section 2. Courts of bankruptcy have jurisdiction to "(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; . . . (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act." Section 57-*i*. "Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor." General Order

XXI.—4. "The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt." Section 16. "The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

Within the intendment of the law provable debts include all liabilities of the bankrupt founded on contract, express or implied, which at the time of the bankruptcy were fixed in amount or susceptible of liquidation. *Dunbar* v. *Dunbar*, 190 U. S. 340, 350; *Crawford* v. *Burke*, 195 U. S. 176, 187; *Grant Shoe Co.* v. *Laird*, 212 U. S. 445, 448; *Zavelo* v. *Reeves*, 227 U. S. 625, 631. It provides complete protection and an ample remedy in behalf of the surety upon any such obligation. He may pay it off and be subrogated to the rights of the creditor; if the creditor fails to present the claim for allowance against the estate he may prove it; and in any event he has abundant power by resort to the court or otherwise to require application of its full *pro rata* part of the bankrupt's estate to the principal debt. To the extent of such distribution the obligation of the bankrupt to the surety will be satisfied. Although, unlike the act of 1867, the present one contains no express provision permitting proof of contingent claims, it does in substance afford the surety on a liability susceptible of liquidation the same relief possible under the earlier act, *i. e.* application to the principal debt of all dividends declared out of the estate (act of March 2, 1867, §§ 19, 27, c. 176, 14 Stat. 517, 525, 529). And as the surety thus either shares or enjoys an opportunity to share in the principal's estate, we think the discharge of the latter

acquits the obligation between them incident to the relationship. *Mace* v. *Wells*, 7 How. 272, 276; *Fairbanks* v. *Lambert*, 137 Massachusetts, 373, 374; *Hayer* v. *Comstock*, 115 Iowa, 187, 191; *Post, Admr.*, v. *Losey*, 111 Indiana, 74, 80; *Smith* v. *Wheeler*, 55 App. Div. (N. Y.) 170, 171.

It would be contrary to the basal spirit of the Bankrupt Law to permit a surety, by simply postponing compliance with his own promise in respect of a liability until after bankruptcy, to preserve a right of recovery over against his principal notwithstanding the discharge would have extinguished this if the surety had promptly performed as he agreed. Such an interpretation would effectually defeat a fundamental purpose of the enactment.

The written indemnity agreement embodied in the bankrupt's application to the surety company for execution of the bond, so far as its terms are important here, but expressed what otherwise would have been implied from the relationship assumed by the parties. At the time of the bankruptcy the obligation under this agreement was ancillary to a liability arising out of a contract estimation of which was easy of establishment by proof. There was no uncertainty which could prevent the surety from obtaining all benefits to which it was justly entitled from the bankrupt estate.

Upon the facts presented we are of opinion that the discharge pleaded by the plaintiff in error constituted a good defense and the court below erred in holding otherwise. The judgment is accordingly reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

GLEASON *v.* THAW.

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

No. 143. Submitted January 19, 1915.—Decided February 23, 1915.

Professional services of an attorney and counselor-at-law are not property within the meaning of par. 2, § 17 of the Bankruptcy Act of 1898, as amended in 1903, excepting liabilities for obtaining property by false pretenses from the general release of the discharge in bankruptcy.

In view of the well known purpose of the Bankruptcy Act, exceptions to the operation of a discharge thereunder should be confined to those plainly expressed.

196 Fed. Rep. 359, affirmed.

THE facts, which involve the construction of the Bankruptcy Act and the effect of a discharge in bankruptcy, are stated in the opinion.

Mr. John B. Gleason, pro se.

Mr. William A. Stone for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The question for determination is whether the professional services of an attorney and counselor at law are property within the meaning of paragraph 2, § 17, of the Bankruptcy Act (30 Stat. 544, 550), as amended in 1903 (32 Stat. 797, 798), which excepts from the general release of a discharge "liabilities for obtaining property by false pretenses or false representations." The essential facts, in the words of the Circuit Court of Appeals, are these (196 Fed. Rep., p. 360):

"On June 28, 1906, the defendant, Harry K. Thaw, was indicted for murder committed in the City of New York. Briefly stated, the complaint alleges that in order to secure the services of the plaintiff as chief counsel, the defendant represented that he was the owner of an interest of at least $500,000 in the estate of his father and had an annual income of $30,000 in his own right. That relying upon these and other representations, the plaintiff consented to act as counsel for the defendant and performed services for him in that capacity which were worth the sum of $60,000 over and above all payments. The complaint charges that all of these representations were false and made with fraudulent intent. The defendant, among other defenses, pleaded in a supplementary answer, his discharge in bankruptcy by the District Court of Pennsylvania, dated December 29, 1910. To this the plaintiff demurs, insisting that the discharge is insufficient in law, the plaintiff's cause of action being liabilities for obtaining property by false representations."

The trial court, following *Gleason* v. *Thaw* (185 Fed. Rep. 345), overruled the demurrer and dismissed the complaint; the appellate court, upon the same authority, affirmed the judgment (196 Fed. Rep. 359).

Gleason v. *Thaw, supra,* came before the Circuit Court of Appeals for the Third Circuit upon a petition to review the final order of the District Court staying an action brought by Gleason on the same indebtedness here involved, and presented the identical question of law now before us. The court answered it in the negative, and among other things in an opinion by Judge Gray said (185 Fed. Rep., p. 347):

"The very ingenious and forceful argument presented to this court by the petitioner for review, is founded mainly upon the proposition that: 'The right to command services of the value of $80,000.00 is property; the services also are property; the test is value—not degree of intangi-

bility.' . . . That the word 'property' is *nomen generalissimum*, as asserted by the petitioner, is not to be denied, but no more is it to be denied that its meaning may be restricted, not only by the application of the maxim, *noscitur a sociis*, but by the purpose for which it is used, or by its evident use as a word of art, or by its use in a technical sense. The very generality of the word requires restriction. . . . There are, however, well considered decisions of the highest authority, in which, from the view point of the particular case, personal rights and liberties are to be included within the meaning of the word 'property'. . . . Such cases, however, are far from saying that services actually rendered under a supposed contract are themselves property, which have been taken fraudulently from the possession of the one who has rendered the service, within the meaning of that word as used in the section of the bankruptcy act now under consideration."

The accurate delimitation of the concept property would afford a theme especially apposite for amplificative philosophic disquisition; but the Bankrupt Law is a prosy thing intended for ready application to the everyday affairs of practical business, and when construing its terms we are constrained by their usual acceptation in that field of endeavor. The word property, without restriction, occurs more than seventy times in the Act. Not once does it plainly refer to professional services, and, except in very few instances, to include them within its intendment would produce a patent absurdity. Reference to the following provisions will suffice to indicate the sense of the word therein. Section 1 (15) declares one shall be deemed insolvent "whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed . . . shall not, at a fair valuation, be sufficient in amount to pay his debts." Section 3-*a* provides that "acts of bankruptcy by a per-

son shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder . . . or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer," etc. Section 50 provides, in respect of trustees' bonds, "(*d*) the court shall require evidence as to the actual value of the property of sureties; . . . (*f*) the actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond." And § 60-*d* brings the two things into sharp contrast—"If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be reëxamined by the court on petition of the trustee," etc.

Congress, we think, never intended that property in the paragraph under consideration should include professional services. At most it denotes something subject to ownership, transfer or exclusive possession and enjoyment, which may be brought within the dominion and control of a court through some recognized process. This is certainly the full extent of the word's meaning as employed in ordinary speech and business and the same significance attaches to it in many carefully prepared writings. The constitutions of many States provide that *all property* shall be taxed, but it has never been supposed that this applies to professional services.

We do not overlook, nor do we intend to qualify, what this court has said in other cases. Our sole present concern is with the interpretation of a particular statute; the scope and purpose of constitutional limitations are in no way involved—they depend upon considerations of a wholly different character.

In view of the well-known purposes of the Bankrupt Law exceptions to the operation of a discharge thereunder should be confined to those plainly expressed; and while much might be said in favor of extending these to liabilities incurred for services obtained by fraud the language of the act does not go so far.

The court below reached a proper conclusion and its judgment is

Affirmed.

McCOACH, COLLECTOR OF INTERNAL REVENUE, *v.* PRATT, EXECUTOR OF DREER.

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

No. 149. Argued January 25, 1915.—Decided March 1, 1915.

Where testator died before July 1, 1902, but creditors had the right, under the local law, as in Pennsylvania, to file claims within a year, and legatees cannot demand payment out of the personal estate until after ascertainment that there is a residue available for payment of legacies, the interests of the legatees were not absolutely vested in possession or enjoyment prior to July 1, 1902, and the tax paid on such legacies under the War Revenue Act of 1898 should, pursuant to § 3 of the act of June 27, 1902, be refunded. *United States* v. *Jones*, *ante*, p. 106, followed, and *Hertz* v. *Woodman*, 218 U. S. 205, distinguished.

201 Fed. Rep. 1021, affirmed.

THE facts, which involve the construction of the War Revenue Act of 1898 and the refunding act of June 27, 1902, are stated in the opinion.

Mr. Assistant Attorney General Wallace, with whom *The Solicitor General* was on the brief, for petitioner:

Taxability of the direct bequests depends on taxability of the annuities to the grandchildren. They are taxable under § 29, act of 1898.

Legacy includes annuity and there is no legal difference between it and life estate in income.

Whether the estate is vested or contingent, and however it is called, it is taxable because not conditional. *United States* v. *Fidelity Trust Co.*, 222 U. S. 159; *Vanderbilt* v. *Eidman*, 196 U. S. 490.

The fact of deferred payment is immaterial. The tax was here imposed before July 1, 1902.

The claim of the executors under the repealing act of April 12, 1902, is unfounded. *Hertz* v. *Woodman*, 218 U. S. 205.

These annuities were not affected by the act of June 27, 1902, because they were not contingent.

Actual possession is not prerequisite to taxability, nor is the determination of the residue a prerequisite to taxability.

The title to all personalty vests in executors upon probate.

Each right, in the executors and in the beneficiaries alike, vested at testator's death, and were not within the operation of either act of 1902.

Section 51, Pennsylvania laws, yields to the expressed intention of testator. Section 22 gives a full year to present claims. *United States* v. *Jones*, *ante*, p. 106, does not apply, as the tax must be paid before claims could be adjudged in probate; and the executor must declare amount of tax in his schedule.

Section 30 expressly authorizes collection without administration of estate. The adjudication of claims is unnecessary.

The rule in the *Jones Case*, if so construed, would cut off all taxes at least one year back of July 1, 1902.

The refunding act cannot apply in this case.

The burden is on the executor to allege the existence of debts.

In support of these contentions see *Aubin* v. *Daly*, 4 B. & Ald. 59; *Bispham's Estate*, 24 Wkly. Notes Cases, 79; Boutwell's Tax System, p. 203; *Bromley* v. *Wright*, 7 Hare, 334; *Burd* v. *Burd*, 40 Pa. St. 182; *Cobb* v. *Overman*, 109 Fed. Rep. 65; *Crenshaw* v. *Knight*, 156 S. W. Rep. 468; 40 Cyc. 1648; *Disston* v. *McClain*, 147 Fed. Rep. 114; *Dunbar* v. *Dunbar*, 190 U. S. 351; *Eidman* v. *Tilghman*, 136 Fed. Rep. 141; *Flickwir's Estate*, 136 Pa. St. 274; *Gannon* v. *Dale*, 1 Law Rep. Ch. Div. 276, 278; *Gaskins* v. *Roger*, L. R. 2 Eq. 248; *Gilpin's Estate*, 14 Pa. Co. Ct. 122; Hanson's Death Duties, p. 392; *Hertz* v. *Woodman*, 218 U. S. 214, 215; 3 Holdworth's Hist. of Eng. Law, p. 126; *Howe* v. *Howe*, 179 Massachusetts, 546; *Re Eaton*, 106 N. Y. Supp. 682; *Re Rothschild*, 71 N. J. Eq. 210; *Keiser* v. *Shaw*, 104 Kentucky, 119; *Knowlton* v. *Moore*, 178 U. S. 41, 64, 110; *Lord Stafford* v. *Buckley*, 2 Ves. Sen. 170; Lumley on Annuities, p. 392; *Long's Estate*, 228 Pa. St. 594; *McArthur* v. *Scott*, 113 U. S. 349; *McCoach* v. *Pratt*, 201 Fed. Rep. 1021; *Minot* v. *Winthrop*, 162 Massachusetts, 113; 2 Pollock & Maitland, p. 132; *Peck* v. *Kinney*, 143 Fed. Rep. 79; *Pennock* v. *Eagles*, 102 Pa. St. 290; Pepper & Lewis Dig. Pa. Laws, 1512, § 179; *Reed's Appeal*, 118 Pa. St. 215; *Re Hutchinson*, 105 N. Y. App. 487; *Re Tracy*, 179 N. Y. 501; *Ritter's Estate*, 190 Pa. St. 108; *Robbins* v. *Legge*, 2 Law Rep. Ch. Div. 12; *Scott* v. *West*, 63 Wisconsin, 529, 571; *Smith's Estate*, 226 Pa. St. 304; *Thompson's Estate*, 5 Wkly. Notes Cases (Pa.), 14; *United States* v. *Fidelity Trust Co.*, 222 U. S. 159; *Vanderbilt* v. *Eidman*, 196 U. S. 480; 2 Woerner's Law on Admr., § 454; *Wright* v. *Callender*, 2 De G., M. & G. 652.

Mr. Walter C. Noyes, with whom *Mr. E. Hunn* and *Mr. H. T. Newcomb* were on the brief, for respondents.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

Whether a succession tax collected under §§ 29 and 30 of the act of June 13, 1898, c. 448, 30 Stat. 448, 464, shall be refunded is the matter here in controversy. The facts bearing upon its solution are these: Ferdinand J. Dreer, a resident of Philadelphia, Pennsylvania, died May 24, 1902, leaving a will directing that certain legacies be paid out of his personal estate to two sons and two grandchildren. The executors took charge of the property and proceeded to administer it under the supervision of the Orphans' Court, as the local law required, first for the benefit of the creditors and next for the benefit of the legatees. The former had a year within which to file their claims and the latter were not entitled to demand payment of the legacies until that time expired, and then only in the event there was a residue available for the purpose. *Jones' Appeal*, 99 Pa. St. 124, 130; *Rastaetter's Estate*, 15 Pa. Sup. Ct. 549, 553–555. On July 1, 1902, a date the importance of which will be seen presently, less than two months of the prescribed year had passed, and whether there would be a residue for the payment of legacies was as yet undetermined. In July, 1903, the Collector of Internal Revenue demanded of the executors a succession tax of $1,692.75 on account of the legacies and the tax was paid under protest. Shortly thereafter the executors sought, in the appropriate way, to have the tax refunded, but the request was denied, and they then sued the Collector to recover back the amount. In the Circuit Court the executors prevailed and the judgment was affirmed by the Circuit Court of Appeals. 201 Fed. Rep. 1021.

By § 29 of the act of 1898 an executor, administrator or trustee having in charge a legacy or distributive share, exceeding $10,000 in actual value, arising from personal

property and passing from a decedent to another by will or intestate laws was subjected to a tax graduated according to the value of the legacy or distributive share; but that section was repealed by the act of April 12, 1902, c. 500, 32 Stat. 96, with a qualification that the repeal should not be effective until July 1 following and should not prevent the collection of any tax imposed prior to the latter date. Next came the act of June 27, 1902, c. 1160, 32 Stat. 406, the third section of which reads as follows:

"That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the Act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An Act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said Act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

As the context shows, the word "vested" in the first sentence has the same meaning as "absolutely vested in possession or enjoyment" in the second, *Vanderbilt* v. *Eidman*, 196 U. S. 480, 500; *United States* v. *Fidelity Trust Co.*, 222 U. S. 158, and the words "contingent" and "absolutely vested in possession or enjoyment" are used

antithetically and applied to both legacies and distributive shares. What is meant by "contingent" is indicated by the phrase with which it is contrasted and by its application to distributive shares as well as to legacies. The only sense in which the former are contingent—and it is practical rather than technical—is that they come into being only where, in due course of administration, the debts of the deceased are ascertained and it is found that a surplus remains for distribution. It is in this sense that the word is applied to distributive shares, and, of course, it is applied to legacies in the same way. In speaking of this section, we said in *United States* v. *Jones*, *ante*, p. 106, at p. 113: "It deals with legacies and distributive shares upon the same plane, treats both as 'contingent' interests until they 'become absolutely vested in possession or enjoyment,' directs that the tax collected upon contingent interests not so vested prior to July 1, 1902, shall be refunded, and forbids any further enforcement of the tax as respects interests remaining contingent up to that date." That case related to a tax collected upon distributive shares in an estate in Pennsylvania. The intestate had died before July 1, 1902, but the time for presenting claims against the estate had not expired prior to that date, and therefore what, if any, surplus would remain was still uncertain and the heirs were not as yet entitled to a distribution. It was accordingly held that the distributive shares did not become "absolutely vested in possession or enjoyment" before July 1, 1902, but remained contingent in the sense of the statute, and consequently that the tax should be refunded. The present case differs from that only in the fact that here the tax was collected upon legacies. This difference is not material. The refunding act deals with both in the same way and the local law subordinates the rights of legatees to those of creditors in like manner as it does the rights of distributees. It follows that the tax here in question must be refunded.

The case of *Hertz* v. *Woodman*, 218 U. S. 205, is relied upon by the Government, as it was in *United States* v. *Jones*, *supra*, but for reasons there given we think it is not in point here.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

KIRMEYER *v.* STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 145. Argued January 22, 1915.—Decided March 1, 1915.

Beer is a recognized article of commerce, and the right to send it from one State to another, and the act of doing so, are interstate commerce, the regulation whereof has been committed to Congress, and a state law interfering with or handling the same conflicts with the Federal Constitution.

Transportation is not complete until delivery to the consignee or the expiration of a reasonable time therefor and prior thereto the provisions of the Wilson Act of August 8, 1890, do not apply.

Whether commerce is interstate or intrastate must be tested by the actual transaction; it does not depend upon the methods employed, distance between the points, or the domicil or character of the parties engaged therein.

The packages in which goods involved in this case were transported in interstate commerce were those customarily used for transportation of such articles, and not a mere plan or device to defeat the policy of the State, and the rulings in that respect in *Austin* v. *Tennessee*, 179 U. S. 343, and *Cook* v. *Marshall County*, 196 U. S. 261, do not apply.

88 Kansas, 589, reversed.

THE facts, which involve the construction and application of the Commerce Clause of the Federal Constitution, are stated in the opinion.

Mr. A. E. Dempsey, with whom *Mr. Frank Doster* was on the brief, for plaintiff in error.

Mr. John S. Dawson, Attorney General of the State of Kansas, for defendant in error, submitted.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The State of Kansas instituted this cause in a local court, September 29, 1910. Kirmeyer was charged with carrying on a liquor business at Leavenworth in open and persistent violation of law and thereby committing a nuisance. The relief sought was "that he be enjoined from conducting said unlawful business; that he be enjoined from maintaining, using and employing said wagons, vehicles, conveyances, horses, mules, telephones and any other property in the said unlawful manner herein alleged; that upon the final determination of this action said injunction be made permanent; that said wagons, vehicles, conveyances, horses, mules, telephones and other property used in said unlawful business be declared common nuisances and that the same be abated."

In the opinion of the trial court the transactions disclosed constituted a part of interstate commerce within the protection of the Constitution of the United States; and judgment was rendered for Kirmeyer. Upon appeal the Supreme Court of the State declared, "The broad question here is whether the defendant was really engaged in commerce between the States of Missouri and Kansas, or was he only seeking by tricks and devices to evade the laws of his State—doing by indirection that which could not lawfully be done by ordinary and direct methods." Referring to numerous opinions of this court it further said they "do not preclude a fair inquiry into methods and practices in order to determine whether transactions

under investigation constitute legitimate interstate commerce or are colorable merely and intended to evade and defeat the just operation of the constitution and law of the State." And the conclusion was— "It is true that a citizen of Kansas who finds that his business is prohibited by our laws may in good faith engage in the same business in another State where the legal obstacle does not exist. But he may not under the guise of moving across the state line, and other shifts or devices to evade the statutes of the State, continue in the prohibited business here and be immune from the penalties of our law. From the facts found by the court and from the testimony of the defendant, it appears that his business was not legitimate interstate commerce but was carried on in violation of the statutes of this State and is subject to abatement and injunction." Accordingly the action of the district court was reversed with instructions to grant the relief prayed for (88 Kansas, 589, 600, 603). Thereupon this writ of error was sued out.

The essential facts disclosed by the record are summarized in paragraphs (*a*) and (*b*) following.

(*a*) Rigorous statutes have long prohibited the sale of intoxicating liquors within the State of Kansas. The city of Leavenworth lies on the Missouri River; on the opposite bank in Missouri is Stillings, a village with one store, roundhouse, a few residences, eight or ten beer warehouses, and a freight depot without a regular agent, but no post office. For a long time plaintiff in error has resided in Leavenworth and prior to 1907 he carried on there an illicit beer trade; for use in the same he there maintained a business place and warehouse and kept wagons and teams. In that year, alarmed by the activities of officials, he discontinued this office and warehouse and immediately opened others in Stillings and connected them with the Leavenworth telephone exchange. He did not change his residence nor remove his wagons and teams

from Leavenworth but kept them in quarters connected by telephone with the local exchange and continued to use them for hauling to and from the new warehouse and making deliveries. Thereafter he received at Stillings barrels, cases and casks of beer in carload lots from Kansas City and other points; sometimes he received like merchandise at the railroad depot in Leavenworth which was then hauled across the river. At the Stillings office he received and accepted orders for beer to be delivered in Leavenworth and other points in Kansas. Eighty-five per cent. came by telephone; the remainder through the Leavenworth post office, but these were carried to his place of business before being opened.

(*b*) Accepted orders for delivery in Leavenworth were filled by setting aside the cases, kegs or casks in the warehouse, tagging them with the names of the purchasers, and then sending them daily—sometimes oftener—over the bridge in his wagons to the residences of purchasers. For such deliveries no charges were made. If the goods were intended for other points in Kansas they were hauled to the railroad station at Leavenworth and there turned over to the carrier. The business for the most part was "family trade" for private use only and amounted to some $500 per month. A license tax was paid to the Federal Government; also merchant's and *ad valorem* taxes to Missouri; he had no Kansas license. The empty cases were gathered up by the drivers throughout Leavenworth, loaded in cars there and shipped to some other State. Advertisements in two Leavenworth papers announced his business and location at Stillings, and likewise gave the telephone number at the horse barn. When parties desiring beer called over this telephone they were advised to call the Stillings office. Collections were usually made by the plaintiff in error or by collectors; sometimes by mail. Drivers received no orders from purchasers.

The instant cause arose before passage of the Act of

Congress, approved March 1, 1913, c. 90, 37 Stat. 699, known as the Webb-Kenyon Bill; consequently neither its construction nor application is now involved; and what is said herein of course has reference to conditions existing prior to that enactment.

Former opinions of this court preclude further discussion of these propositions: Beer is a recognized article of commerce. The right to send it from one State to another and the act of doing so are interstate commerce the regulation whereof has been committed to Congress; and a state law which denies such right or substantially interferes with or hampers the same is in conflict with the Constitution of the United States. Transportation is not complete until delivery to the consignee or the expiration of a reasonable time therefor and prior thereto the provisions of the Act of Congress, approved August 8, 1890, c. 728, 26 Stat. 313—the Wilson Act,—have no application. *License Cases*, 5 How. 504, 577; *Leisy* v. *Hardin*, 135 U. S. 100, 110; *Rhodes* v. *Iowa*, 170 U. S. 412, 426; *Vance* v. *Vandercook Co.* (No. 1), 170 U. S. 438, 444; *American Express Co.* v. *Iowa*, 196 U. S. 133, 142, 143; *Heyman* v. *Southern Ry.*, 203 U. S. 270, 276; *Adams Express Co.* v. *Kentucky*, 206 U. S. 129, 135; *Adams Express Co.* v. *Kentucky*, 214 U. S. 218, 222.

The foregoing cases and those cited therein we also regard as controlling authority in support of the claim that the business carried on by plaintiff in error within the State of Kansas was interstate commerce. That the traffic moved by horse-drawn wagons from a point near the state line, instead of by railroad from a greater distance, does not change the applicable rule. Nor did the mere adoption of cumbersome and expensive methods render the business intrastate—that must be tested by the actual transactions.

The Supreme Court of the State gave much weight to the dealer's past conduct and animating purpose and re-

lied upon language quoted from *Austin* v. *Tennessee*, 179 U. S. 343, and *Cook* v. *Marshall County*, 196 U. S. 261.

Considered in the light of our former decisions, if the business carried on by plaintiff in error after removal of his office to Stillings had been conducted by a dealer who had always operated from that place we think there could be no serious doubt of its interstate character. And we cannot conclude that a legal domicile in Kansas coupled with a reprehensible past and a purpose to avoid the consequences of the statutes of the State suffice to change the nature of the transactions. Otherwise one of two persons located side by side in the same State and doing the same business in identical ways might be engaged in interstate commerce while the other was not.

Improper application was given to what was said in *Austin* v. *Tennessee* and *Cook* v. *Marshall County*, *supra*. The point for decision in them was whether the packages containing cigarettes shipped into the State were "original" ones within the constitutional import of the term as theretofore defined. Looking at all the circumstances this court concluded they were not. The general use of like packages was unknown and impracticable in transactions between manufacturers and wholesale dealers residing in different States and the plan pursued was plainly a mere device designed to defeat the policy of the State where the goods were received—not a *bona fide* commercial arrangement. Here, no such question is presented.

A long line of opinions have discussed the legal principles involved—reiteration would be fruitless. The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent herewith.

Reversed.

LINN & LANE TIMBER COMPANY *v.* UNITED STATES.

SAME *v.* SAME.

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

Nos. 46, 159. Argued January 27, 28, 1915.—Decided March 8, 1915.

This court follows the findings of fact of two courts below in this case that the corporation was a mere tool of the individual organizing and controlling it and holding most of its capital stock, that his knowledge as to the fraud was its knowledge, and that the corporation was a party to an effort to conceal the title until the period of limitation had expired. *McCaskill Co.* v. *United States*, 216 U. S. 504.

Where the corporation was organized simply to take title to lands and its first business was to record the deeds from the owners of practically all of its stock, and there is doubt as to whether they were actually delivered until then, the difference in legal personality between the grantor and the corporation gives the latter no greater rights than the former.

The fact that some third parties held stock of a corporation as collateral for debts of the principal stockholder *held* in this case, following the findings of the courts below, not to have altered the situation.

Where a secret transfer of wrongfully held land is made through the medium of a corporation for the purpose of busying the United States with the wrong person until the statute has run, service on the man thus put forward is sufficient to avoid the statute.

Where the bills to set aside patents for fraud have been filed and subpœnas issued and delivered for service before the statute has run, and reasonable diligence shown in getting service, the running of the statute is interrupted and the rights of the United States against the patents are saved.

Where the decision of the Secretary of the Interior that patents should be issued has been obtained by such fraud as existed in this case, it is

not conclusive; the matter is open for consideration by the courts. *Washington Securities Co.* v. *United States*, 234 U. S. 76.
196 Fed. Rep. 593; 203 Fed. Rep. 394, affirmed.

THE facts, which involve the right of the United States to cancel patents for land on the ground of fraud in the entries, and the application of the statute of limitations to the actions to cancel, are stated in the opinion.

Mr. John Lind, with whom *Mr. A. Ueland* and *Mr. W. M. Jerome* were on the brief, for appellants.

Mr. Assistant Attorney General Knaebel, with whom *Mr. Henry C. Lewis* was on the brief, for the United States.

Mr. Joel F. Vaile and *Mr. Henry McAllister, Jr.*, filed a brief as *amici curiæ*.

Mr. Joseph Paxton Blair and *Mr. Charles R. Lewers* filed a brief as *amici curiæ*.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are suits in equity brought by the United States against the appellants to annul patents issued under the Timber and Stone Act of June 3, 1878, c. 151, 20 Stat. 89, on the ground that the entries were fraudulent. Both of the courts below have found that the entries were fraudulent, that the defendant Smith was either a party to the fraud or chargeable with notice of it, and that the Linn & Lane Timber Company stood in no better position than Smith. The Circuit Court of Appeals made decrees for the United States in respect of all the lands concerned. 181 Fed. Rep. 545. 196 Fed. Rep. 593; 116 C. C. A. 267. 203 Fed. Rep. 394; 121 C. C. A. 498. The main question here concerns the statute of limitations: "suits to vacate

and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents." Act of March 3, 1891, c. 561, § 8; 26 Stat. 1095, 1099. See Act of March 3, 1891, c. 559; 26 Stat. 1093. In No. 46 the twenty-eight patents in controversy were issued on August 12, 1902. In No. 159, nine of the patents were issued on August 12, 1902, and eight on July 9, 1902. The bills were filed and subpœnas were taken out and delivered to the Marshal on May 25, 1908. On July 20 the Marshal returned *non est inventus* as to Smith. An order of notice was applied for on the same day, suggesting that he was residing in Minneapolis, and was granted on July 27. Smith was served with process on August 11, 1908, and the corporation was made a party on November 16, and was served on November 18, 1908; so that it will be seen that the corporation was not brought into the suit until more than six years had run after the issue of all the patents and that Smith was served more than six years after the issue of eight of the patents involved in No. 159. On the other hand the bills were filed within six years.

The patented lands had been conveyed to various persons in trust for Smith in 1900, shortly after the making of final proof. In May, 1906, Smith, still having the equitable or legal title, organized a Minnesota corporation, the appellant, with 1000 shares of $100 each, for the purpose of receiving and holding the title to these and other lands. He took 998 shares, his wife one, and his attorney one. He then offered to pay for the stock with the land, and subsequently caused to be executed deeds purporting to convey the lands to the corporation, but he retained the deeds and did not have them recorded until September 9, 1908, after the beginning of these suits, and more than six years after the issue of the patents. It is found, it would seem reasonably, that one purpose of Smith was to keep the titles concealed until the statute of

limitations should have run. The United States was ignorant of the transaction. But a month from the recording of the conveyances to the corporation Smith and other defendants pleaded it in abatement, and in November, as we have said, the United States filed amended bills.

Upon the facts as found by the two courts below we must take it that the corporation was the mere tool of Smith, that his knowledge was its knowledge, *McCaskill Co.* v. *United States*, 216 U. S. 504, and that it was party to an effort to keep the title concealed until it was too late for the United States to complain. It even is open to some doubt whether the deeds ever were delivered until they were recorded, and it seems open to none that, as was said by the Circuit Court of Appeals, recording the deeds was the first business the corporation did. This being so, the difference in legal personality between Smith and the corporation gives the corporation no greater rights than Smith. It cannot be privy to a fraud and on the ground of its success set up a title of which, if that be material, Smith is to have substantially the whole advantage, and thus defeat the adjudication against Smith that otherwise would undo the fraud. There is no question of creditors' rights and the only ground for hesitation is that before the bill was filed some of the shares had been pledged by Smith, and fifteen shares had been transferred to one Johnson and also pledged for Smith's debt. But we are of opinion with the findings that the position was not changed as between the United States, Smith and the corporation in such a way as to give the last a better standing in this case. Those who took the stock as security did not deal with the corporation as outsiders, but became a part of it while it still was under the manifest domination of Smith and charged with participation in Smith's fraud. The corporation cannot derive any new right from them. *Wilson Coal Co.* v. *United*

States, 110 C. C. A. 343; 188 Fed. Rep. 545. Whether they have a remedy is not a question here.

We now are not considering the effect of a fraudulent concealment of a cause of action. We are considering whether a man who knows that his title is bad and will be attacked can call into being a corporation which he owns, in order to save the property, make a deed to it, put the deed into his pocket, leave it unrecorded and, without the need of trusting even an accomplice, can keep it with perfect security until the statute has run, and then set up that his creature owns the land. We are deciding that if a secret transfer of wrongfully held land is made in this way for the purpose of busying the United States with the wrong person until the title shall be made good by time, service on the man thus put forward is sufficient to avoid the statute and the trick must fail.

The bills were filed and subpœnas were taken out and delivered to the Marshal for service before the statute had run, reasonable diligence was shown in getting service and therefore the rights of the United States against all the patents were saved. For when so followed up the rule is pretty well established that the statute is interrupted by the filing of the bill. *Coppin* v. *Gray*, 1 Y. & C., C. C. 205, 207. *Purcell* v. *Blennerhassett*, 3 Jo. & Lat. 24, 45. *Forster* v. *Thompson*, 4 Dr. & Warr. 303, 318. *Hele* v. *Lord Bexley*, 20 Beav. 127. *Hayden* v. *Bucklin*, 9 Paige (N. Y.), 512. *Aston* v. *Galloway*, 38 No. Car. 126. *Dilworth* v. *Mayfield*, 36 Mississippi, 40, 52. *United States* v. *American Lumber Co.*, 85 Fed. Rep. 827, 830. *United States* v. *Miller*, 164 Fed. Rep. 444.

There was an attempt made in argument to reopen the questions of fact upon which the two courts below agreed, but we see no reason to depart from the common rule and therefore we do not advert to any of those matters. It also was argued that the decision of the Secretary of the Interior that the patents should be issued is conclusive.

But the decision was obtained by such frauds that the matter was open for reconsideration by the courts. *Washington Securities Co.* v. *United States*, 234 U. S. 76.

Decrees affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of these cases.

RAMAPO WATER COMPANY *v.* CITY OF NEW YORK.

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

No. 715. Argued February 24, 1915.—Decided March 8, 1915.

Where the constitution of the State reserves the right so to do, the charter of a corporation may be repealed without impairing the obligations of a contract. *Calder* v. *Michigan*, 218 U. S. 591.

In the absence of a specific decision of the highest court of the State to that effect, this court will not construe a statute authorizing a water supply corporation to exercise eminent domain under the provisions of the Railroad Act as giving to that corporation a vested right to exclude the rest of the world from whatever watersheds it chooses for an unlimited period and one that cannot be impaired by subsequent legislation simply by filing a map.

The Railroad Act of New York requires a corporation intending to exercise eminent domain not only to file maps of the property to be taken but also to file written notice to the occupants thereof and the mere filing of the map does not create rights against the State.

The legislation of the State of New York of 1905 empowering the City of New York to acquire lands for its new water supply is not unconstitutional as impairing the obligation of the contract of the charter rights of the plaintiff in error in this case or depriving it of its property without due process of law under the act authorizing

it to acquire property in the same watershed under the provisions of the Railroad Act, it appearing that no proceedings for such acquisition had ever been taken beyond the filing of a map.

THE facts, which involve the constitutionality under the impairment of obligation and due process clauses of the Federal Constitution of legislation of the State of New York in regard to the new water supply for the City of New York, are stated in the opinion.

Mr. Carroll G. Walter, with whom *Mr. Walter C. Noyes* was on the brief, for appellant:

The bill having alleged the existence of a contract and its impairment and the possession of property and its deprivation without due process of law, a case arising under the United States Constitution was presented, and the District Court had jurisdiction notwithstanding the lack of diversity of citizenship.

The bill shows on its face that the plaintiff acquired, by grant from the State, a vested right and franchise to utilize the watersheds of the Esopus, Catskill, Schoharie and Rondout Creeks for the purpose of constructing and maintaining a water works system, and to supply water from these sources to the various municipalities of the State.

The franchise so acquired by the plaintiff constitutes a contract and a vested property right protected by the Federal Constitution, and was not destroyed by the repealing acts mentioned in the bill.

The acts and proceedings of the defendants, done under color of authority of state laws, constitute an impairment of the plaintiff's contracts and a taking of its property without due process of law.

The defendants have no "special authority from the legislature" to take the lands and waters to which the plaintiff's franchise relates, and the legislature has not

authorized those lands to be devoted to "some other public use."

Numerous authorities sustain these contentions.

Mr. Louis C. White, with whom *Mr. Frank L. Polk* was on the brief, for appellees:

All parties to the suit are citizens of the State of New York, and unless the bill of complaint shows on its face some question arising under the Constitution or laws of the United States, the court below was without jurisdiction and the appeal was properly dismissed.

The bill of complaint shows on its face that the plaintiff had no contract, the obligation of which was impaired, nor any property of which it was deprived, by the legislation and acts complained of.

Chapter 724 of the Laws of 1905 makes ample provision for the ascertainment and payment of compensation to every owner or person interested in any land taken by the City of New York under that act.

The decree should be affirmed and the certified question answered in the negative.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity to restrain the City of New York and the Board of Water Supply from proceeding further with the enterprise upon which they already had spent over one hundred and twenty-nine million of dollars in order to provide the city with a supply of water. The ground is as follows:

The plaintiff (appellant) originally was incorporated under a general act, in 1887, for the purpose of storing and supplying water for mining, domestic, manufacturing, municipal and agricultural purposes, to cities, other corporations, and persons. By virtue of other statutes it had the right to acquire title to land and water for its

corporate purposes in the manner specified by the General Railroad Act, ch. 140, Laws of 1850; and it spent money, had surveys made, filed some maps, and acquired options for the purchase of real estate in pursuance of the ends for which it was formed.

In 1890 the laws under which the plaintiff was incorporated were repealed, but thereafter ch. 985 of the Laws of 1895 reiterated the grant of the powers specified in the charter and authorized the corporation to acquire 'in the same manner specified and required in' the above mentioned Railroad Act 'such lands and waters along the watershed of the Ramapo, and along such other watersheds and their tributaries, as may be suitable for the purpose of accumulating and storing the waters thereof.' The corporation is to make a map of the route adopted and the land to be taken and file the same in the office of the Clerk of the County through which the route runs or in which the land is situate. It is to give written notice to all occupants of lands so designated and the occupants and owners are given time to apply for the appointment of commissioners, by a petition stating the objections to the route designated and the route to which it is proposed to alter the same, with elaborate provisions for notice and hearing and appeal to the Supreme Court, which 'may affirm the route proposed by the corporation or may adopt that proposed by the petitioner.' Under this act the corporation filed maps covering substantially the whole of the drainage areas or watersheds of the Esopus, Catskill, Schoharie, and Rondout creeks, about a thousand square miles (being the same lands that the City now has taken), acquired options for purchase of land, and spent large sums.

Before this time, it is alleged, the courts of New York had declared that the filing of maps under the Railroad Law of New York gave to the corporation filing them a vested right to the exclusive use of the lands covered by

the maps. The plaintiff in 1898 made an offer to the City of New York to furnish it with water from the region in question, but, pending investigation by the City, in 1901 the act of 1895 giving the plaintiff its rights was repealed by an act alleged to be unconstitutional and void. In 1905 the City was empowered itself to acquire new water supplies, machinery was provided to that end, and the City has gone ahead as we have stated, without regard to the plaintiff's alleged rights. The plaintiff sets up that the laws under which the City acts impair the obligation of contracts between it and the State and take its property without due process of law, contrary to Article I, § 10, and the Fourteenth Amendment of the Constitution of the United States. An answer was filed, but the defendants also moved to dismiss for want of jurisdiction on the ground that all the parties were citizens of New York and that the case involved no question under the Constitution. The District Court, being of opinion that the bill disclosed no such rights as the plaintiff claimed and therefore showed no real constitutional ground, dismissed the bill.

The plaintiff's argument, while admitting that it must appear that there is a substantial question under the Constitution, and that the formal averment of such a question is not enough, makes a rather useless attack upon the application of that principle in *Underground Railroad* v. *New York,* 193 U. S. 416. If it is apparent that the bill is groundless, it does not matter very much whether the dismissal purports to be for want of jurisdiction or on the merits. But we are of opinion that the groundlessness of the bill is so obvious that it fairly may be said that no substantial constitutional question appears.

The charter of the company of course could be repealed without impairing the obligation of a contract as the right was reserved, as usual, in the constitution of the State. *Calder* v. *Michigan,* 218 U. S. 591. The only matter de-

serving a word is the claim that by filing the maps the corporation gained rights that survive. As to that, in the first place it would require stronger language than any that is found in the act of 1895 to lead us to believe that the legislature meant that the rights conferred with regard to routes should be extended over any or all of the watersheds in the State of which the plaintiff might see fit to file a map. The direction to file a map of the route adopted and the land to be taken, coupled with the other provisions that we have recited, appears to us to have in view the route and the land needed for the route, and only that, not the thousand square miles that the plaintiff claims. In the next place the plaintiff had given no notice to anybody and notice to occupants of the land is a condition to the existence of any right. And finally it is held in New York and affirmed by this court, that no such right even for the route of a railroad is created as against the State by the filing of a map. *People* v. *Adirondack Ry.*, 160 N. Y. 225, 242–247; 176 U. S. 335, 346. *Underground R. R.* v. *New York*, 193 U. S. 416, 428.

We appreciate the argument that although the corporation may have had no lien on the land or right as against the sovereign power, it had a right as against all subordinate bodies to exclude them from the lands of its choice, that the decisions had declared this right to be vested and indestructible except by legitimate exercise of the power of eminent domain, that it had spent money and taken action on the faith of them, and that a later decision cannot take away the right. But the cases relied upon are too remote for the confident application of that doctrine if there were no other objections to it. They concern the effect of filing a map of a railroad route and only when coupled with notice to the landowners concerned. We should be more inclined to follow *Sauer* v. *New York*, 206 U. S. 536. *Moore-Mansfield Construction Co.* v. *Electrical Installation Co.*, 234 U. S. 619, 626. *Wil-*

loughby v. *Chicago*, 235 U. S. 45. But as we have said, nothing short of a specific decision of the Court of Appeals would make us believe that the act of 1895 gave to the plaintiff, without notice to landowners or other preliminary, a vested right, seemingly unlimited in time, to exclude the rest of the world from whatever watersheds it chose, simply by filing a map.

Decree affirmed.

NORTHERN PACIFIC RAILWAY COMPANY *v.* STATE OF NORTH DAKOTA ON RELATION OF McCUE, ATTORNEY GENERAL.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY *v.* SAME.

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

Nos. 420, 421. Argued October 19, 20, 1914.—Decided March 8, 1915.

This court takes the facts as found by the state court as established unless

(1) A Federal right has been denied as the result of a finding shown by the record to be unsupported by evidence or

(2) A conclusion of law as to a Federal right and a finding of fact are so commingled as to make it necessary to analyze the latter.

Neither of those conditions exist in this case.

Railroad property is private property devoted to public use and the State has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction.

It is not necessary there should be uniform rates or the same percentage of profits on every sort of business; there is room for reasonable classification.

Despite this range of permissible action the State has no arbitrary power over rates; the devotion of the carrier's property to public use is qualified by the carrier's right to a reasonable reward; the State

may not select a commodity on a class of traffic even if of a low grade and instead of fixing a reasonable rate require the carrier to transport it at less than cost or for merely nominal compensation.

Public interest cannot be invoked as a justification for demands passing the limits of constitutional protection.

This court does not sit as a revisory board to substitute its judgment for that of the legislature or its administrative agent.

This court is not required to concern itself with mere details of a schedule; or to review a particular tariff which yields substantial compensation, when the profitableness of the intrastate business as a whole is not involved. But a different question arises when the State has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation.

There is a presumption that rates fixed by the State for intrastate traffic are reasonable and just but it is one that may be rebutted by the carrier showing, as in this case, that it is non-compensatory.

As the maximum intrastate rates on coal in carload lots fixed by ch. 51 of the laws of North Dakota are unreasonable—either requiring the carrier to transport the commodity at a loss or for a merely nominal compensation after taking into account the entire traffic to which the rates apply—the State exceeded its authority in enacting the statute which amounts to an attempt to take the property of the carrier without due process of law in violation of the Fourteenth Amendment.

26 N. Dak. 438, reversed.

THE facts, which involve the validity under the due process provision of the Fourteenth Amendment of a statute of North Dakota fixing maximum intrastate rates for transportation of coal by railroad companies, are stated in the opinion.

Mr. Charles W. Bunn, with whom *Mr. Charles Donnelly* was on the brief, for plaintiff in error in No. 420.

Mr. John I. Dille, with whom *Mr. A. H. Bright* and *Mr. John L. Erdall* were on the brief, for plaintiff in error in No. 421.

Mr. Andrew Miller, Attorney General of the State of North Dakota, and *Mr. C. L. Young*, with whom *Mr. John*

Carmody and *Mr. Alfred Tager* were on the brief, for defendants in error:

A non-compensatory rate is not necessarily confiscatory. There may be such a special commodity rate fixed by the state authorities and if the entire intrastate business yields a fair profit upon the investment devoted thereto, the special rate by itself is not a taking of property. The rule is elastic. This court has never held that a rate for service lower than is returned for the entire business or because it returns no profits is unreasonable.

Smyth v. *Ames*, 169 U. S. 466, does not hold that fair returns upon property invested is an unqualified rule. The rate allowed is what the services rendered are reasonably worth. The right to dividends must give way to the paramount right of the public. *Minn. & St. L. Ry.* v. *Minnesota*, 186 U. S. 268; *Covington Turnpike* v. *Sanford*, 164 U. S. 576; *Reagan* v. *Farmers L. & T. Co.*, 154 U. S. 362; *San Diego Land Co.* v. *National City*, 174 U. S. 757; *St. Louis & S. F. Ry.* v. *Gill*, 54 Arkansas, 101; *S. C.*, aff'd 156 U. S. 649.

A carrier is not entitled to a uniform rate of return on each commodity. *Interstate Ry.* v. *Massachusetts*, 207 U. S. 79. So as to other public utilities corporations. *Willcox* v. *Consol. Gas Co.*, 212 U. S. 19; *Atlantic Coast Line* v. *North Carolina*, 206 U. S. 1.

In passing upon reasonableness of rates the interests of the public as well as the carrier are to be considered. *Matthews* v. *Corporation Comm.*, 106 Fed. Rep. 7; *Southern Ry.* v. *McNeill*, 155 Fed. Rep. 756; *Arkansas Rate Cases*, 168 Fed. Rep. 730; *S. C.*, 187 Fed. Rep. 307. State court cases are to like effect. *Southern Ry.* v. *Stoveworks*, 128 Georgia, 223; *Jacobson* v. *Wisconsin Ry.*, 71 Minnesota, 519; *Taylor* v. *Mo. Pac. Ry.*, 76 Kansas, 467; *Cantrell* v. *St. Louis &c. Co.*, 176 Illinois, 512; *McCue* v. *Nor. Pac. Ry.*, 19 N. Dak. 45. See also *Louis. & Nash. R. R. Coal Rates*, 26 I. C. C. 220; Wyman on Pub. Serv.

Corp., § 1201; Freund, Police Power, § 551; 3 Encyc. Sup. Ct. Rep. 632. *Int. Comm. Comm.* v. *Un. Pac. Ry.*, 222 U. S. 541, is not opposed to these cases.

The intrastate business of the carriers as a whole produced a fair return.

Classification of rates is proper and within the power of the State. 2 Wyman, § 1232; Beale & Wyman, § 554; *Tift* v. *Southern Ry.*, 138 Fed. Rep. 264.

Allowance should be made for the fact that coal is one of the lowest classes of freight and cheapest to transport. *Louis. & Nash. R. R.* v. *Wilson*, 132 Indiana, 517; *Trade Leagues* v. *Phila., Wil. & Balt. Ry.*, 8 I. C. C. 386; *Am. Ins. Co.* v. *Chi. & Alt. Ry.*, 74 Mo. App. 89; *Hayes* v. *Railway Co.*, 12 Fed. Rep. 309.

Shipments in carload lots should be at low rates.

In this case of coal in carload lots the revenues exceed actual outlay and there is a contribution towards expenses which would have existed even if there had been no coal hauled.

The rate was fixed as a declaration of public policy in favor of a domestic industry and the general welfare of the State. *Gladson* v. *Minnesota*, 166 U. S. 427.

The burden of showing that the rates are confiscatory is on the carrier.

Mr. Justice Hughes delivered the opinion of the court.

By Chapter 51 of the Laws of 1907, the legislature of North Dakota fixed maximum intrastate rates, graduated according to distance, for the transportation of coal in carload lots. It was further provided that in case the transportation was over two or more lines of railroad it should be considered as one haul, the compensation for which should be divided among the carriers according to their agreement or, if they could not agree, as the railroad

commissioners should decide subject to appeal to the courts. While the statutory rates governed all coal shipments, their practical application was almost solely to lignite coal.

The carriers refused to put the rates into effect, and in August, 1907, the Attorney General of the State began proceedings in its Supreme Court to obtain a mandatory injunction against the Northern Pacific Railway Company, the Minneapolis, St. Paul & Sault Ste. Marie Railway Company and the Great Northern Railway Company. The companies answered that the statute violated the Commerce Clause of the Federal Constitution, and also that it infringed the Fourteenth Amendment by fixing rates that were 'unremunerative,' 'unreasonable,' and 'confiscatory.' The Supreme Court of the State, overruling these contentions, granted the injunction. 19 N. Dak. 45. It was held that the evidence was not sufficient to overcome the presumption in favor of the rates. On writ of error from this court, the decree was affirmed without prejudice to the right of the railroad companies to reopen the case after an adequate trial of the rates. 216 U. S. 579.

This decision was rendered in the early part of the year 1910 and thereupon the rates were put into effect. After a trial for over a year, the case was reopened, voluminous testimony was taken and the Supreme Court of the State, making its separate findings of fact as to the effect of the rates in the intrastate business of each carrier, and stating its conclusions of law, entered judgment commanding the carriers to keep the rates in force. 26 N. Dak. 438. The Northern Pacific Railway Company and the Minneapolis, St. Paul & Sault Ste. Marie Railway Company have sued out these writs of error.

The period to which the testimony relates is the fiscal year ending June 30, 1911. The facts may be thus summarized:

Northern Pacific Railway Company.

The total revenue received by this company for the intrastate carriage of lignite coal for the fiscal year was $58,953.07. It was also deemed to be practicable to ascertain the amount of expense properly chargeable to this traffic. Upon this point, the court said: "As a result of the painstaking work of the accounting department of this railway company, and its endeavors to render all the assistance possible in determining the matter of the apportionment of expense to this commodity, as is evidenced by the care and detail in the accounting, the information furnished by the exhibits, and that the books of the company have been thrown open to the experts of the State, we are enabled to arrive, with a reasonable degree of certainty, at the proper proportion of expense that should be chargeable against the revenue received from the carriage of this commodity." 26 N. Dak., p. 446.

With respect to the division of some of the items of expense (maintenance of way and structures, and taxes), there was no dispute, and, as to the others, the range of controversy was narrow. The company contended that the traffic in question produced at the statutory rates a loss of $2,253.65; the State insisted that it yielded a profit of $2,391.63. After a detailed analysis, the state court found the charges against the revenue received from the lignite traffic to be: (1) For train operation expense, $30,850.12; (2) switching, $4,971; (3) station service, $4,182.58; (4) freight car repairs, renewals, and depreciation, $7,121.54; (5) traffic and general expenses (no loss and damage allowed), $1,456.14; (6) maintenance of way and structures, $7,119.93; (7) taxes, $2,424.15; making the total expenses, $58,125.46, and the surplus income, $827.61. *Id.*, pp. 460, 461. The summary of the findings of fact, is as follows:

"That, as to the Northern Pacific Railway Company, out of total freight receipts for lignite coal, amounting to

$58,953, the total cost of transportation, or out-of-pocket costs, together with all fixed or overhead expenses apportionable to said lignite traffic, consumed all of said receipts excepting $847, its net profit in the handling of the lignite business for the twelve months in question. That such rate is slightly remunerative, but in fact non-compensatory, considering the volume of freight carried and the property of the railroad devoted thereto." *Id.*, p. 439.

Minneapolis, St. Paul & Sault Ste. Marie Railway Company.

The state court regarded the statistics furnished by this company as being in the main estimates without satisfactory bases. Still, on making an elaborate examination of the facts disclosed by the record—all the testimony adduced in the three cases being available in each one so far as pertinent—and on taking judicial notice of certain local conditions, the court was able to find sufficient proof to justify it in determining that under the statutory rates the intrastate transportation of lignite coal was conducted by this company at a loss. *Id.*, pp. 461–472. A large part of the traffic, after a short haul, was delivered to connecting carriers—the Northern Pacific and Great Northern lines—and the pro-rating of the statutory compensation for the entire haul operated injuriously. As to this part, said to be 'nearly half the lignite business,' this road was 'virtually a branch line of the other two railroads in accumulating for them their lignite traffic.' It was found, further, that the value of the railway property within the State had not been established, nor had the portion of value attributable to the intrastate business been determined; and, also, that the carriage of lignite coal increased 'the railroad expenses but sixty per cent. of the usual statutory rate for the lignite haul,' that is, that this percentage of the rate covered the 'out-of-pocket cost' of the traffic, the remaining expenses in this view being such as

would have been incurred had no lignite coal been transported.

The gross receipts from the intrastate traffic in question during the fiscal year were $83,670. The final results of the court's analysis in the case of this company are thus epitomized:

"Its total receipts amount to more than its actual out-of-pocket costs, or actual costs of transportation, but are from $9,000 to $12,000 less than the total costs including fixed and overhead expenses properly chargeable to the carriage of this commodity and against the earnings therefrom. That the carriage of lignite coal by the Soo line within this State during said fiscal year was not only non-profitable, but occasioned a loss to it when its fixed expenses apportionable to all traffic are in proper proportion and amount assigned to and charged against the earnings from this commodity." *Id.*, p. 439.

In answer to the contention of the State that the company could not be heard to complain with respect to the disadvantage of the prorating with connecting carriers, inasmuch as the basis was agreed upon without an appeal to the board of railroad commissioners, the court said that it was difficult to see what other basis could have been taken, and, further, that the result, in substance, would have been the same. The amount which could thus have been gained, it was said, would have been taken 'from the net revenues of the Northern Pacific carrier principally,' and would have been insufficient to have given to the Minneapolis, St. Paul & Sault Ste. Marie company a net profit, so that 'all the difference in fact would have been that both Soo and Northern Pacific would be then hauling this freight at less than the gross cost, including, of course, out-of-pocket and all fixed charges.' *id.*, p. 483.

We understand that all the 'fixed charges,' to which the findings refer, are actual expenses which, while including taxes, do not include any return whatever upon the in-

vestment in the property whether by way of interest or otherwise.

The facts thus found must be taken to be established. This court will review the finding of facts by a state court (1) where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. *Kansas City Southern Ry.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Wood* v. *Chesborough*, 228 U. S. 672, 678. But the present case is not within either branch of the rule. *Portland Ry.* v. *Oregon Railroad Commission*, 229 U. S. 397, 412; *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243, 244. It cannot be said that the findings of fact made by the state court are unsupported by evidence, and it is apparent that the substantial question raised by the assignments of error and submitted in argument arises upon the facts found. True, the Northern Pacific Company insists that on a critical examination of the evidence it would be ascertained that, instead of a net profit of about $800, it received no profit at all from the traffic in question under the statutory rate, but the remuneration as found is so slight as not to be more than nominal in view of the extent of the traffic, and in this aspect the finding is that the rate as to this company is non-compensatory. So, while the contention of the Minneapolis, St. Paul & Sault Ste. Marie Company that it proved the value of the property used by it in the intrastate business is clearly inadmissible under the decisions of this court (*Minnesota Rate Cases*, 230 U. S. 352), still in the present case the determination of that value is not necessary inasmuch as no complaint is made with respect to the company's return upon its entire intrastate business, and, so far as the attempted showing of the value

of the property devoted to the traffic in question is concerned, that also is unimportant, as whatever that value might be, it is found that no net return upon it was secured.

As to the law, the state court held:

"(a) The statutory freight rate is presumed to be reasonable, which presumption continues until the contrary appears, and the rate is shown beyond a reasonable doubt to be confiscatory.

"(b) Proof that a rate is non-compensatory—that is, while producing more revenue than sufficient to pay the actual expenses occasioned by the transportation of the commodity, but insufficient to also reimburse for that proportion of the railroad's fixed or overhead costs properly apportionable to such commodity carried—is not sufficient to establish that the rate is confiscatory in law.

"(c) In order to establish such a non-compensatory rate to be confiscatory, it must further appear that any deficit under the rate affects the net intrastate freight earnings materially, and reduces them to a point where they are insufficient to amount to a reasonable rate of profit on the amount of the value of the railroad property within the state contributing to produce such net earnings."

Accordingly, it was further held that, after establishing the value of the property employed in the production of the net intrastate freight earnings, it must appear, in order to show confiscation, either (1) that such earnings are insufficient to yield a fair return upon that value and that the commodity in question is carried for less than what is sufficient to meet all expenses, including 'out-of-pocket costs' and fixed charges, or (2) that the loss on the commodity under the rate attacked 'reduces the balance of the net intrastate freight earnings' to a point where, including the loss on the commodity rate, they fail to yield such return. 26 Nor. Dak., p. 440.

And it was because their case failed to meet these tests

that the plaintiffs in error were commanded to observe the rate.

The general principles to be applied are not open to controversy. The railroad property is private property devoted to a public use. As a corporation, the owner is subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they were granted. Aside from specific requirements of this sort, the common carrier must discharge the obligations which inhere in the nature of its business. It must supply facilities that are reasonably adequate; it must carry upon reasonable terms; and it must serve without unjust discrimination. These duties are properly called public duties, and the State within the limits of its jurisdiction may enforce them. The State may prescribe rules to insure fair remuneration and to prevent extortion, to secure substantial equality of treatment in like cases, and to promote safety, good order and convenience.

But, broad as is the power of regulation, the State does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case, it would be no answer to say that the car-

rier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain. Thus, in *Lake Shore & Michigan Southern Ry.* v. *Smith*, 173 U. S. 684, the regulation as to the sale of mileage books was condemned as arbitrary without regard to the total income of the carrier. Similarly, in *Missouri Pacific Ry.* v. *Nebraska*, 217 U. S. 196, it was held that the carrier could not be required to build mere private connections, and the adequacy of the receipts from its entire business did not enter into the question. And this was so because the obligation was not involved in the carrier's public duty and the requirement went beyond the reasonable exercise of the State's protective power.

We have, then, to apply these familiar principles to a case where the State has attempted to fix a rate for the transportation of a commodity under which, taking the results of the business to which the rate is applied, the carrier is compelled to transport the commodity for less than cost or without substantial compensation in addition to cost. We say this, for we entertain no doubt that, in determining the cost of the transportation of a particular commodity, all the outlays which pertain to it must be considered. We find no basis for distinguishing in this respect between so-called 'out-of-pocket costs,' or 'actual' expenses, and other outlays which are none the less actually made because they are applicable to all traffic, instead of being exclusively incurred in the traffic in question. Illustrations are found in outlays for maintenance of way and structures, general expenses and taxes. It is not a sufficient reason for excluding such, or other, expenses to say that they would still have been incurred had the particular commodity not been transported. That commodity has been transported; the common carrier is under a duty to carry, and the expenses of its business at a particular time are attributable to what it does carry. The State cannot estimate the cost of carrying

coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing the burden of the upkeep of the property upon coal and other commodities. This, of course, does not mean that all commodities are to be treated as carried at the same rate of expense. The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned. It may be difficult to make such an apportionment, but when conclusions are based on cost the entire cost must be taken into account.

It should be said, further, that we find nothing in the record before us, and nothing in the facts which have been set forth with the most careful elaboration by the state court, that can be taken to indicate the existence of any standard whatever by reference to which the rate in question may be considered to be reasonable. It does not appear that there has been any practice of the carriers in North Dakota which affords any semblance of support to a rate so low. Whatever inference may be deduced from coal rates in other States, as disclosed by the record, is decidedly against the reasonableness of the rate. And it may be added that, while the rate was found to be compensatory in the case of the Great Northern Railway Company, this was distinctly shown to be due to the peculiar conditions of the traffic over that road, the differences with respect to which were fully detailed by the state court. 26 N. Dak., pp. 439, 472-480. Nearly ninety per cent. of the total intrastate traffic in lignite coal upon the three roads was over the lines of the plaintiffs in error. It is urged by the State that the commodity in question is one of the lowest classes of freight. This may be assumed, and it may be a good reason for a lower rate than that charged for carrying articles of a different sort, but the mere grade of the commodity cannot be regarded as furnishing a suffi-

cient ground for compelling the carrier to transport it for less than cost or without substantial reward.

The State insists that the enactment of the statute may be justified as 'a declaration of public policy.' In substance, the argument is that the rate was imposed to aid in the development of a local industry and thus to confer a benefit upon the people of the State. The importance to the community of its deposits of lignite coal, the infancy of the industry, and the advantages to be gained by increasing the consumption of this coal and making the community less dependent upon fuel supplies imported into the State, are emphasized. But, while local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the State may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to which the carrier had in no way agreed. It does not aid the argument to urge that the State may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant, they may be reduced. Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action. We cannot reach the conclusion that the rate in question is to be supported upon the ground of public policy if, upon the facts found, it should be deemed to be less than reasonable.

The legislature, undoubtedly, has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all

commodities or to secure the same percentage of profit on every sort of business. There are many factors to be considered,—differences in the articles transported, the care required, the risk assumed, the value of the service, and it is obviously important that there should be reasonable adjustments and classifications. Nor is its authority hampered by the necessity of establishing such minute distinctions that the effective exercise of the rate-making power becomes impossible. It is not bound to prescribe separate rates for every individual service performed, but it may group services by fixing rates for classes of traffic. As repeatedly observed, we do not sit as a revisory board to substitute our judgment for that of the legislature, or its administrative agent, as to matters within its province. *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439; *Louisville & Nashville R. R.* v. *Garrett,* 231 U. S. 298, 313. The court, therefore, is not called upon to concern itself with mere details of a schedule; or to review a particular tariff or schedule which yields substantial compensation for the services it embraces, when the profitableness of the intrastate business as a whole is not involved.

But a different question arises when the State has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the presumption of reasonableness is rebutted. If in such a case there exists any practice, or what may be taken to be (broadly speaking) a standard of rates with respect to that traffic, in the light of which it is insisted that the rate should still be regarded as reasonable, that should be made to appear. As has been said, it does not appear here. Frequently, attacks upon state rates have raised the question as to the profitableness of the entire intrastate business under the State's requirements. But the decisions in this class of

cases (which we have cited in the margin [1]) furnish no ground for saying that the State may set apart a commodity or a special class of traffic and impose upon it any rate it pleases, provided only that the return from the entire intrastate business is adequate. In *St. Louis & San Francisco Ry.* v. *Gill*, 156 U. S. 649, a statute fixing a maximum rate for passengers in the State of Arkansas was challenged, but the allegation and offer of proof that the rate would compel the carriage of passengers at a loss related only to a portion, or division, of the railroad and not to the result of all the traffic to which the rate in question applied. The holding that this was insufficient was in entire accord with the above stated principle,—that the rate-making power may be exercised in a practical way and that the legislature is not bound to assure a net profit from 'every mile, section, or other part into which the road might be divided.' *Id.*, p. 665. A passenger rate may apply generally throughout the State, and the effect of the rate must be considered with respect to the whole business governed by the rate. In *Smyth* v. *Ames*, 169 U. S. 466, a schedule of freight rates was involved, and, while the entire schedule was under consideration, it was recognized that in order to determine its adequacy the

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[1] *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307; *Dow* v. *Beidleman*, 125 U. S. 680, 690; *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U. S. 339, 341; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Covington & Lexington Turnpike Co.* v. *Sandford*, 164 U. S. 578; *Smyth* v. *Ames*, 169 U. S. 466; *S. C.*, 171 U. S. 361; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739; *Chicago, Milwaukee & St. Paul Ry.* v. *Tompkins*, 176 U. S. 167; *San Diego Land & Town Co.* v. *Jasper, supra; Stanislaus County* v. *San Joaquin Canal Co.*, 192 U. S. 201; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655; *Louisville* v. *Cumberland Telephone & Telegraph Co.*, 225 U. S. 430; *Minnesota Rate Cases*, 230 U. S. 352, 433; *Missouri Rate Cases*, 230 U. S. 474, 497; *Southern Pacific Co.* v. *Campbell*, 230 U. S. 537; *Allen* v. *St. Louis, Iron Mountain & Southern Ry.*, 230 U. S. 553, 556.

intrastate freight business might be segregated. *Id.*, pp. 535, 550. The case of *Minneapolis & St. Louis R. R.* v. *Minnesota*, 186 U. S. 257, involved a rate fixed by the Railroad and Warehouse Commission of the State of Minnesota for the intrastate transportation of hard coal in carload lots. There was no proof that the carrier was compelled to transport the coal at a loss or without substantial compensation. The principal testimony, as the court observed, was intended to show that 'if the rate fixed by the Commission for coal in carload lots were applied to *all* freight, the road would not pay its operating expenses, although in making this showing the interest upon the bonded debt and the dividends were included as part of the operating expenses.' It was said that it was 'quite evident' that this testimony had 'but a slight, if any, tendency to show that even at the rates fixed by the Commission there would not still be a reasonable profit upon coal so carried' (*id.*, p. 266); and this conclusion effectually distinguishes the case from the one at bar. In *Interstate Street Ry.* v. *Commonwealth*, 207 U. S. 79, 84, the decision rested upon the ground that the charter of the company was accepted subject to the obligations imposed by the statute there in question. In *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, in addition to the rate for gas supplied for general consumption in the City of New York, there was a lower rate fixed for that furnished to the City itself. It was said by the court that the criticism of the 'wholesale' rate to the City was met by the fact that the total returns from the sale of gas were adequate. It was not established in that case that this 'wholesale' rate required a service without substantial compensation in addition to cost.

It has repeatedly been assumed in the decisions of this court, that the State has no arbitrary power over the carrier's rates and may not select a particular commodity or class of traffic for carriage without reasonable reward.

In *Atlantic Coast Line R. R.* v. *Florida*, 203 U. S. 256, 260, and in *Seaboard Air Line Railway* v. *Florida*, 203 U. S. 261, 270, there was an attack upon a rate on a single article, to wit, on phosphates, but the proof as to the effect of the rate and the cost of the transportation was found to be insufficient. The case of *Atlantic Coast Line R. R.* v. *North Carolina Corporation Commission*, 206 U. S. 1, involved the validity of an order of the State Commission requiring the railroad company so to arrange its schedule of transportation between two points as to make connections with through trains. It was held that the order merely compelled the carrier to perform a duty which fell within the scope of the obligations it had assumed. So far from the case being an authority for the conclusion that the validity of a particular rate cannot in any case be challenged if the return from the entire intrastate operations are deemed to be adequate, the court in the course of its opinion expressly conceded the contrary. The court said (*id.*, pp. 25, 26):

"Let it be conceded that if a scheme of maximum rates was imposed by state authority, as a whole adequately remunerative, and yet that some of such rates were so unequal as to exceed the flexible limit of judgment which belongs to the power to fix rates, that is, transcended the limits of just classification and amounted to the creation of favored class or classes whom the carrier was compelled to serve at a loss, to the detriment of other class or classes upon whom the burden of such loss would fall, that such legislation would be so inherently unreasonable as to constitute a violation of the due process and equal protection clauses of the Fourteenth Amendment. Let it also be conceded that a like repugnancy to the Constitution of the United States would arise from an order made in the exercise of the power to fix a rate when the result of the enforcement of such order would be to compel a carrier to serve for a wholly inadequate compensation a class or

classes selected for legislative favor even if, considering rates as a whole a reasonable return from the operation of its road might be received by the carrier. Neither of these concessions, however, can control the case in hand, since it does not directly involve any question whatever of the power to fix rates and the constitutional limitations controlling the exercise of that power, but is concerned solely with an order directing a carrier to furnish a facility which it is a part of its general duty to furnish for the public convenience."

In *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, 549, in speaking of the carriers' concession that they were unable to determine the cost of the particular traffic in question and that a former rate had not been 'less than cost,' the court said: "This concession . . . establishes an important fact in dealing with the difficult question of determining what is a reasonable rate on a particular article. Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article." (See also *Southern Railway* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, 301.) In *Wood* v. *Vandalia R. R.*, 231 U. S. 1, the rate order of the state commission related to a particular sort of traffic and it appeared that the proof was insufficient to show the cost of transportation. This was also the case in *Louisville & Nashville R. R.* v. *Garrett*, 231 U. S. 298, which related to rates on particular commodities

and the order of the state commission was sustained, not because the State was at liberty to fix such rates as it might see fit upon the ground of local policy regardless of reasonable compensation and thus to require the carrier to transport the commodities in question for less than cost, but because the evidence not only failed to show that the rates were not reasonably adequate but rather tended to establish that they were (*Id.*, p. 314). The same conclusion, with respect to the same rates, was reached on further hearing in *Louisville & Nashville R. R.* v. *Finn*, 235 U. S. 601, 607.

To repeat and conclude: It is presumed,—but the presumption is a rebuttable one—that the rates which the State fixes for intrastate traffic are reasonable and just. When the question is as to the profitableness of the intrastate business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intrastate business and show that it has been denied a fair return upon that value. With respect to particular rates, it is recognized that there is a wide field of legislative discretion, permitting variety and classification, and hence the mere details of what appears to be a reasonable scheme of rates, or a tariff or schedule affording substantial compensation, are not subject to judicial review. But this legislative power cannot be regarded as being without limit. The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it must be concluded that the State has exceeded its authority.

The judgments, respectively, are reversed and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE PITNEY dissents.

NORFOLK AND WESTERN RAILWAY COMPANY *v.* CONLEY, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA.

ERROR TO THE CIRCUIT COURT OF KANAWHA COUNTY, STATE OF WEST VIRGINIA.

No. 197. Argued October 13, 1914.—Decided March 8, 1915.

Northern Pacific Ry. v. *North Dakota, ante,* p. 585, followed to effect that while the State has a broad field for the exercise of its power in fixing intrastate rates for common carriers it may not require them to transport a segregated commodity or class of traffic either at less than cost or for a mere nominal consideration.

This court must on writ of error under § 237, Jud. Code, analyze the facts as found by the state court if it is necessary to do so in order to determine whether that which purports to be a finding of fact is so interwoven with the question of law involving the Federal right asserted as to be in substance a decision of the latter.

An analysis of the evidence in this case shows that the two cent a mile passenger rate established by ch. 41 of the acts of 1907 of West Virginia affords such a narrow, if any, margin over the cost of the traffic that the plaintiff in error is forced to carry passengers, if not at or below cost, with merely a nominal reward, and it follows that the State exceeded its power in enacting the same and that it is void as an attempt to deprive the carriers of their property without due process of law in violation of the Fourteenth Amendment.

THE facts, which involve the constitutionality under the due process provision of the Fourteenth Amendment of a statute of West Virginia fixing the maximum fare for

passengers on railways at two cents a mile, are stated in the opinion.

Mr. John H. Holt and *Mr. Lucien H. Cocke*, with whom *Mr. Joseph I. Doran* and *Mr. Theodore W. Reath* were on the brief, for plaintiff in error:

The earnings from intrastate passenger business must be separated from all other earnings to determine whether the act is confiscatory.

Chapter 41, Act of 1907, regulating passenger rates upon railroads in the State of West Virginia, and prescribing penalties for the violation thereof is unconstitutional. *Ches. & Ohio Ry.* v. *Conley*, 230 U. S. 513; *Coal Ry.* v. *Conley*, 67 W. Va. 129; *Consolidated Gas Case*, 212 U. S. 19; *Five Per Cent Case*, 31 I. C. C. 351, 407; *Int. Com. Comm.* v. *Un. Pac. R. R.*, 222 U. S. 541; *Knoxville* v. *Water Co.*, 212 U. S. 1; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Railroad Co.* v. *Philadelphia*, 220 Pa. St. 100; *Smyth* v. *Ames*, 169 U. S. 466; *Southern Ry.* v. *St. Louis Hay Co.*, 214 U. S. 297.

The railroad properly shows the capital invested in its intrastate passenger service used and useful in that service.

The railroad company properly shows the earnings and expenses derived from and chargeable to its intrastate passenger business.

The railroad company should be allowed to segregate its intra-passenger earnings from all other earnings in the State in its attempt to show confiscation. *Atl. Coast Line* v. *North Carolina*, 206 U. S. 1; *Coal Ry.* v. *Conley*, 67 W. Va. 174; *Lake Cargo Coal Rate Case*, 22 I. C. C. 604; *Louis. & Nash. R. R.* v. *Alabama*, 208 Fed. Rep. 35; *Minnesota Rate Cases*, 230 U. S. 352; *Missouri Rate Cases*, 230 U. S. 474; *M. & St. L. R.* v. *Minnesota*, 186 U. S. 257; *Smyth* v. *Ames*, 169 U. S. 466; *S. & N. A. R. R.* v. *Alabama*, 210 Fed. Rep. 465.

Mr. A. A. Lilly, Attorney General of the State of West Virginia, for defendants in error:

The carrier does not properly show the capital invested in its intrastate passenger service used and useful therein. The valuation proved is improper for a rate basis. *People* v. *New York*, 199 U. S. 1; *San Francisco* v. *Dodge*, 197 U. S. 70; *Missouri Rate Case*, 230 U. S. 474; *Allen* v. *St. Louis &c. Ry.*, 230 U. S. 552; *Chi., M. & St. P. R. R.* v. *Tompkins*, 176 U. S. 167; nor does it properly show intrastate earnings and expenses.

The carrier cannot segregate its intrastate passenger earnings from all other intrastate earnings in order to show confiscation. *Norfolk & West. Ry.* v. *Pinacle Coal Co.*, 44 W. Va. 574; *Railway Co.* v. *Conley*, 67 W. Va. 174; *Railway Co.* v. *United States*, 99 U. S. 402.

If the State allows the carrier to earn suitable return for its whole intrastate business it may require some commodities to be carried at a loss. *St. Louis &c. Co.* v. *Gill*, 156 U. S. 649; *Minnesota Rate Case*, 230 U. S. 352; *Minn. &c. Ry.* v. *Minnesota*, 186 U. S. 257; *Willcox* v. *Consol. Gas Co.*, 212 U. S. 19; *Atl. Coast Line* v. *Nor. Car. Corp. Comm.*, 206 U. S. 1; *Pens. & Atl. Ry.* v. *Florida*, 3 L. R. A. 661; *Penna. R. R.* v. *Philadelphia*, 220 Pa. St. 122.

A rate of 6% per annum is reasonable, *Covington &c. Co.* v. *Sanford*, 164 U. S. 578, but even if smaller, if any, the carrier cannot complain.

MR. JUSTICE HUGHES delivered the opinion of the court.

In 1907, the legislature of West Virginia passed an act fixing the maximum fare for passengers on railroads, as described in the statute, at two cents a mile. Acts, 1907, Ch. 41, p. 226. After the rate had been tested by operating under it for two years, the plaintiff in error brought this suit to restrain its enforcement as being in violation of the

constitution of the State, and also upon the ground that it was repugnant to the Fourteenth Amendment by reason of (1) its provision for penalties, (2) its classification of railroads, and (3) its alleged confiscatory requirements, through the reduction of the revenue from the traffic to less than a reasonable compensation. The validity of the statute, as construed by the state court, with respect to penalties and classification was upheld in *Chesapeake & Ohio Ry.* v. *Conley*, 230 U. S. 513. In the case of *Coal & Coke Ry.* v. *Conley*, 67 W. Va. 129, while the statute was sustained against the other objections above mentioned, it was adjudged to be confiscatory in its operation with respect to the plaintiff in that case. In the present suit the Circuit Court of Kanawha County by its decree entered in March, 1913, held that the rate was not confiscatory in fact as to the plaintiff in error. No opinion appears in the record and there were no special findings. An application was made to the Supreme Court of Appeals of West Virginia for the allowance of an appeal to that court, and it was refused. This writ of error was then sued out.

1. The fundamental question presented is whether the validity of the passenger rate can be determined by its effect upon the passenger business of the company, separately considered. What has been said in the opinion in *Northern Pacific Railway* v. *North Dakota*, decided this day (*ante*, p. 585), makes an extended discussion of this question unnecessary. It was recognized that the State has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services. It was further held that despite this range of permissible action, the State has no arbitrary power over rates; that the devotion of the property of

the carrier to public use is qualified by the condition of the carrier's undertaking that its services are to be performed for reasonable reward; and that the State may not select a commodity, or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost or for a compensation that is merely nominal.

These considerations are controlling here. The passenger traffic is one of the main departments of the company's business; it has its separate equipment, its separate organization and management, and of necessity its own rates. In making a reasonable adjustment of the carrier's charges, the State is under no obligation to secure the same rate of return from each of the two principal departments of business, passenger and freight; but the State may not select either of these departments for arbitrary control. Thus, it would not be contended that the State might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service. And, on the same principle, it would also appear to be outside the field of reasonable adjustment that the State should demand the carriage of passengers at a rate so low that it would not defray the cost of their transportation, when the entire traffic under the rate was considered, or would provide only a nominal reward in addition to cost. That fact, satisfactorily proved, would be sufficient to rebut the presumption of reasonableness; and if in any case it could be said that there existed other criteria by reference to which the rate could still be supported as a reasonable one for the transportation in question, it would be necessary to cause this to appear. *Northern Pacific Railway* v. *North Dakota, supra,* and cases there cited.

2. So far as findings are concerned, we have in the present case simply a general, or ultimate, conclusion of

fact which is set forth in the decree of the state court; and it is necessary for us, in passing upon the Federal right which the plaintiff in error asserted, to analyze the facts in order to determine whether that which purports to be a finding of fact is so interwoven with the question of law as to be in substance a decision of the latter. *Kansas City Southern Ry.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655, 668, 669; *Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 528; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611; *Wood* v. *Chesborough*, 228 U. S. 672, 678.

3. The passenger rate in question went into effect in May, 1907, and was observed by the company until about September, 1909, when under the terms of the interlocutory injunction in this suit the charge was increased to two and one-half cents a mile. There were, therefore, two fiscal years, June 30, 1907, to June 30, 1909, during which the company operated its road in West Virginia under the statutory rate. Evidence was introduced on behalf of the company showing the results according to its calculations. It was testified that the intrastate passenger receipts had been carefully ascertained. With respect to the operating expenses, it was said that for many years accounts had been kept for the purpose of separating the expenses incident to the freight and passenger traffic, respectively; that about 65 per cent. of these expenses could be directly assigned, and that the remaining 35 per cent., consisting of items common to both sorts of transportation, were divided between the passenger and freight traffic on the basis of engine miles,—this being deemed to be more equitable than the train-mile basis originally used, inasmuch as most of the freight was hauled by two engines. In practice, this method was assumed—in accordance with an early computation—to mean that 20 per cent. of such items should be assigned to the passenger

traffic; this, it was insisted, was a close approximation. Where a division of the road was partly in one State and partly in another the passenger expenses were apportioned according to track mileage. These expenses within the State having thus been ascertained, they were divided between the interstate and intrastate traffic upon the basis of the gross passenger earnings; that is, it was assumed that the cost of the interstate and intrastate passenger traffic was the same in relation to revenue. It was also testified that betterments were not included in expenses, and that the above-mentioned apportionment covered all the operating expenses, except taxes, the latter being apportioned to each class of business according to its share of the gross receipts.

It was stated that the intrastate passenger receipts which had been $362,997.74 in the fiscal year 1906–7 [1] had fallen, notwithstanding a considerable increase in the number of passengers and passenger mileage, to $289,943.22 in the fiscal year 1907–8. The passenger expenses for the latter year, estimated according to the method above set forth, together with taxes, amounted to $275,519.79, leaving a net surplus of $14,423.43. In the following fiscal year, 1908–9, the intrastate passenger receipts were $281,864.50. This showed a reduction of $81,133.24, as compared with the fiscal year 1906–7, although there was a gain over that year of 1,567,374 in the passenger mileage. The expenses attributed by the company to the intrastate passenger traffic, including taxes, for the year 1908–9, amounted to $283,416.62, thus leaving a deficit in the passenger operations of $1,552.12.

In the receipts, as thus stated, there was omitted the revenue derived from the mail, express, news privileges and other items of passenger train earnings. Including this miscellaneous income, it appeared from the company's

[1] Approximately eleven months of the fiscal year 1906–7 were under the former maximum fare of three cents a mile.

statement that the net return of the intrastate passenger business for the year 1907–8 was $18,354.62; in the year 1908–9, the inclusion of these items still left a deficit amounting to $616.11.

Criticizing the methods of apportionment adopted by the company, the State presented on its part elaborate calculations for the purpose of showing the effect of the rate. These calculations were based upon a painstaking analysis made by the State's expert accountant of the receipts and expenses disclosed by the company's records and accounts. For this critical study there were selected the months of November, 1909, and May, 1910, which the State's witness testified were typical with respect to the passenger business of the fiscal year ending June 30, 1910. The examination was made of the traffic on the Pocahontas and Kenova divisions of the road, which contained over 90 per cent. of the total track mileage of the company in West Virginia, and the passenger traffic on which—according to passenger mileage—was stated to be over 97 per cent. of the whole. The testimony was that the results of the analysis of the traffic on these divisions could be deemed to be fairly representative of the entire passenger business. The receipts of the intrastate traffic were adjusted to the two cent fare basis; that is, according to the statutory rate as applied to the actual travel over the road. The State suggests that neither in its own calculations nor in those of the company was any account taken of the receipts from interstate passengers in West Virginia, but these were properly excluded. *Smyth* v. *Ames*, 169 U. S. 466, 541. The company had kept on its books separate accounts of the expenses of the freight and passenger business on the divisions above-mentioned, but the State's expert did not accept the company's distribution. For example, on the Pocahontas division, the books showed passenger expenses in November, 1909, amounting to $48,895.22; the witness for the State by his computa-

tions made these expenses $37,100.72. On the same division in May, 1910, the company's figures for passenger expenses were $51,885.72; the State's, $40,643.36. There were also similar reductions of considerable amounts on the Kenova division. It is not necessary to review in detail the methods thus used on the part of the State to apportion the various common items of expense,—that is, after all items capable of direct assignment had been charged to the business to which they related. It is sufficient to say that instead of employing a general factor for the distribution of the outlays common to both kinds of traffic, freight and passenger, the State's witness divided each particular common item according to its character so as to make what was deemed to be a fair apportionment of that item. In this way, a variety of methods were employed which the witness described at length. After ascertaining the amount of the total expense considered to be attributable to the passenger traffic within the State, it was divided between the intrastate and interstate business; and for the most part—aside from the expenses of passenger stations—the division was made on the basis of passenger miles and without charging extra cost to the intrastate traffic.

By combining the results of the selected periods, it was shown that in the intrastate passenger business, according to the classification and apportionment adopted, the operating expenses and taxes consumed 97.4203 per cent. of the total income.

This, in brief, was the result of the elaborate analysis presented by the State. There is no reason to suppose that either the periods chosen or the methods used were unfavorable to the rate. Included in the passenger business were the items of mail, express, excess baggage, etc.; the State did not present calculations as to the net return upon these items separately considered. When the State's expert who testified that he had undertaken to

separate the cost of the express business, was asked on cross-examination whether with these items omitted the actual cost of carrying intrastate passengers was not in excess of two cents a mile, he said that it would be difficult to answer without a separate analysis of the mail item, but added that 'in rough computation' that cost was very close to two cents.

It is apparent, from every point of view that this record permits, that the statutory rate at most affords a very narrow margin over the cost of the traffic. It is manifestly not a case where substantial compensation is permitted and where we are asked to enter the domain of the legislative discretion; nor is it one in which it is necessary to determine the value of the property employed in the intrastate business. It is clear that by the reduction in rates the company is forced to carry passengers, if not at or below cost, with merely a nominal reward considering the volume of the traffic affected. We find no basis whatever upon which the rate can be supported and it must be concluded in the light of the principles governing the regulation of rates that the State exceeded its power in imposing it.

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE PITNEY dissents.

MICHIGAN CENTRAL RAILROAD COMPANY *v.* MICHIGAN RAILROAD COMMISSION.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 91. Submitted December 1, 1914.—Decided March 8, 1915.

A State, in virtue of its authority to regulate railroads as public highways, may, in a proper case, require two railroad companies to make a connection between their tracks so as to facilitate interchange of traffic, without violating rights of the company secured by the Federal Constitution. *Wisconsin R. R. Co.* v. *Jacobson*, 179 U. S. 287.

A State, acting within its jurisdiction and not in hostility to any Federal regulation of interstate commerce, may compel a carrier to accept loaded cars from another line and transport them over its own. *Chi., Mil. & St. P. Ry.* v. *Iowa*, 233 U. S. 344.

A State may on reasonable conditions require a carrier to permit its empty or loaded cars to be hauled from its line upon a connecting line for purposes of loading or delivery of intrastate freight and to permit cars of other carriers loaded with such freight consigned to points on the connecting line to be hauled from its line upon the connecting line for purposes of delivery.

The common law is subject to change by legislation, and so *held* that a State may require a carrier, within reasonable bounds of regulation in the public interest, to permit its equipment to be hauled off its line by other carriers, although it was not bound to permit the same at common law.

It is a matter of common knowledge that interchange of freight cars between carriers is the usual practice; and a state statute requiring such interchange as to intrastate commerce is not so unreasonable as to amount to a taking of property without due process of law.

An order of a state railroad commission requiring carriers to interchange freight cars for intrastate freight is to be read in the light of the opinion delivered by the Commission and as so read, the order involved in this case is not unreasonable nor does it take the property of the carriers without due process of law.

An order of a state railroad commission requiring carriers to exchange freight and passengers in accordance with the provisions of the act establishing the Commission which has been construed by the state court as relating only to intrastate commerce, because the jurisdiction of the Commission is limited thereto, *held* not to disregard the needs of interstate commerce or to be a burden thereon, and also *held*

this court presumes, until the contrary appears, that the state court will not so construe or enforce the order as to interfere with or obstruct interstate commerce.

An order of the Michigan State Railroad Commission requiring two connecting railroads to make physical connection for transfer of intrastate business including loaded freight cars and empty cars being returned or forwarded for being loaded, *held* within the power of the State and not to a taking of the property of the carriers without due process of law or an interference with and regulation of interstate commerce. *Central Stock Yards* v. *Louis. & Nash. R. R.*, 192 U. S. 568, and *Louis. & Nash. R. R.* v. *Stock Yards*, 212 U. S. 132, distinguished.

168 Michigan, 230, affirmed.

THE facts, which involve the validity of an order of the State Railway Commission of Michigan requiring a railway with respect to intrastate traffic to interchange cars, freight and passengers with another railway, are stated in the opinion.

Mr. Frank E. Robson and *Mr. Henry Russell* for plaintiff in error:

Act 300 of the Public Acts of 1909 of Michigan recognizes and preserves the distinctions which obtain in Michigan between street railways and railroads. See Act 312.

Railroad is used as meaning corporations organized under the general railroad law, and street railways as meaning those organized under the street railway act or other similar laws.

Railroads broadly and distinctly differ from street railways, and it has always been the policy of the legislature of Michigan to maintain this classification.

A street railway is constructed and operated on the public highways under the consent of the municipalities (§ 13, Street Railway Act, § 6446, C. L., 1897, App'x A, p. 44), and is not an additional servitude and may be constructed without compensation to abutting owners. *Detroit &c. Ry.* v. *Mills*, 85 Michigan, 634, 652–655; *Nichols* v. *Railway*, 87 Michigan, 361, 368–369, 370–1; *People* v. *Railway*, 92 Michigan, 522, 524; *Dean* v. *Railway*, 93

Michigan, 330; *Detroit &c. Railway* v. *R. R. Commissioner*, 127 Michigan, 219, 230; *People* v. *Eaton*, 100 Michigan, 208–211; *Austin* v. *Detroit &c. Ry.*, 134 Michigan, 149; *Mannel* v. *Detroit &c. Ry.*, 139 Michigan, 106; *Ecorse* v. *Jackson &c. Ry.*, 153 Michigan, 393.

A railroad before constructing its railway upon a public street or highway must obtain the consent of the municipality and pay damages and compensation to abutting owners (subd. 5, § 9, General R. R. Law, § 6234, C. L., 1897). A railroad is an additional servitude. Cases *supra* and *G. R. & I. R. R.* v. *Heisel*, 38 Michigan, 62; *S. C.*, 47 Michigan, 393; *Cooper* v. *Alden*, Har. Ch. 72; *Hoffman* v. *Flint &c. Ry.*, 114 Michigan, 316; *Nichols* v. *Railway*, 87 Michigan, 361, 372; *Keyser* v. *Lake Shore R. R.*, 142 Michigan, 143.

Under §§ 19, 25 and 28, Art. 8, State Constitution, 1909, the control of the public highways is expressly reserved to and placed in the cities, villages and townships. Even under the constitution of 1850 the right of control over the highways by municipalities was absolute. *Detroit* v. *Railway*, 95 Michigan, 460; *Monroe* v. *Detroit &c. Ry.*, 143 Michigan, 315; *Attorney General* v. *Toledo Ry.*, 151 Michigan, 473.

The decisions of the Michigan Supreme Court have long recognized the policy of the legislature, and declared the well-defined distinction between railroads and street railways. *Grand Rapids R. R.* v. *Heisel*, 38 Michigan, 62; *Ecorse* v. *Jackson Ry.*, 153 Michigan, 393; *Mason* v. *Lansing R. R.*, 157 Michigan, 1, 18.

This distinction has also been recognized in the matter of taxation of railroads and street railways, *Detroit* v. *Mfrs. R. R.*, 149 Michigan, 530; and as well in the application of the criminal statutes relating to railroads, *People* v. *Beebehyser*, 157 Michigan, 239; and see *Monroe* v. *Detroit &c. Ry.*, 143 Michigan, 315.

This act of the legislature must be considered a part of

the charter of the railway company. *Van Etten* v. *Eaton*, 19 Michigan, 187; *Attorney General* v. *Perkins*, 73 Michigan, 303; *Dewey* v. *Central Car Co.*, 42 Michigan, 399; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 459; *Central Transp. Co.* v. *Pullman Co.*, 139 U. S. 24, 48; *Orr* v. *Lacey*, 2 Doug. 230, 255; *Day* v. *Spiral Buggy Co.*, 57 Michigan, 146; and see *Nichols* v. *Railway*, 87 Michigan, 361, 370.

For definitions of "belt line" and "terminal railroads" and the manner in which they are used in Michigan, see *Bridwell* v. *Gates City Co.*, 127 Georgia, 520; *State* v. *Martin*, 51 Kansas, 462, 478; *Coltier* v. *Railroad*, 113 Tennessee, 101; *Diebold* v. *Kentucky Traction Co.*, 117 Kentucky, 146, 152.

Subdivision b, § 7, Act 300, is invalid under the due process of law provision of the Fourteenth Amendment. As construed by the Commission and the state court it requires the railroad to deliver its cars to the railway company for the use of the latter company, and makes no provision for the paramount needs of the railroad of its own equipment, nor for its prompt return, nor compensation therefor. It also requires the railroad company to make delivery of property transported by it to a place off from its right of way which is not under its control. *Atchison &c. R. R.* v. *Denver &c. R. R.*, 110 U. S. 667, 681.

The statute does not require the Michigan Central to accept such passengers on through tickets issued by the Detroit United, or to accept freight on a through billing. The statute in substance expressly states that cannot be required, and unless there is language in the statute which legally requires a terminal delivery on the line of the street railway, the relation between themselves is that of the common law. The Michigan Central is not bound to carry beyond its own line, nor to enter into contracts for through routes. *Atchison &c. Ry.* v. *Denver &c. Ry.*, 110 U. S. 667, 680, 681–682, 683; *Oregon Short Line* v. *Nor.*

Pac. R. R., 51 Fed. Rep. 465; *S. C.*, 61 Fed. Rep. 158; *Little Rock &c. R. R.* v. *St. Louis &c. R. R.*, 41 Fed. Rep. 559; *S. C.*, 59 Fed. Rep. 400; 63 Fed. Rep. 775; *Little Rock &c. R. R.* v. *East Tenn. &c. R. R.*, 47 Fed. Rep. 771, 781; *Prescott* v. *Atchison &c. Ry.*, 73 Fed. Rep. 438; *Chicago City Ry.* v. *Chicago*, 142 Fed. Rep. 844.

As construed by the Commission and the state court the statute becomes a bald command that the Michigan Central turn its property over to the Detroit United for the use of the latter without compensation to it and without reasonable rules under which such use of the property may be had. This is invalid. *Central Stock Yards* v. *Louis. & Nash. R. R.*, 118 Fed. Rep. 113; *S. C.*, 192 U. S. 568, 571.

See also cases *supra*, and *Chicago N. W. Ry.* v. *Osborne*, 52 Fed. Rep. 912, 915; *St. Louis Drayage* v. *Louis. & Nash. R. R.*, 65 Fed. Rep. 39; *Gulf &c. Ry.* v. *Miami S. S. Co.*, 86 Fed. Rep. 407, 416; *Ilwaco &c. Ry.* v. *Oregon &c. Ry.*, 57 Fed. Rep. 673; *Express Company Cases*, 117 U. S. 1, 29; *Louis. & Nash. R. R.* v. *West Coast Naval Stores*, 198 U. S. 483, 497.

A railway cannot be compelled to deliver its cars to private sidings or spur tracks. *Mann* v. *Pere Marquette R. R.*, 135 Michigan, 210, 219; *McNeill* v. *Southern Railway*, 202 U. S. 543, 561; *Central Stock Yards* v. *Louis. & Nash. R. R.*, 118 Fed. Rep. 113.

The order of the Michigan Railroad Commission of June 5, 1908, is invalid because founded upon an invalid law. The action of the Commission was arbitrary and unreasonable. It does not undertake to provide a reasonable compensation for the use of its cars taken, or for loss, damage to, or detention thereof, or for the needs of the railroad with respect to such cars, or for their prompt return. *Oregon &c. R. R.* v. *Fairchild*, 224 U. S. 510, 523; *United States* v. *Balt. & Ohio S. W. Ry.*, 226 U. S. 14, 20.

The use of property is a taking in a constitutional sense

in the State of Michigan. *Grand Rapids Co.* v. *Jarvis*, 30 Michigan, 308, 320.

The rule is the same, irrespective of any written constitutional provision.

It is not enough that plaintiff in error be turned over to its action at law for its remedy to obtain compensation, nor can it be required to accept anything other than a present adequate fund which is placed under its control and demand at substantially the time of the taking of the property. 2 Lewis on Eminent Domain, 3d ed., § 680; *Waterbury* v. *Platt*, 76 Connecticut, 435; *Bloodgood* v. *Mohawk &c. R. R.*, 18 Wend. 218; *Attorney General* v. *Old Colony &c. R. R.*, 160 Massachusetts, 62, 90.

Section 7, subd. b, of the act of 1909, as construed by the Railroad Commission and the state court, and the orders made in pursuance thereof, operate as a burden upon and interference with interstate commerce, as it requires delivery of such cars under all circumstances and without excuse and without reference to the demands of interstate commerce. *McNeill* v. *Southern Ry.*, 202 U. S. 543, 561; *Chicago &c. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426, 433; *St. Louis S. W. Ry.* v. *Arkansas*, 217 U. S. 136, 149; *Houston &c. Ry.* v. *Mayes*, 201 U. S. 321, 328.

Mr. Grant Fellows, Attorney General of the State of Michigan, for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

This writ of error brings under review a judgment of the Supreme Court of Michigan (168 Michigan, 230), awarding a peremptory writ of mandamus directing plaintiff in error, with respect to intrastate traffic, to interchange cars, carload shipments, less than carload shipments, and passenger traffic with the Detroit United Railway at the point of physical connection between the tracks

of the two companies in the village of Oxford in that State.

The Michigan Railway Commission, defendant in error, is a public administrative body, continued and existing under Act No. 300 of the Public Acts of 1909 as the successor of a similar commission established by Act No. 312 of the Public Acts of 1907. It has ample regulative powers, originally conferred by the 1907 act and continued by the 1909 act without modification material to the present controversy.[1] The mandamus proceeding was based

[1] Michigan Public Acts 1907, No. 312.

"SEC. 7. . . . (b) Where it is practicable and the same may be accomplished without endangering the equipment, tracks, or appliances of either party, the commission may, upon application, require steam railroads and interurban and suburban railroads to interchange cars, carload shipments, less than carload shipments, and passenger traffic, and for that purpose may require the construction of physical connections upon such terms as it may determine: *Provided*, That nothing in this act shall be construed to require through billing of freight as between steam and electric, suburban or interurban railroads, but such suburban and interurban railroads may be used for the handling of freight in carload lots in steam railroad freight cars between shippers or consignees and the steam railroads, in the same manner and under the same general conditions, except as to motive power, as belt line railroads and terminal railroads are now or may hereafter be used for like purposes.

"(c) Every corporation owning a railroad in use shall, at reasonable times and for a reasonable compensation, draw over the same the merchandise and cars of any other corporation or individual having connecting tracks: *Provided*, Such cars are of the proper gauge, are in good running order and equipped as required by law and otherwise safe for transportation and properly loaded: *Provided further*, If the corporations cannot agree upon the times at which the cars shall be drawn, or the compensation to be paid, the said commission shall, upon petition of either party and notice to the other, after hearing the parties interested, determine the rate of compensation and fix such other periods, having reference to the convenience and interests of the corporation or corporations, and the public to be accommodated thereby, and the award of the commission shall be binding upon the respective corporations interested therein until the same shall have been revised. . . .

upon an order made by the former Commission in the year 1908, which, it is admitted, was preserved by § 49 of the 1909 act.

"SEC. 24. . . . (b) The commission may at any time, upon application of any person or any railroad, and upon notice to the parties interested, including the railroad, and after opportunity to be heard as provided in section twenty-two, rescind, alter or amend any order fixing any rate or rates, fares, charges or classifications, or any other order made by the commission, and certified copies shall be served and take effect as herein provided for original orders.

"SEC. 25. All rates, fares, charges, classifications and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie, lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of section twenty-six of this act, or until changed or modified by the commission as provided for in paragraph (*b*), section twenty-four of this act.

"SEC. 26. (a) Any railroad or other party in interest, being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or services, may within sixty days commence an action in the circuit court in chancery against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates fixed is unlawful or unreasonable, or that any such regulation, practice or service fixed in such order is unreasonable; in which suit the commission shall be served with a subpœna. The commission shall file its answer, and on leave of court any interested party may file an answer to said complaint, whereupon said action shall be at issue and stand ready for hearing upon ten days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the circuit court shall always be deemed open for the hearing thereof, and the same shall proceed, be tried and determined as other chancery suits. Any party to such suit may introduce original evidence in addition to the transcript of evidence offered to said commission, and the circuit courts in chancery are hereby given jurisdiction of such suits and empowered to affirm, vacate or set aside the order of the commission in whole or in part, and to make such other order or decree as the courts shall decide to be in accordance with the facts and the law.

* * * * * * * *

The Michigan Central Railroad Company is a corporation existing under the General Railroad Law of the State (Comp. Laws 1897, ch. 164, §§ 6223 *et seq.*), and as lessee operates a line of railroad extending from Detroit to Bay City and passing through the village of Oxford, all in

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"(c) If, upon the trial of said action, evidence shall be introduced by the complainant which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court, before proceeding to render judgment, unless the parties in such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon receipt of such evidence the commission shall consider the same, and may alter, modify, amend and rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulations, practice or service complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence.

"(d) If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

"(e) Either party to said action, within sixty days after service of a copy of the order or judgment of the court, may appeal to the supreme court, which appeal shall be governed by the statutes governing chancery appeals. When the appeal is taken the case shall, on the return of the papers to the supreme court, be immediately placed on the calendar of the then pending term, and shall be brought to a hearing in the same manner as other cases on the calendar, or, if no term is then pending, shall take precedence of a different nature (*sic*), except criminal cases at the next term of the supreme court.

"(f) In all actions under this section the burden of proof shall be upon the complainant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be."

The foregoing provisions were substantially reënacted in Public Acts 1909, No. 300, as §§ 7 b and c, 24, 25, 26 a, c, d, and e respectively.

the State of Michigan; this line being part of a railroad system extending through that State and into adjoining States and the Dominion of Canada, and over which the company transports passengers and property in interstate and foreign, as well as intrastate commerce. The Detroit United Railway Company is a corporation organized and existing under the Street Railway Act (Comp. Laws 1897, ch. 168, §§ 6434 *et seq.*), and operates an interurban electric railway extending from Detroit to the city of Flint, and likewise passing through the village of Oxford. Between Oxford and Flint, which are 28 miles apart, the line passes through the villages of Ortonville, Goodrich, and Atlas, distant respectively 10, 16, and 18 miles from Oxford.

In the early part of the year 1908 petitions were filed before the Commission by certain merchants resident in Ortonville and Goodrich, asking that a physical connection be established between the tracks of the Michigan Central and Detroit United at Oxford for the interchange of cars, carload shipments, less than carload shipments, and passenger traffic. The Michigan Central answered denying that it would be practicable to construct and maintain such a physical connection, and denying the authority of the Commission to order any such connection for the purposes mentioned in the complaint. The Detroit United answered denying the practicability of interchanging carload shipments (supposing a physical connection to have been established), without unreasonable expenditure of money in changing its road and equipment. There was a full hearing, at which both companies were represented. The questions before the Commission were three: (a) Is a physical connection between the tracks at Oxford practicable; (b) Can the interchange of business be accomplished without endangering the equipment, tracks, or appliances of either party; and (c) Are the facts and circumstances such as to reasonably justify

the Commission in requiring such connection and interchange. The question of through billing was not involved. The Commission held that the statute in terms conferred upon it the authority which it was asked to exercise, and declined to pass upon the question of its validity, deeming that to be a judicial question and not within its province. It found the construction and maintenance of the connection between the tracks to be feasible and practicable, and the expense of construction approximately $500. Upon the evidence introduced and a personal inspection of the line of the Detroit United, the Commission found that line to be of standard gauge, with rails of the same pattern and weight as those used on many steam roads, and without heavy grades offering resistance to freight traffic, and that the handling of freight in steam railroad cars over that line was practicable and might be accomplished without endangering the equipment, tracks, or appliances of either company, and without involving either in unreasonable expense. Whether steam or electricity should be used as a motive power was declared to be a question to be solved by the Detroit United Company in the light of its own experience. The Commission also found the proposed interchange to be reasonable from the standpoint of the Michigan Central, and that it entailed small sacrifice to that company, which would have to expend its proportion of the amount necessary to install the connection, but would not be involved in further expenditure; and that the business to be derived from Ortonville, Goodrich, and the surrounding country *via* the Detroit United Railway and the proposed connection promised to be considerable in amount, making the Michigan Central a beneficiary by the connection; and held that under its charter it owed a duty as common carrier to the entire State, so that while required to give greatest consideration to those most accessible to its operations, it must further give as great consideration to those not immediately

upon its lines as was consistent with the other operations of the road. The result was an order, dated June 5, 1908, made under the provisions of § 7 b of the 1907 act, requiring the Michigan Central and Detroit United Companies on or before August 15 in the same year to connect their tracks at such point in the village of Oxford as they should between themselves agree upon as most desirable, and thereafter to interchange cars, carload shipments, less than carload shipments, and passenger traffic at that point, in accordance with the provisions of § 7; and declaring that if they should be unable to agree as to the point of connection the Commission would make a supplemental order determining its location. Such a supplemental order was afterwards made. These orders were duly served upon both companies, and neither instituted any proceeding to test their validity in the manner permitted by §§ 25 and 26 of the 1907 act. The physical connection between the tracks was installed and is still maintained by the companies, and no question is now made respecting this. But the Michigan Central complied, to the extent of installing the physical connection, under protest, particularly with respect to so much of the order as required the interchange of cars, carload and less than carload shipments, and passenger traffic at that point. The Detroit United is willing and able to accept cars and carloads of freight from the Michigan Central, to be delivered along the line of the Detroit United under a service similar to that offered by belt lines and terminal railroads in the same State, but the Michigan Central has hitherto refused and still refuses to deliver cars and carloads or less than carload shipments of freight in cars to the Detroit United for transportation to points upon its line. There is no controversy about the other parts of the order.

The issuance of the mandamus was opposed upon the ground (among others), that the Commission's order and the statutes purporting to authorize it were repugnant to

the Fourteenth Amendment, in that enforcement of the order would deprive the Michigan Central of its property without due process of law, and also upon the ground that the order amounted to an attempt to regulate and impose a burden upon interstate commerce contrary to § 8 of Article I of the Constitution of the United States. The Supreme Court of Michigan held that the statute authorized the making of such an order by the Commission, and that since plaintiff in error had failed to institute proceedings to review it under §§ 25 and 26 of the Act the questions of the practicability of the physical connection and of the interchange of traffic, as well as the reasonableness of the service required, were not open in the mandamus proceeding. It also held that the jurisdiction of the Commission was limited to intrastate traffic, and that its order in the present case must be deemed to be so limited.

The act establishing the Michigan Railroad Commission, as it stood after amendment by Public Acts 1911, No. 139, was under consideration in *Grand Trunk Ry.* v. *Michigan Ry. Comm.*, 231 U. S. 457, which dealt with the compulsory interchange of intrastate traffic at Detroit. With respect to judicial review, it will be observed that by § 25 (set forth in the margin, *supra*) the regulations prescribed by the Commission are to be treated as lawful and reasonable until found otherwise in an action brought for the purpose pursuant to the provisions of § 26, or until modified by the Commission as provided in § 24. Section 26 permits the railroad company or other party in interest, being dissatisfied with the Commission's order, to commence an action in the Circuit Court in chancery to set it aside on the ground of unreasonableness, with opportunity to introduce original evidence in addition to that which was submitted to the Commission. If new evidence is offered the court may refer it to the Commission for its consideration, and that body may thereupon

rescind or modify the original order. The court passes upon either the original or the modified order, and may affirm or set it aside in whole or in part, and make such other order as may be in accordance with the facts and the law. From its judgment there is an appeal to the Supreme Court. The respective functions of the Commission and the courts under this legislation were considered, in a rate case, by the state Supreme Court in *Detroit & Mackinac Ry.* v. *Michigan Railroad Comm'n*, 171 Michigan, 335, 346, and by this court in a subsequent case between the same parties, 235 U. S. 402, affirming 203 Fed. Rep. 864.

The argument submitted here in behalf of plaintiff in error has taken a wide range, many of the contentions being matters purely of local law, and these so interwoven with the discussion of Federal questions that it is somewhat difficult to distinguish them. It ought to be unnecessary to say that whether distinctions have heretofore been recognized, under the laws of Michigan, between "railroads" and "street railways"; whether the acts of 1907 and 1909 preserve or disregard these distinctions; and whether § 7 was intended to apply to both kinds of roads or to "railroads" only; are questions with which this court has no proper concern, they being conclusively disposed of by the decision of the state court of last resort in the present case. So, also, it is, for all purposes of our jurisdiction, established not only that the Commission in making the order, acted in the authorized exercise of the State's power of regulation, but that the two companies are legally competent to perform the duties thereby imposed upon them respectively.

That a State, in virtue of its authority to regulate railroads as public highways, may in a proper case require two companies to make a connection between their tracks so as to facilitate the interchange of traffic, without thereby violating rights secured by the Constitution of the United

States, is settled by the decisions of this court in *Wisconsin &c. R. R.* v. *Jacobson*, 179 U. S. 287, 296, 301; and *Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 528.

That a State, acting within its jurisdiction and not in hostility to any Federal regulation of interstate commerce, may compel the carrier to accept loaded cars from another line and transport them over its own, such requirement being reasonable in itself, is settled by *Chi., Mil. & St. P. Ry.* v. *Iowa*, 233 U. S. 334, 344. In that case it was held there was no essential difference, so far as concerned the power of the State, between such an order and one requiring the carrier to make track connections and receive cars from connecting roads in order that reasonably adequate facilities for traffic might be provided.

It seems to us that the principle of these decisions sustains also the State's power to make a reasonable order requiring a carrier to permit empty or loaded cars owned by it to be hauled from its line upon the connecting line for purposes of loading or delivery of intrastate freight, and to permit the cars of other carriers loaded with such freight consigned to points on the connecting line to be hauled from its line upon the connecting line for purposes of delivery. This question was left undetermined in *McNeill* v. *Southern Railway*, 202 U. S. 543, 563, which had to do with a state regulation operating directly upon interstate commerce.

The contentions of plaintiff in error to the contrary will be briefly considered.

It is said that section 7 b of the 1907 act, as reënacted in 1909, under which the Commission's order was made, permits the use of suburban and interurban railroads for the handling of freight in carload lots in steam railroad freight cars only "in the same manner and under the same general conditions, except as to motive power, as belt line railroads and terminal railroads are now or may hereafter be used for like purposes." And it is insisted that the

terms "belt line railroads" and "terminal railroads" have not been judicially construed by the Michigan courts, and, there being no finding by the Commission or the court upon the question, the order and judgment are in this respect indefinite. But the Commission in its petition for mandamus averred: "That belt line and terminal railroads within this State vary in length from a fraction of a mile to fifteen miles or more; that cars and carloads of freight are transported to and from industries located along the line of such belt or terminal railroads to the tracks of railroad companies with which said belt lines and terminal railroads are connected, under a local switching charge or tariff, and that through billing of freight as between other railroads and belt and terminal railroads is not customary or usual." And in the answer of the Railroad Company this was admitted as matter of fact, it being at the same time insisted "that said Detroit United Railway Company is not in fact or in law a belt line or terminal railroad corporation, nor authorized by law to act as such; nor are the line or lines of railway operated by it extending from the village of Oxford to the City of Flint and within the boundaries of said municipalities, belt or terminal railroads; nor can they in fact or in law be used as belt or terminal railroads may be or are now used; nor has said relator any power or authority to require this respondent to give the use of its tracks or terminal facilities for the purposes mentioned in said orders or otherwise." There is no question, therefore, as to the mode in which belt line and terminal railroads are in fact used, and so the statute and order are relieved from the charge of indefiniteness in this respect. As already shown, the decision of the state court of last resort is a conclusive response to the legal objections taken in the clause quoted from the answer.

It is said the statute as construed and enforced by the Commission and the Supreme Court is repugnant to the "due process" clause because it in effect requires a delivery

by the Michigan Central at points off its own lines. By its terms, however, the order does not require the Michigan Central to haul the cars to points on the Detroit United, but only to permit them to be hauled by the latter company. At common law a carrier was not bound to carry except on its own line, and probably not required to permit its equipment to be hauled off the line by other carriers. *A., T. & S. F. R. R.* v. *D. & N. O. R. R.*, 110 U. S. 667, 680; *Kentucky &c. Bridge Co.* v. *Louis. & Nash. R. R.*, 37 Fed. Rep. 567, 620; *Oregon Short Line* v. *Northern Pacific Ry.*, 51 Fed. Rep. 465, 472, 475; affirmed, 61 Fed. Rep. 158. But in this, as in other respects, the common law is subject to change by legislation; and, so long as the reasonable bounds of regulation in the public interest are not thereby transcended, the carrier's property cannot be deemed to be "taken" in the constitutional sense. *Minn. & St. Louis R. R.* v. *Minnesota*, 193 U. S. 53, 63; *Atlantic Coast Line* v. *N. Car. Corp. Com'n*, 206 U. S. 1, 19; *Grand Trunk Ry.* v. *Michigan Ry. Com.*, 231 U. S. 457, 470; *Wisconsin &c. R. R.* v. *Jacobson, supra; Chi., Mil. & St. P. Ry.* v. *Iowa, supra.*

The insistence that the property of plaintiff in error in its cars is taken by the order requiring it to deliver them to the Detroit United Railway involves, as we think, a fundamental error, in that it overlooks the fact that the vehicles of transportation, like the railroad upon which they run, although acquired through the expenditure of private capital, are devoted to a public use, and thereby are subjected to the reasonable exercise of the power of the State to regulate that use, so far at least as intrastate commerce is concerned. *Munn* v. *Illinois*, 94 U. S. 113. That it is not as a rule unreasonable to require such interchange of cars sufficiently appears from the universality of the practice, which became prevalent before it was made compulsory, and may be considered as matter of common knowledge, inasmuch as a freight train made up wholly

of the cars of a single railroad is, in these days, a rarity. In Michigan, car interchange has long been a statutory duty. Mich. Gen. Acts 1873, No. 79, § 15, p. 99; No. 198, § 28, p. 521; *Michigan Central R. R.* v. *Smithson*, 45 Michigan, 212, 221. And see *Peoria & P. U. Ry.* v. *Chicago, R. I. & P. Ry.*, 109 Illinois, 135, 139; *Burlington &c. Ry.* v. *Dey*, 82 Iowa, 312, 335; *State* v. *Chicago &c. Ry.*, 152 Iowa, 317, 322; affirmed, 233 U. S. 334; *Pittsburgh &c. Ry.* v. *R. R. Commission*, 171 Indiana, 189, 201; *Jacobson* v. *Wisconsin &c. R. R.*, 71 Minnesota, 519, 531; affirmed, 179 U. S. 287.

To speak of the order as requiring the cars of plaintiff in error to be delivered to the Detroit United "for the use of that company" involves a fallacy. The order is designed for the benefit of the public having occasion to employ the connecting lines in through transportation. The Detroit United, like the Michigan Central, acts in the matter as a public agency.

The contention that no provision is made for the paramount needs of plaintiff in error for the use of its own equipment, nor for the prompt return or adjustment for loss or damage to such equipment, nor for compensation for the use thereof, is not substantial. The order is to receive a reasonable interpretation, and according to its own recitals is to be read in the light of the opinion of the Commission, which shows that it is not intended to have an effect inconsistent with the other operations of the company. It was expressly found that there was no special ground for apprehending loss or damage to the equipment. Certainly the order does not exclude the ordinary remedies for delay in returning cars or for loss or damage to them. Nor does it contemplate that plaintiff in error shall be required to permit the use of its cars (or of the cars of other carriers for which it is responsible) off its line without compensation. The state court expressly held that § 7 c provides for reasonable compensation to the

carrier whose cars are used in the interchange. The finding of the Commission, approved by the court, was that the Michigan Central would merely have to expend its proportion of the amount necessary to install the connection between the two roads, and would be called upon for no further expenditure in the premises, and that the business to be derived by it from Ortonville, Goodrich, and the surrounding country *via* the Detroit United Railway, promised to be considerable in amount, and thereby the Michigan Central would be a beneficiary from the proposed connection and interchange. It was, we think, permissible for the court to find, as in effect it did find, that the benefits thus derived would include compensation for the use of the cars of the Michigan Central for purposes of loading and delivery along the line of the Detroit United. We are unable to see that any question as to the adequacy of the compensation was raised in the state court.

Plaintiff in error relies upon *Central Stock Yards* v. *Louis. & Nash. R. R.*, 192 U. S. 568, and *Louis. & Nash. R. R.* v. *Stock Yards Co.*, 212 U. S. 132. The former of these was an action in the Federal court and came here by appeal from the Circuit Court of Appeals. This court held as a matter of construction that the constitution of Kentucky did not require that the railroad company should deliver its own cars to another road. The second case was a review of the judgment of the court of last resort of the State. That court having held that the state constitution did require the carrier to deliver its own cars to the connecting road, it was contended that this requirement was void under the Fourteenth Amendment as an unlawful taking of property. This court said (212 U. S. 143): "In view of the well known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless transshipment or breaking bulk, in case of an

unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The constitution of Kentucky is simply a universal undiscriminating requirement, with no adequate provisions such as we have described. . . . We do not mean, however, that the silence of the constitution might not be remedied by an act of legislature or a regulation by a duly authorized subordinate body if such legislation should be held consistent with the state constitution by the state court." The case now before us is plainly distinguishable, as appears from what we have said. And, upon the whole, we see no sufficient ground for denouncing the regulation in question as either arbitrary or unreasonable.

There remains the contention that the statute and the order made in pursuance of it operate as a burden upon and interference with interstate commerce. That the order intrinsically applies only to intrastate traffic was held by the state court in this case, upon the ground that the jurisdiction of the Commission is thus limited; and in this the court did but follow its previous ruling in *Ann Arbor R. R.* v. *Railroad Commission*, 163 Michigan, 49. Therefore, the contention under the Commerce Clause is narrowed to the single point that the order requires the cars of the Michigan Central to be turned over to the connecting carrier "at all times and under all circumstances and without reference to the needs and demands of interstate commerce." But it seems to us that this is an unreasonable construction of the order. By its terms, as thus far construed by the state court, it merely requires the two companies to interchange cars, carload shipments,

less than carload shipments and passenger traffic, in accordance with the provisions of § 7 of the Act, that is to say, "in the same manner and under the same general conditions except as to motive power as belt line railroads and terminal railroads are now or may be used for like purposes." Manifestly, this involves no disregard of the needs of interstate commerce, and we must indulge the presumption, until the contrary is made to appear, that the State will not so construe or enforce the order as to interfere with or obstruct such commerce. *Ohio Tax Cases*, 232 U. S. 576, 591; *St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 369. The recent decisions of this court, cited in support of the contention that the order interferes with interstate commerce (*Houston & Tex. Cent. R. R.* v. *Mayes*, 201 U. S. 321, 329; *McNeill* v. *Southern Railway*, 202 U. S. 543, 561; *St. Louis S. W. Ry.* v. *Arkansas*, 217 U. S. 136, 149; *Chi., R. I. &c. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426, 433); are so plainly distinguishable that no time need be spent in discussing them.

Judgment affirmed.

WILSON CYPRESS COMPANY *v.* DEL POZO Y MARCOS.

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

No. 135. Argued January 19, 1915.—Decided March 15, 1915.

Although the jurisdiction of the Federal court may have been invoked solely on account of diverse citizenship, if the object of the suit is to quiet title to a grant of the former sovereign, depending for its completeness on a treaty and on laws of the United States and acts of Federal officers thereunder, this court has jurisdiction to review the judgment of the Circuit Court of Appeals.

Although the amount of land patented to the grantee of a former sovereign may have exceeded the amount confirmed by the act of

Congress and have been predicated upon a survey and limitation to the amount confirmed, the patentee has a taxable interest in the land that can be reached for proper taxation by the State.

Where the lower courts erroneously sustained complainant's contention that the lands involved were not taxable because never segregated from the public domain, and therefore did not pass upon the other contentions also urged by complainant as sufficient to sustain the title and which involved questions of local law and the weighing of conflicting evidence, this court will not on finding that the lower courts erred on the question of taxability finally pass on the other questions, but will reverse the decree and remand the case to the lower court for further proceedings in accordance with the opinion.

202 Fed. Rep. 742, reversed.

SUIT to quiet title brought in the Circuit Court for the Southern District of Florida by appellees, whom we shall call throughout complainants and the appellant defendant.

The bill alleges that the complainants are the heirs at law of Miguel Marcos, a lieutenant in the Spanish Army; that he was granted by the lawful authorities of the King of Spain on the eighteenth of October, 1815, 5,500 acres of land in the then Province of East Florida, on two banks of a creek which empties into the St. John's river about two miles north of Long Lake; that the grant was confirmed to his widow, Teresa Rodriguez, in her own right and for and on behalf of her children by the United States to the extent of a league square; that the grant was an inchoate right to said tract, under the laws of Spain called a first title or permit to occupy the land and, after occupancy and proof thereof, to secure a complete or royal title, but before such title issued Spain ceded East Florida to the United States, who, by the eighth article of the treaty between the United States and Spain, occupied the position of Spain with regard to this and like grants of land and were pledged to confirm title thereto; that the lands were neither surveyed nor segregated from the public domain during the sovereignty of Spain; that the same were wild and uncultivated, were never in the actual occu-

pancy of the grantee or of his widow and children and the title thereto at the time of the cession of the Floridas passed to the United States, subject to the equitable claim of the complainants.

The succession of complainants to the original grant is traced by the bill and it is alleged that soon after the cession of the Floridas to the United States, Teresa Rodriguez, applied to the board of land commissioners appointed to examine and report on claims to lands in East Florida for the confirmation of the grant and it was reported by the board to Congress as a valid grant and its confirmation recommended. That thereafter Congress, by an act approved May 23, 1828, c. 70, 4 Stat. 284, confirmed it to the extent of a league square, to be located within the limits of the original claim and bounded by sectional lines, and to be in quantities of not less than one section. That under the sixth section of the act of Congress confirmation of the grant was required to be accepted as a final settlement of the claim or the claim to be brought before the judge of the Superior Court for the district of East Florida within one year from the passage of the act; that the latter proceeding was not had and that by the act of Congress the title to the land was confirmed to the extent of one league, to be located within the bounds of the original grant.

That it was held by the judicial and executive branches of the Government that a league square was 4,438.68 acres. That by the laws then in force in the Territory of Florida it was the duty of the Surveyor General of the Territory to make the survey of the lands confirmed to complainants' ancestor and make certificate thereof and file the same in the land office of the United States in said Territory. That among the acts of Congress extending to said Territory was the act of March 3, 1807, by the terms of which it was made unlawful to take possession of, survey or cause to be surveyed or settle upon any lands ceded or secured to the United States by any treaty with a foreign

nation, or any land, claim to which had not been recognized and confirmed by the United States, under a penalty of forfeiture of the right, title and claim to such lands. That the ancestors of complainants were residing in Cuba on the twenty-third of May, 1828, and they and their descendants have since that date resided there and none of them have resided or been in the United States since the passage of the act of May 23, 1828, confirming the grant to the extent of a league square. That the United States never surveyed and segregated the lands as confirmed, as held by the Land Department of the United States, and the confirmees had no power to cause such survey to be made. That the lands embraced in the grant were surveyed as public lands by the United States in 1847, and such survey was approved May 15, 1848. A certified copy of the official plat of survey is attached to the bill and it is alleged that the lands were held by the Land Department of the United States to be public lands and were so treated from 1831 to February 12, 1894, upon which date the grant described in the bill was by the Land Department of the United States declared to be a valid, confirmed private grant to Teresa Rodriguez and ordered to be patented, and thereafter it was so patented to her, her heirs, assigns and legal representatives, and the lands described as section 37, township 19, south of range 28, and section 41, township 19, south of range 29, according to the plat of the public surveys made by the United States, and for the aggregate of 5,486.46 acres. That until such recognition of the title of complainants and those under whom they claim from and after May 23, 1828, complainants were excluded from the possession of the lands, and the United States had both the legal title and possession and right of possession of them and any occupancy of them by any other than the United States was a mere trespass; that before February 12, 1894, complainants and those under whom they take title were not able to take possession of

the lands because the United States claimed the entire grant as public lands.

The bill then sets out the asserted title of the defendant to have been derived from a sale to one John Starke on July 5, 1852, by the sheriff and ex-officio tax collector of Orange County, Florida, based upon a pretended execution for certain unpaid taxes alleged to have been assessed "upon the 'lands supposed to belong to Teresa Rodriguez,'" and the said sheriff attempted to deed to said Starke "'all the right, title and interest of Teresa Rodriguez and others'" in and to said tracts of land. That the said sale and deed are absolutely null and void because (1) it was alleged to be an assessment upon the single tract containing 5,480 acres and to be payable for the years 1845 to 1851, both inclusive, during which time the legal title and possession were in the United States; that the lands were expressly exempt from taxation by the statute of the State of Florida during those years, which declared that the act for the assessment and collection of taxes should not be construed to embrace lands belonging to the United States. (2) That the amount of taxes assessed was in excess of what could have been lawfully levied. (3) That proper notice of the sale was not given; (4) nor was the land sold in the parcels required. (5) That the deed was not properly executed, it having no subscribing witness and its record being wholly unauthorized.

Like invalidity is asserted against the tax and sale of the land for the years 1867, 1868 and 1869 assessed to John Starke, and conveyed by the sheriff to one William Mills. In addition it is alleged that no statute in Florida authorized a tax collector to make a tax deed upon a sale for the non-payment of taxes, such being the duty of the county clerk of the county wherein lay the lands. That the assessment and tax sale and deed to William Mills were made in execution of a conspiracy by him and Robert

C. Patten and one George C. Powell to deprive complainants of their title; that Mills never took possession of the lands but attempted to convey them to Powell; that Powell entered only upon section 9 (a part of section 37, above named) of said township 19, range 28, and made some improvements to complainants unknown and cut some timber thereon. That he exercised no other acts of ownership and those were continued but for a short time and "were not uninterrupted by continued occupancy for seven years" and were subsequently abandoned by him; that the possession was not sufficient either in character or duration to enable him to claim the benefit of the statute of limitations against any action brought by complainants; that complainants were precluded from bringing any action because the lands were held and claimed adversely by the United States and held to be public lands of the United States. Other tax assessments and sales are alleged and conveyance and title traced through them to the defendant, the Wilson Cypress Company, but the latter has never had such possession as would bar a right of entry by complainants. It is alleged that complainants tried to get a recognition of their title but only succeeded on June 18, 1894.

There are many other allegations which assert the validity of complainants' title and the invalidity of that of defendant, and that on June 26, 1895, the United States quit-claimed and patented to the legal representatives of Teresa Rodriguez the lands granted to Marcos and which had been surveyed as section 37, township 19, range 28, and section 41 of the same township, range 29, containing 5,486.46 acres. That the patent was duly recorded in the records of the United States and in the public records of Lake County, Florida, and the grantor of defendant and defendant had knowledge of it when the conveyance was made. That after the issue of the patent complainants were for the first time entitled to the possession of the

lands and from such date they became subject to taxation, and thereafter complainants sent their agent to Florida and took possession of the lands and have continued ever since to claim and have exercised acts of ownership over them.

It is alleged that the tax deeds referred to in the bill are fair upon their faces and are clouds upon the title of complainants and hinder them in the full enjoyment of their property and should be canceled and discharged from the public records.

It is further alleged that defendant will aver that no patent was necessary to evidence complainants' title and that by the confirmation of the grant title vested in the grantee and his legal representatives, but complainants allege that under the facts set out the United States did not relinquish title until the twenty-sixth of June, 1895, and before the approval of the survey of the lands granted the legal title was in the United States and the claim of complainants attached to no particular land.

There are other allegations of what the defendant will aver as to possession and right and it is then alleged that there never has been such possession by defendant as would establish an adverse holding.

An injunction was prayed against the defendant enjoining it and its officers from exercising acts of ownership over the land or from disturbing the possession of complainants; that the tax deeds and other deeds set out in the bill be held to have been executed without authority of law and that they be annulled and canceled.

The answer is as voluminous as the bill. It negatives many of the allegations of the bill either by denials or opposing allegations and asserts that the grant from Spain and its confirmation by the United States passed a complete title to the land. It also asserts the validity of the title acquired through the tax deed; alleges the insufficiency of the bill in equity; sets up the statute of limita-

tions, and charges laches and estoppel, the complainants in the bill having permitted large expenditures for care and improvement of the property by defendant. And it also puts in issue the relationship of complainants to Marcos and Teresa Rodriguez and denies that they are entitled to maintain the bill.

Upon proof being submitted, and after hearing, it was decreed that complainants were descendants and heirs at law of Teresa Rodriguez, the grantee in the patent of the United States hereinbefore referred to, were entitled to "an undivided interest in and to the lands" in controversy (which were specifically described) "and for themselves and as representatives of all persons claiming title to said lands through the said Teresa Rodriguez, her heirs and legal representatives," were "entitled to maintain this bill to remove cloud from" the lands.

The decree recited the tax deeds and the lands which they purported to convey, and adjudged that the deeds, having been based upon assessments made prior to the issue of the patent and while the validity of the grant to Marcos was denied by the United States, were absolutely null and void and a cloud upon the title of Teresa Rodriguez and her legal representatives and heirs at law and set aside.

And it was further decreed that defendant had no title or interest in the patented lands and that it and all persons claiming under it were enjoined from setting up any title under the tax deeds or from entering upon or holding possession of the lands or any part thereof.

The decree was affirmed by the Circuit Court of Appeals. The opinion of the court was as follows (202 Fed. Rep. 742): "The lands in controversy were not segregated from the public domain, and the title thereto remained in the United States until the issuance of the patent; therefore they were not taxable by the State of

Florida at the several times they were listed for taxes and sold for nonpayment thereof."

Mr. John C. Cooper for appellant.

Mr. William W. Dewhurst, with whom *Mr. Joseph H. Jones* and *Mr. John C. Jones* were on the brief, for appellees.

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

The tedious volume and prolixity of the bill are directed to establish that Miguel Marcos, the ancestor of complainants, received a grant from the Spanish authorities, not becoming complete in his descendants, the complainants, until June 18, 1894, and until such time the lands which the grant embraced were not subject to state taxation and that, therefore, the deeds issued to defendant in consequence of such taxation are void. And of this view were the two lower courts, the one in consequence entering a decree to quiet the title of complainants against the deeds, and the other affirming such decree. This appeal was then taken.

A motion is made to dismiss the appeal on the ground that the jurisdiction of the court was invoked solely because the complainants were aliens and the defendant was a citizen of the United States. This is a narrow view of the bill. It seeks to quiet the title of complainants to a tract of land commencing in a grant from Spain, depending for its completeness upon the treaty with Spain and laws of the United States, and the action under those laws by the officers of the Land Department of the United States, and it especially relies on those laws to defeat defendant's claim of title and to have it removed as a cloud upon that asserted by complainants. Indeed, there

is scarcely a contention of complainants which does not primarily or ultimately depend upon the laws of the United States. The motion to dismiss is, therefore, denied.

The first proposition on the merits is the character of the grant from Spain to Marcos. Complainants contend, as we have seen, that it was an inchoate or incomplete grant. The defendant, *per contra*, insists that it was confirmed as a complete and perfect title by the force and effect of the treaty between the United States and Spain.

It is well here to repeat some of the allegations of the bill that their scope and effect may be understood. It alleges the action of the Board of Land Commissioners reporting the grant to Congress for confirmation and the several acts of Congress relating thereto, especially the act of May 23, 1828, c. 70, 4 Stat. 284. That the grant was under the laws of Spain, "called a first title or permit to occupy the land and, after occupancy and proof thereof, to secure a complete or Royal title." It is, however, further averred that before a perfect title could be obtained Florida was ceded to the United States, who by the eighth article of the treaty pledged itself to confirm the title; and that to secure such confirmation Teresa Rodriguez, widow of Marcos, applied to the Board of Land Commissioners and the Board reported the grant to Congress as valid and recommended its confirmation, and that thereafter Congress, by the act of May 23, 1828, confirmed it to the extent of a league square, to be located within the limits of the original claim and bounded by sectional lines and to be "in quantities of not less than one section."

This apparently left nothing to be done but to segregate the land by a survey, but the bill alleges that the grantees were required to accept the confirmation as a final settlement or bring their claim before the judge of the Superior Court for the district of East Florida.

This was not done, it is alleged, but it is again alleged that the title was confirmed to the extent of one league square, to be located within the bounds of the original grant.

Notwithstanding they had a grant confirmed to them of a possible league square, possession was not taken, it is alleged, because under the act of March 3, 1807, to have taken possession would have forfeited their right, and that it was not until February 12, 1894, when their title was recognized by the Land Department of the United States, that they were able to assert ownership of the land. In other words, that until such date the United States did not relinquish its title and possession of the lands; that the obligation to confirm grants of lands assumed by the United States by the treaty with Spain was political in character, and to be discharged as the United States deemed expedient, and as to the grant to Marcos the United States retained possession and title thereto from March 23, 1828, to the issuance of the patent; that before the approval of the survey of the lands granted to Marcos the legal title was in the United States and the claim of complainants attached to no particular lands.

It will be observed, therefore, that the basis of the contention of complainants is that their ancestor, Marcos, received an inchoate title to an unspecified tract of land "two miles north of Long Lake on both banks of a creek emptying into the St. John's river, if this tract of land could be identified," and because it was not identified, even by the survey approved by the Land Department, counsel say that "the title to the lands in controversy, therefore, whether Marcos held a first cession or a royal title, is held under the United States and not under Spain."

This, however, we assume, is but another way of stating that complainants had no interest in the land that they could assert or that the State of Florida could tax until the United States issued its patent, and yet the United

States has done no more than recognize the title derived from Spain and as derived from Spain. It is true there were at first some doubts and hesitation, but ultimately the recognition was complete, following and in pursuance of the confirmation of the Marcos grant by the act of May 23, 1828, and upon a survey made as early as 1851. At whose instance the survey was made does not appear. Section 1 of the act of May 23, 1828, requires the land confirmed by it "to be located by the claimants, or their agents, within the limits of such claims or surveys . . . which location shall be made within the bounds of the original grant, in quantities of not less than one section, and to be bounded by sectional lines." Some uncertainty arises from § 2. It provides that no more than the number of acres contained in a league square shall be confirmed within the bounds of any one grant; and no confirmation shall be effectual until a full and final release of all claim to the residue contained in the grant. And something is made of the provision by complainants to refute the contention of defendant that the act was an absolute confirmation of the grant, but it certainly cannot be contended that it took all power from the act and left the grant without any foundation whatever; and we are brought back to the consideration that a valuable property was confirmed to complainants which only needed a survey to identify it, and, when surveyed, was segregated from the public domain and subject to the taxing jurisdiction of the State. The survey was made, we have seen, in 1851 under contract with Benjamin A. Putnam, surveyor general. The act of June 28, 1848, c. 83, 9 Stat. 242, directed that surveys be made as soon as practicable of the private claims or grants which had been duly confirmed situated in the State of Florida. It is probable that the survey was made in obedience to this direction. The field notes of the survey and the official plat thereof were approved by the surveyor general June 20, 1851,

and the patent recites that the description of the land therein given is taken "from the approved field notes of the survey thereof as executed by M. A. Williams, a deputy surveyor, in the month of January, 1851, under his contract with Benjamin A. Putnam, surveyor general of Florida, of the 19th of October, 1850." Indeed, the patent rests alone on the survey as a description and segregation of the land, the grant of which was confirmed by the act of Congress of May 23, 1828, as claim No. 22, recommended for confirmation December 16, 1825, by the Board of Commissioners in pursuance of the act of Congress of March 3, 1823.

All the conditions of a taxable property existed, unless there be merit in the contention of the complainants that the survey of 1851, upon which the patent was predicated, was of no effect unless and until approved by the Commissioner of the General Land Office. This contention has been earnestly pressed upon our attention, but is untenable. It has no support in any statute or regulation that was in force at the time. The confirmatory act of May 23, 1828, and the act of June 28, 1848, were both silent upon the subject, and in the absence of some applicable special provision the general statute relating to public surveys was controlling. The general statute was then embraced in the act of May 18, 1796, c. 29, 1 Stat. 464, and its amendments, and was afterwards incorporated in Chapters 1 and 9 of Title 32 of the Revised Statutes, more especially §§ 2223 and 2395. It expressly dealt with the survey of private land claims as well as of public lands, but contained no requirement that the survey of either be approved by the Commissioner. This is apparent upon an inspection of the statute and is shown by two decisions of this court, one relating to the survey of a private land claim resting upon a confirmed Mexican grant and the other to the survey of public lands. *Frasher* v. *O'Connor*, 115 U. S. 102, 115; *Tubbs* v. *Wilhoit*, 138 U. S.

134, 142–144. In both cases the court approvingly referred to a decision of the Secretary of the Interior, in the latter case quoting the Secretary of the Interior as follows: "There is nothing in the act of 1796, or in the subsequent acts, which requires the approval of the commissioner of the general land office before said survey becomes final and the plats authoritative. Such a theory is not only contrary to the letter and spirit of the various acts providing for the survey of the public lands, but is contrary to the uniform practice of this department. There can be no doubt but that under the act of July 4, 1836, reorganizing the general land office, the commissioner has general supervision over all surveys, and that authority is exercised whenever error or fraud is alleged on the part of the surveyor general. But when the survey is correct, it becomes final and effective when the plat is filed in the local office by that officer." And it was added: "This practice was changed by the Land Department in April, 1879, and communicated in its instructions to surveyors general on the 17th of that month. It was not until after such instructions that the duplicate plats filed in the local land offices were required to be previously approved by the commissioner of the general land office." It follows that the land granted and confirmed was fully identified by the survey of 1851, the field notes and plat of which are shown in the record. Of the office of the patent it is enough to repeat what was said in *Beard* v. *Federy*, 3 Wall. 478, 491: "In the first place, the patent is a deed of the United States. As a deed, its operation is that of a quit-claim, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the Board of Land Commissioners. In the second place, the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the

country." In *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 339, 344, such a patent was described "as a confirmation in a strict sense." See also § 3 of the act of May 23, 1828.

It will be observed, from the allegations of the bill, which we have taken the trouble to repeat, that the foundation of the title of complainants is a grant from Spain, which was reported as valid by the Board of Commissioners of the United States, recommended by such Board for confirmation and confirmed by the Act of Congress of May 23, 1828, to the extent of one league, "to be located by the claimants"; that subsequently (1851) a survey was made under a contract of the Surveyor General of Florida which has been accepted as the segregation of the land and set forth in the patent, and that the sole basis of the patent is the title so derived and confirmed.

It is true, as we have stated, that the Commissioner of the Land Office in 1890 refused to issue a patent, deciding that the claim had been "surveyed in Tp. 19, S., Rs. 28 and 29 E., for 5,426.82 acres." The grounds of his decision were these: the claim was before Congress when the act of February 8, 1827, c. 9, 4 Stat. 202, was passed but that that act only confirmed those claims which were under the quantity of 3500 acres and provided "for the survey of this [Teresa Rodriguez] and other claims, exceeding in area 3500 acres." Referring to the act of May 23, 1828, it was said that by its sixth section those holding claims like that under consideration might secure a confirmation thereof by prosecuting the same in the courts. It was further said that "patents in this class of cases are based on some confirmatory act of Congress or upon a confirmation of some tribunal, created by Congress for that purpose." Considering that there was no confirmation by Congress and no decision of any tribunal created by Congress, the Commissioner declined "to patent the same for the want of proper evidence upon which to base such action." A review of the decision and

action was invoked and the attention of the Commissioner was directed to § 1 of the act of May 23, 1828, and a confirmation claimed thereunder on the ground "that its survey contains a less quantity than a league square." To this the Commissioner answered that the "grant was made by Spanish authority and must be understood to mean a grant of 5,500 acres according to the measurement used by Spain in measuring grants of this character. . . . A 'league square' by this measurement contains 25,000,000 varas, or 4438.68 English acres.

"The Rodriguez claim, as before stated, has been surveyed so as to embrace 5,426.82 acres, or 988.14 acres in excess of a Spanish 'league square.'

"Said act of 1828 provided a method by which claims not confirmed by its first section might be confirmed by its second section. This second section required the claimants, who accepted its provisions, to release the land in excess of a league square.

"No release of the 988.14 acres herein referred to is found on file here. . . .

"The Rodriguez claim not having been confirmed, I must decline to take up the same with a view to the issuance of a patent therefor."

An appeal was taken to the Secretary of the Interior and a decision rendered by him February 12, 1894. The Secretary stated that the lands within the limits of the grant have been surveyed in Twp. 19 S., Rs. 28 and 29 E., in Florida, that it was presented to the Board of Land Commissioners in Florida for 5,500 acres, and contained according to said survey 5,486.46 acres. The opinion then recites the history of the grant and the steps which had been taken for its confirmation, defined a league square to contain 6,002.50 acres of land and that in accordance therewith the grant was petitioned and allowed for 5500 acres.

In answer to the view expressed by the Commissioner

that a Spanish league was meant, it was said that the conclusion was "at variance with and repugnant to every fact and circumstance in the history of Spanish grants in the provinces mentioned [Louisiana and the Floridas] and in the legislation of Congress in relation thereto." It was hence held that a "league square" of land as understood by Congress in the act of May 23, 1828, meant a tract of land containing 6,002.50 acres and that it followed, therefore, that the Rodriguez claim "contained, as shown by the survey, less than a league square and is confirmed by the first section of the act of May 23, 1828, *supra*." The decision of the Commissioner was reversed and that officer was "directed to patent said claim in accordance with the survey thereof."

Both the Commissioner and the Secretary proceeded upon the theory that the survey as approved by the surveyor general in 1851 was effective, if the grant was confirmed by the first section of the act of 1828.

We have been at pains to cite at length from these decisions to show how little stood in the way of the complete assurance of complainants' title and that its foundation was the direct confirmation of it by the act of May 23, 1828, and that the grant needed definition only by a survey, which was made as we have seen, in 1851. This survey was referred to by counsel for complainants, by the Commissioners of the Land Office and the Secretary of the Interior and in the patent, it being made the foundation of the latter. The case, therefore, becomes in principle like *Wisconsin Railroad Company* v. *Price County*, 133 U. S. 496; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Northern Pacific R. R.* v. *Patterson*, 154 U. S. 130; *Maish* v. *Arizona*, 164 U. S. 599.

This disposes of the primary proposition in the case, to-wit, that complainants had a taxable interest in the granted lands; but assuming the contrary, defendant yet insists that complainants are not entitled to the relief

which they pray. There are other contentions as well, urged respectively by defendant and complainants, upon which the courts below did not pass, and we are brought to consider what disposition should be made of the case in view of such contentions.

The first of the contentions relates to the title of defendant, which has its foundation in a sale for taxes by the State of Florida alleged to have been assessed for the years 1845 to 1851, both included, and a deed from the sheriff to one John Starke (1852), and subsequently an assessment to the latter for taxes and a sale for his delinquency, title ultimately reaching defendant through mesne conveyances.

The validity of the tax deeds is attacked by complainants, they asserting that the deeds were not preceded by a valid assessment, nor indeed any assessment, nor executed in accordance with the laws of the State, nor (as to some of them) by the proper officer. On these contentions, as we have said, the courts below expressed no opinion. Their solution depends upon testimony somewhat voluminous and not very satisfactory, of which there is no analysis either by the master or by the trial court or by the Court of Appeals.

The statute of the State, it is agreed, in 1845 to 1851 required the assessors of the counties "to take down and assess the taxable property in his county" and on or before the first day of March in each year "to make out three books in alphabetical order of all the taxable property in his county, one of which books he shall forward to the comptroller of the treasury, one other of said books he shall deliver to the sheriff of his said county, and the other book he shall deliver to the board of county commissioners of his said county."

The act provided that in default of an assessment by the assessors the sheriffs of the counties should assess and list the taxes for their respective counties and to proceed

to have the property therein assessed in such manner as the assessors were required to perform such duty.

The chief clerk of the comptroller's office, upon being called as a witness by complainants, testified that he found duplicate tax rolls of 1845 to 1851, inclusive, except for the year 1847, which he could not find. To his certain knowledge the rolls had been in the office for thirty years. The rolls were certified by the assessor as correct so far as his knowledge extended. Some of the rolls were not endorsed as filed. The witness testified that he could add nothing to the identity of the rolls other than the certificates and that he could not determine whether the roll of 1845 was made in accordance with law or not. And further that the "book" (roll) was alphabetically arranged to the extent of the first letter in the surnames and that the land was designated according to its quality as first, second or third rate and assessed respectively at three-fourths, one-half and one-quarter of a cent an acre, but the number of acres was not given nor a description of the land.

To the question whether there was property assessed to Teresa Rodriguez he answered, "So far as the question of whether any lands are entered there opposite the name of Teresa Rodriguez is concerned, I will say that I am unable to find that particular name. But I will state further that it is impossible for me to declare that the property of Teresa Rodriguez is not assessed, for the reason that property is entered on this book, following after the word 'same' in a number of instances, and for that reason I don't know who 'same' was intended to be. In a number of instances 'same' appears there, and 'ditto.' In making the ditto they used two ditto marks. Wherever the word 'same' appears a name immediately precedes it, but where the ditto marks (or dots, the intention of which I do not know) just precede those, no name appears."

There is other testimony equally confusing as to the

roll of 1846. He testified that some portions of it were rotted out. But how far this affected the roll does not clearly appear. And as to the roll of 1848 he testified that it was so mutilated and torn that he was unable to arrive at any conclusion as to how the lands were assessed therein; and further that he was unable to give the names that were entered between the letter P and the letter S, for the reason that by decay they had become so dim and stained that he was unable to make them out. The testimony was clearer as to the roll of 1849 and the name of Teresa Rodriguez did not appear thereon. The witness testified that Teresa Rodriguez' name did not appear on the roll of 1850, but he was not able to say whether her property was attempted to be assessed or not; that he was only prepared to say that her name was not on the roll. The certificate to this roll stated "that the foregoing assessment of State taxes corresponds exactly with that contained in the book filed by me in the office of the Judge Probate, and were retained by me, John Simpson, tax assessor and collector." It may be observed in passing that John Simpson, as sheriff and tax collector, levied upon and sold to John Starke lands "supposed to belong to Teresa Rodriguez." There is some presumption that he proceeded upon a knowledge of the records and the requirements of the law. We have seen, the statute required the sheriffs to make assessments if the assessors failed to make them.

On cross-examination the clerk of the comptroller's office repeated that he was unable to determine if Teresa Rodriguez' lands had been assessed, that "in the absence of specific descriptions it would be impossible to determine a question of that nature."

Testimony was offered on the part of defendant to the effect that the court house of Orange County, where the lands are situated, was destroyed by fire in 1868 or 1869 and one only of the books of record was saved, it not being in the court house at the time of the fire. It was a mis-

cellaneous record—separate volumes of deeds, mortgages and miscellaneous matter not then being required. There was nothing in its index which covered tax sales or tax assessments.

It will be observed, therefore, the testimony as to assessments is somewhat uncertain and confused and that the courts below made no attempt to analyze or explain it, their view of the case making it unnecessary.

There are other contentions equally dependent upon testimony. For instance, defendant asserts that the record shows that complainants were guilty of laches, more than twelve years having elapsed from the date of the patent to the filing of the bill, and that besides the suit is barred by the statute of limitations. And, further, that one of the parties in the tax title took possession immediately upon his purchase of the lands in 1872 and remained in possession until 1882, cultivated a portion of the lands, cut timber therefrom and exercised other acts of ownership. That his successor in title succeeded also to the possession, holding it until his sale in 1884 to the Florida Colonization Company, the grantor of the defendant, from which, in 1890, defendant received the title and possession.

It is contended that during all such time complainants neither paid nor offered to pay taxes, that the other parties did, the defendant successively from 1890, and that it also made other expenditures; that complainant asserted no claim to the lands against it and let twelve years elapse after patent was issued before bringing this suit.

The courts below rejected these contentions. The trial court seemed to have arrived at its conclusion by disregarding the possession, whatever it was, which was held by defendant's predecessors in the title or its possession prior to the issue of the patent. "It makes no difference," the court said, "what the occupation or possession may have been while the title to the property was in the United States, and it is not considered that the possession during

such time can be resorted to to determine whether or not the property was, after the issue of the patent, in the actual possession of the defendant through its agent sufficient to legally bar a right to maintain a bill to remove cloud from title."

We think the learned court erred in this. The continuity of possession was a factor to be considered,—we do not say determinative. The evidence of numerous witnesses seems to conflict upon the character and extent of such possession, an analysis of which can better be made in the first instance by the master or the trial court than by an appellate court.

There are other contentions, besides, which were not passed upon. The validity of the deed from the sheriff to Starke is questioned because, it is asserted, it has neither subscribing witnesses nor evidence of having been acknowledged, and, it is contended, under the laws of Florida a certified copy of a deed is not admissible in evidence as proof of the execution or contents of the original, if the record has not been made upon the evidence of execution required by the statute, citing *Kendrick* v. *Latham*, 25 Florida, 819. Indeed, the contention is even that a deed without subscribing witnesses does not convey the land described for a term of more than two years, citing *Hart* v. *Bostwick*, 14 Florida, 162, 173; *Neal* v. *Gregory*, 19 Florida, 356.

To this defendant opposes the contention that the laws of Florida did not require subscribing witnesses to a deed from a sheriff made in execution of a levy upon the property for the collection of taxes, and that, further, even if so, there was a right to receive a deed from the successor of the sheriff and that, therefore, an equitable title was conveyed to Starke which was subject to taxation and to sale upon his delinquency.

We do not pass upon the contention nor intimate an opinion of the other contentions we have mentioned or

which are presented by the pleadings. We refer to them to show that on account of the view of the courts below on the taxability of the lands they omitted to pass on a number of important issues, some of which require a consideration of testimony, and some—it may be all—an examination of the local laws and decisions, as dependent on such testimony. And, we repeat, a consideration of such testimony should be made in the first instance by the trial court. *Chicago, Milwaukee &c. Ry.* v. *Tompkins*, 176 U. S. 167; *Owensboro* v. *Owensboro Water Works Co.*, 191 U. S. 358.

Decree reversed and cause remanded for further proceedings in accordance with this opinion.

McCORMICK *v.* OKLAHOMA CITY.

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

No. 170. Argued March 4, 1915.—Decided March 15, 1915.

Where the bill presents a case of diversity of citizenship only, the decree of the Circuit Court of Appeals is final: An appeal to this court must be dismissed.

An allegation in a pleading that by reason of contracts with a municipality plaintiff had a vested right of property in such contracts or in their performance and that a refusal to perform amounts to deprivation of such property does not give the allegation any other character than that of one alleging ordinary breach of contract.

A constitutional question cannot be imported into the case in that manner.

Appeal from 203 Fed. Rep. 921, dismissed.

THE facts, which involve the jurisdiction of this court to review judgments of the Circuit Court of Appeals, are stated in the opinion.

Mr. B. F. Burwell for appellant.

Mr. Claude Weaver, with whom *Mr. J. W. Johnson* and *Mr. V. V. Hardcastle* were on the brief, for appellees.

Memorandum opinion by MR. JUSTICE MCKENNA, by direction of the court.

Suit for specific performance of eighteen contracts for the paving of certain streets in the city of Oklahoma City, Oklahoma.

A temporary restraining order was applied for and denied. The suit subsequently came on to be heard on the bill, answer and proofs, and a decree was entered dismissing it. The decree was affirmed by the Circuit Court of Appeals. 203 Fed. Rep. 921.

A question of jurisdiction arises, that is, whether an appeal lies from the decree of the Circuit Court of Appeals to this court, and that depends upon the ground on which the jurisdiction of the District Court was invoked and whether, as a consequence, the decree of the Circuit Court of Appeals was final.

The bill alleges that McCormick, whom we shall designate as complainant, is a citizen and resident of St. Louis, Missouri, and that the city of Oklahoma City is a citizen and resident of Oklahoma, being a municipal corporation thereof, and that the other defendants are its officers.

The gravamen of the suit is that under an ordinance of the city, resolutions were passed by the city council at different times providing for the paving of certain streets in the city and that under due and legal proceedings had under such resolutions plans, specifications and estimates of the work were prepared by the city engineer. That in accordance with these and notices published complainant filed with the city clerk proposals and bids which were afterwards by the council duly accepted; that they, there-

fore, became and constituted valid and binding contracts between the city and complainant for making such improvements and that he by reason of such contracts has a vested right of property in the same and is entitled to be permitted to perform the same. That subsequently the council attempted by resolution or motion to reconsider its action and to set aside the awards, in violation of complainant's rights. That he tendered formal written contracts and requested the acting mayor to execute them, but that officer refused to do so or to approve the bonds presented therewith. That complainant has done in all other particulars the things required to be done and performed by him and had done some work under his contracts before they were attempted to be set aside. That unless restrained the city will deprive complainant of the privilege of making the improvements and prevent him from making the profits thereon, which would amount to at least $45,000; that the attempt of the city to set aside the awards to complainant "is in violation of the Constitution of the United States and in violation of the constitution and laws of the State of Oklahoma, and is an attempt to deprive this complainant of property without due process of law."

These are the general outlines of the bill and they are sufficient to show that diversity of citizenship was alleged and, in a general way, that the Constitution of the United States and of the State of Oklahoma were violated. The basis of the latter allegation is that complainant had binding contracts with the city which the city refused to permit him to perform. Their breach is alleged and nothing more, and the allegation gets no other quality or character by the assertion that complainant had a "vested right of property" in the contracts or their performance and that to take this away is a deprivation of property without due process of law. Nor would such be the result if complainant had averred that the circumstances amounted

to an impairment of the obligation of his contract, a contention which he in effect urged upon the oral argument.

The case, therefore, falls under the ruling in *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, and subsequent cases.

In *Dawson* v. *Columbia Trust Company*, 197 U. S. 178, 181, it was said that the mere fact that a city is a municipal corporation does not give to its refusal to perform a contract the character of a law impairing its obligation or depriving of property without due process of law. *St. Paul Gas Light Co.* v. *St. Paul, supra*, was adduced.

In *Shawnee Sewerage & Drainage Co.* v. *Stearns*, 220 U. S. 462, 471, it was said: "The breach of a contract is neither a confiscation of property nor a taking of property without due process of law."

It follows that the bill presents a case of diversity of citizenship only and the decree of the Circuit Court of Appeals was final.

We may observe that that court and the District Court decided that there were no contracts consummated by complainant with the city.

Appeal dismissed.

AMERICAN SEEDING MACHINE COMPANY *v.* COMMONWEALTH OF KENTUCKY.

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

No. 175. Argued March 5, 1915.—Decided March 15, 1915.

International Harvester Co. v. *Kentucky*, 234 U. S. 216, followed to effect that §§ 3915 and 3941, of the Kentucky Anti-Trust Statutes, are invalid under the due process provision of the Fourteenth

Amendment because, as construed by the Court of Appeals of that State, they offer no standard of conduct that it is possible to know. 152 Kentucky, 589, reversed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of certain provisions of the Anti-trust Act of the State of Kentucky, are stated in the opinion.

Mr. J. E. Bowman, with whom *Mr. Alexander Pope Humphrey* was on the brief, for plaintiff in error.

There was no appearance or brief filed for defendant in error.

Memorandum opinion by MR. JUSTICE MCKENNA, by direction of the court.

Plaintiff in error was convicted in the Circuit Court of Barren County, Kentucky, and fined for alleged violation of §§ 3915 and 3941 of the Kentucky laws commonly known as the Kentucky Anti-trust Statutes, and prosecutes this writ to review the judgment.

The grounds of error assigned are: (1) That the statutes in question are in conflict with the Fourteenth Amendment to the Constitution of the United States; (2) That the particular transactions involved were transactions of interstate commerce and protected from state regulation by the Commerce Clause of the Constitution of the United States.

These grounds were presented to the lower court first by demurrer, which was overruled, and, after answer and trial to a jury, by a request for peremptory instructions for defendant.

The sections of the laws of Kentucky referred to were declared to be invalid by this court under the Fourteenth Amendment because they, as construed by the Court of

Appeals of the State, offered no standard of conduct that it is possible to know. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216. Therefore, the judgment of conviction against plaintiff in error must be reversed.

It is not necessary to pass on any other question.

Judgment reversed.

A. J. PHILLIPS COMPANY *v.* GRAND TRUNK WESTERN RAILWAY CO.

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

No. 124. Argued January 15, 1915.—Decided March 15, 1915.

A finding by the Interstate Commerce Commission in a general investigation that an advance in a rate on a specified commodity between specified points is unreasonable inures to the benefit of every shipper who has paid the unjust rate, provided however, that he asserts his claim against the carrier within the time fixed by law.

A shipper who paid charges prior to the passage of the Hepburn Act and did not commence proceedings until more than one year after the passage of that act cannot recover on the strength of a finding of the Interstate Commerce Commission made in a general proceeding to which he was not a party that the rate paid was unreasonable.

The Conformity Act (Rev. Stat. 914) does not apply to a state rule of practice prohibiting taking advantage of the statute of limitations by general demurrer to a cause arising under a Federal statute expressly limiting the time within which the right created by the statute can be asserted—in which case the lapse of time not only bars the remedy but destroys the liability.

The prohibitions of the Interstate Commerce Act against unjust discriminations relate not only to inequality of facilities but also to giving preferences by means of consent judgments or waivers of defenses open to the carrier.

Quære, whether connecting carriers participating in a haul, the advanced

rate for which was held by the Commission to be excessive but who were not responsible for advancing the rate, could be held jointly and severally responsible for reparation before they had been heard by the Commission.

The facts, which involve the right of a shipper to recover from the carrier freight charges held to have been unreasonable by the Interstate Commerce Commission and the provisions in the Hepburn Act limiting the time within which claims of that nature can be asserted, are stated in the opinion.

Mr. Edward H. S. Martin and *Mr. George M. Stephen* for plaintiff in error.

Mr. L. C. Stanley for defendants in error.

Mr. Justice Lamar delivered the opinion of the court.

The A. J. Phillips Company is a manufacturer of doors at Fenton, Michigan. For use in its business it purchased large quantities of lumber, much of which was shipped from points in Alabama, over the lines of the Illinois Central, the Southern, the Grand Trunk Western, and the Detroit & Milwaukee Railway Companies. Prior to April, 1903, the rate to Fenton was 28 cents a hundred,—of which 14 cents was the charge for the haul, over the Southern and the Illinois Central, from Alabama points to the Ohio River. The remaining 14 cents represented the charge of the Grand Trunk and the Detroit Companies for the haul from the Ohio River to Fenton.

In April, 1903, the Illinois Central, the Southern Railway, and other carriers operating in the Gulf States, filed a tariff which made an advance of 2 cents per hundred on lumber shipped from Alabama mills to the Ohio River and beyond.

On July 24, 1903, the Yellow Pine Association filed a complaint with the Interstate Commerce Commission seeking to have this increase declared to be unreasonable.

After a hearing the Commission held (10 I. C. C. 505–547) that "the advance of 2 cents was not warranted under all the facts and evidence and that the resultant increased rate is unreasonable and unjust. An order will be issued in accordance with these views." The carriers sought to have this order enjoined, but the action of the Commission was sustained by the Circuit Court and, on May 27, 1907, that ruling was affirmed by the Supreme Court of the United States (206 U. S. 441)—After which—as appears from the official reports (*Joyce* v. *Ill. Cent. R. R.*, 15 I. C. C. 239)—the Commission approved the settlement of a number of claims for reparation which had been previously filed. The Phillips Company was not a party to the proceedings before the Commission and made no claim for reparation but on May 11, 1909, it brought suit in the Circuit Court of the United States for the Eastern District of Michigan, against the four carriers named above, for the recovery of the overcharge. The declaration,—which by reference, made the report of the Commission in 10 I. C. C. 505 a part of the pleading (*Robinson* v. *B. & O. R. R.*, 222 U. S. 507)—alleged that the four carriers had charged plaintiff 30 cents per hundred though they well knew that 28 cents was the highest just and reasonable freight rate that could be charged on lumber and that anything in excess of 28 cents was illegal, unjust and excessive. It was also averred that the Commission on the complaint of the Yellow Pine Association had found the 2 cent advance to be unreasonable, and for that reason the plaintiff claimed that the defendant-carriers were each and all bound to return to it the 2 cent overcharge on 218 cars of lumber. There was a prayer for judgment for $5,000 damages and $2,000 attorney's fees.

The Southern Railway was not served. The Illinois Central having no office in the district was ultimately dismissed from the case. The demurrer of the other two

defendants was sustained. That judgment was affirmed by the Circuit Court of Appeals, and the case brought here by writ of error.

1. The Phillips Company, relying on a finding by the Commission on the complaint of the Yellow Pine Association, that a 2 cents advance in a lumber rate was unreasonable, brought suit against four carriers to recover an overcharge collected on 90,432,500 pounds of lumber shipped to it over their connecting lines. But as the plaintiff was not a party before the Commission the defendants insist that it cannot take advantage of the order that the rate was unjust, so as to be able to maintain the present suit.

But the proceeding before the Commission, to determine the reasonableness of the 2 cents advance, was not in the nature of private litigation between a Lumber Association and the carriers, but was a matter of public concern in which the whole body of shippers was interested. The inquiry as to the reasonableness of the advance was general in its nature. The finding thereon was general in its operation and inured to the benefit of every person that had been obliged to pay the unjust rate. Otherwise those who filed the complaint, or intervened during the hearing, would have secured an advantage over the general body of the public, with the result that the order of the Commission would have created a preference in favor of the parties to the record and would have destroyed the very uniformity which that body had been organized to secure. The plaintiff and every other shipper similarly situated was entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding and order. See *Abilene Case*, 204 U. S. 446; *Robinson* v. *B. & O.*, 222 U. S. 507; *Baer Bros.* v. *Denver &c.*, 233 U. S. 479, 489, and compare *Nicola* v. *Louisville & Nashville R. R.*, 14 I. C. C. 200 (4), 205.

2. But while every person who had paid the rate could

take advantage of the finding that the advance was unreasonable, he was obliged to assert his claim within the time fixed by law. When the overcharge was collected a cause of action at once arose and the shipper at once had the right to file a complaint or to intervene in proceedings instituted by others. If he failed to take either of those steps and there was a finding of unreasonableness in the proceedings begun by others, he could, if in time, present his claim, and await the result of the litigation over the validity of any order made at the instance of those parties. If it was ultimately sustained by the court as valid he would then be in position to obtain reparation from the Commission—or a judgment from a court of competent jurisdiction, on a claim that had been seasonably presented. But neither proceedings begun by other shippers, nor findings of unreasonableness and orders issued thereon by the Commission, would save the rights of those who disregarded the requirements of the Hepburn Amendment, that,

"all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order, and not after; provided, that claims accrued prior to the passage of this act may be presented within one year." 34 Stat. 586.

In the present case the overcharges were made and paid prior to August, 1904. The present suit was brought May 9, 1909,—less than two years after the validity of the Commission's order was sustained by the Supreme Court,—but, more than one year after the passage of the Hepburn Amendment, and more than four years after the plaintiff's cause of action arose.

3. It is argued, however, that under the Conformity Act (R. S. 914), the case is to be governed by the Michigan

practice, which does not permit a defendant to take advantage of the statute of limitations by a general demurrer to the declaration. But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years *and not after*. Under such a statute the lapse of time not only bars the remedy but destroys the liability (*Finn* v. *United States*, 123 U. S. 227, 232) whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this as in so many other instances must be borne in mind in construing the Commerce Act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different States, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. The Railroad Company therefore was bound to claim the benefit of the statute here and could do so here by general demurrer. For when it appeared that the complaint had not been

filed within the time required by the statute it was evident, as matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for overcharges collected more than four years prior to the bringing of this suit, it was proper to dismiss the action.

4. There is the further contention that the connecting carriers operating north of the Ohio River had to collect the filed tariff rate of 30 cents per hundred, even though they were not responsible for the advance, and that in no event could they be held liable for the refund until after they had been heard by the Commission. There is nothing in this record indicating that the Commission undertook to impose a liability upon those who had not been heard. But the conclusion that the plaintiff's cause of action had been lost by lapse of time, makes it unnecessary to determine whether carriers participating in the haul,—but who did not put in the advance, or who were not parties to the proceeding in which a portion of the rate was held to be unreasonable,—could be held jointly and severally liable for the collections made by them while the 30 cent rate was in force. The suit was properly dismissed on other grounds and the judgment is

Affirmed.

SEABOARD AIR LINE RAILWAY *v.* PADGETT, ADMINISTRATRIX OF PADGETT.

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

No. 710. Argued February 24, 1915.—Decided March 22, 1915.

Where plaintiff in error seeks to review under § 237, Judicial Code, the judgment of the state court in a case arising under the Employers' Liability Act, this court may not consider non-Federal questions

which do not in their essence involve the existence of right to recover under the Federal statute.

Existence of power to review the judgment of the state court under § 237, Judicial Code, rests not merely upon form but upon substance and cannot arise from the mere assertion of a formal right which is so wanting in foundation and unsubstantial as to be devoid of merit and therefore frivolous.

While in this case the assignment of error on its face is not frivolous and gives jurisdiction to review, the proposition that the jury was misled by the instructions of the court in regard to the doctrine of assumption of risk is unfounded.

If the proof is sufficient to justify the submission of the case to the jury on the question of assumption of risk, there is no reversible error in so doing and in not instructing a verdict for defendant, and, as in this case, two courts below have concurred in finding that there was sufficient proof this court finds there was no error.

83 S. E. Rep. 633, affirmed.

THE facts, which involve the jurisdiction of this court of writs of error to review a judgment of the state court under § 237, Judicial Code, are stated in the opinion.

Mr. J. B. S. Lyles for plaintiff in error:

The right, privilege or immunity claimed by defendant below under the Federal Employers' Liability Act was specially set up or claimed by defendant within § 237 of the Code.

This court will review the findings of fact in the lower courts under the circumstances of this case.

The legal conclusions of the state court upon facts found were erroneous.

There is evidence that the intestate came to his death while employed in interstate commerce within the act.

There is evidence of negligence proximately resulting in the death of plaintiff's intestate.

In support of these contentions see *Baker* v. *Telegraph Co.*, 84 S. Car. 477; *Benson* v. *Lancashire Ry.*, 1 King's Bench, 242; *Buist Co.* v. *Lancaster Co.*, 68 S. Car. 526; *Crosby* v. *Railway*, 83 S. Car. 575; *S. C.*, 81 S. Car. 31;

Dent v. *Bryce*, 16 S. Car. 1; *Ellsworth* v. *Metheny*, 104 Fed. Rep. 119; *Grand Trunk Ry.* v. *Lindsay*, 233 U. S. 838; *Guess* v. *A. C. L. R. R.*, 88 S. Car. 87; *Illinois Cent. R. R.* v. *Behrens*, 233 U. S. 473; *Jones* v. *C. & W. C. Ry.*, 98 S. Car. 197; *McCord* v. *Blackwell*, 31 S. Car. 138; *Michigan Cent. Ry.* v. *Vreeland*, 227 U. S. 59; *Miedreich* v. *Lauenstein*, 232 U. S. 236; *Mondou* v. *Railway*, 223 U. S. 1; *Murphy* v. *Railroad*, 89 S. Car. 15; *Nor Car. Ry.* v. *Zachary*, 232 U. S. 248; *Patton* v. *Tex. & Pac. R. R.*, 179 U. S. 658; *Pedersen* v. *Railroad*, 229 U. S. 150; *Russell* v. *Shore Line R. R.*, 155 Fed. Rep. 22; *Re Scheffer*, 105 U. S. 449; *Seaboard Air Line* v. *Duvall*, 225 U. S. 477; *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492; *St. Louis S. W. Ry.* v. *Harvey*, 144 Fed. Rep. 806; *St. L., I. Mtn. & S. Ry.* v. *Hesterly*, 228 U. S. 702; *St. L., I. Mtn. & S. Ry.* v. *McWhirter*, 229 U. S. 265; *Stone* v. *Atl. Coast Line*, 96 S. Car. 228; *Thompson* v. *Lee*, 19 S. Car. 489; *Towles* v. *Railway*, 83 S. Car. 504; *Wyatt* v. *Cely*, 86 S. Car. 539, 544.

Mr. W. Boyd Evans, with whom *Mr. James H. Fanning*, *Mr. W. H. Sharpe* and *Mr. A. D. Martin* were on the brief, for defendant in error.

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

Is there jurisdiction to review the action of the court below in affirming the judgment of the trial court which was entered on the verdict of a jury, and if so, was error below committed, are the questions for decision (83 S. E. Rep. 633).

The suit was brought to recover damages alleged to have been suffered by the death of Lewis H. Padgett, a railroad engineer in the service of the defendant company, the plaintiff in error, caused by his having fallen during the

early morning hours into a drop pit in a locomotive roundhouse belonging to the company. The negligence charged was not only the failure to cover the pit but also to properly light the roundhouse. If our jurisdiction attaches, it can only be because the right to recover was based upon the Act of Congress commonly known as the Employers' Liability Act, it having been averred that the deceased was an employé of the company, actually engaged in interstate commerce. But as pointed out in *St. Louis & Iron Mountain Ry.* v. *McWhirter*, 229 U. S. 265, 275, although the cause of action relied upon was based upon the Federal statute, nevertheless, "as it comes here from a state court, our power to review is controlled by Rev. Stat., § 709 [§ 237, Judicial Code] and we may therefore not consider merely incidental questions not Federal in character, that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings was exclusively confined, or the converse, that is to say, the right of the defendant to be shielded from responsibility under that statute because when properly appiied no liability on his part from the statute would result. *Seaboard Air Line Ry.* v. *Duvall*, 225 U. S. 477; *St. Louis, I. M. & S. Ry.* v. *Taylor*, 210 U. S. 281." The existence of jurisdiction to review under the principles just stated depends not merely upon form but upon substance; that is, in this class of cases as in others the general rule controls that power to review cannot arise from the mere assertion of a formal right when such asserted right is so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous. There is no doubt that the assignments of error on their face embrace Federal questions which give jurisdiction to review. We therefore exercise jurisdiction and come to consider the questions on their merits, incidentally pointing out in doing so the reasons why the questions are not of such a frivolous character as not to afford a basis for the

authority to examine and dispose of them. The trial court gave to the jury every instruction concerning the meaning and application of the Act of Congress asked by the company and therefore there is no ground whatever for saying that the view of the statute relied upon by the company was not given to the jury. But despite this fact two of the nine assignments of error insist that the jury was misled concerning the doctrine of assumption of the risk applicable under the statute because of two statements as to the law on the subject made by the court to the jury over the exception of the defendant which are asserted to have been confusing because possibly conflicting with each other. But while the proposition has sufficient strength to exclude the conception that the contention is frivolous, we are nevertheless of opinion that the court below was right in holding that even upon the concession for argument's sake that the two charges referred to if they had stood alone might have tended to give to the jury a mistaken conception of the law of assumption of the risk, nevertheless there was no reason for saying that they could have produced such a result in view of the express instruction concerning the doctrine of assumption of the risk as applied to the case in hand which was given by the court to the jury in the very words asked by the company, and which was so explicit as to dispel the possibility of misconception. Whether the instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements but by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied. And as from both of these points of view we are of opinion that there is no room whatever for the conclusion that any confusion or misconception as to the doctrine of assumption of the risk could have arisen from the particular statements which are relied upon, the proposition based upon them is without merit.

While this disposes of the two assignments which are directly and specifically concerned with the interpretation of the statute, nevertheless the remaining seven also raise questions of law under the statute, since they all in one form or another rest upon the contention that error was committed by the trial court in not taking the case from the jury and instructing a verdict for the defendant upon the assumption that there was no evidence sufficient to justify the submission of the case to the jury for its consideration. *Cresswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611; *St. Louis & Iron Mountain Ry.* v. *McWhirter*, 229 U. S. 276, 277; *Miedrich* v. *Lauenstein*, 232 U. S. 236, 243, 244; *Carlson* v. *Curtiss*, 234 U. S. 103, 106. Considering the case from this point of view we think the contention cannot be said to be frivolous since its solution is by no means free from difficulty, a situation which was manifested by the division of opinion which arose on the subject in the court below and by the further fact that some members of this court now consider the proposition as affording adequate ground for reversal. But although the question is not free from complexity, a majority of the court is of opinion that the proof was sufficient to justify the submission of the case to the jury and therefore the proposition affords no basis for holding that reversible error was committed because that course was pursued. As the considerations by which this conclusion is sustained depend solely upon an analysis of the evidence, and as a statement upon the subject therefore would amount only to giving a summary of the proof in this case and its tendencies involving no matter of doctrinal importance, for this reason and additionally in view of the fact that both the courts below have concurred in holding that there was no sufficient ground to take the case from the jury, we think it is unnecessary to state the proof and its tendencies and we therefore content ourselves with saying

that the contention that error was committed in not taking the case from the jury is found, after an examination of the record, to be without merit.

In the argument a contention was urged based upon some expression made use of by the trial court in refusing the request to take the case from the jury. Although we have considered the proposition and find it totally devoid of merit, we do not stop to further state the contention or the reasons which control us concerning it as we think it is manifestly an afterthought, as it was virtually not raised in the trial court and was not included in the assignments of error made for the purpose of review by the court below nor in those made in this court on the suing out of the writ of error.

Affirmed.

WRIGHT, COMPTROLLER GENERAL OF GEORGIA, *v.* CENTRAL OF GEORGIA RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 161. Argued January 28, 29, 1915.—Decided March 22, 1915.

This court will not presume that a state legislature in granting a charter containing exemptions would either practice deceit or make a futile grant.

A lessee of railroads which were built under special charters containing irrepealable contracts by which the property was not subject to be taxed higher than a specified per cent on the annual income derived therefrom is not subject to an *ad valorem* tax as the owner of such property.

The statutes of Georgia in regard to the taxation of railroads involved in this action are construed as making the fee exempt from other taxation than that provided for in favor of the lessee as well as of the lessor.

While technical distinctions should be avoided as far as may be in matters of taxation in the interest of substantial justice, they should not be disregarded in order to enable a State to escape from a binding bargain; and so *held* in regard to distinctions between lessors and lessees where the protection of the latter is necessary in order to make good the promise of the State made to the former.

The courts cannot take the place of the taxing power nor can taxes based on ownership of the property be enforced against a lessee of the property under the statutes of Georgia and the leases involved in this case.

206 Fed. Rep. 107, affirmed.

THE facts are stated in the opinion.

Mr. John C. Hart and *Mr. Samuel H. Sibley* for appellant.

The contracts for exemptions are personal, are not vendible nor transferable, and are valid only so long as those companies as such conducted the business of common carriers. The state charter contracts limiting the tax rate is personal to these corporations to whom granted and did not run with the property, not having been transferred to the Central of Georgia Railway with the consent of the State at a time when the State could consent, and cannot be invoked by lessee, for its own benefit.

The person with whom the contract is made by the State may continue to enjoy benefits unmolested as long as he chooses, but there his rights end, and he cannot by any form of conveyance transmit the contract or its benefits to a successor. *Rochester Ry.* v. *Rochester*, 205 U. S. 247; *Morgan* v. *Louisiana*, 93 U. S. 217; *Wilson* v. *Gaines*, 103 U. S. 417; *Louis. & Nash. R. R.* v. *Palmes*, 109 U. S. 244; *Pickard* v. *Tennessee &c.*, 130 U. S. 637; *St. Louis &c. R. R.* v. *Gill*, 150 U. S. 649; *Nor. & West. Railroad Co.* v. *Pendleton*, 156 U. S. 667.

The Constitution of the State forbids exemption. Article 7, § 2, par. 1; *Rochester Ry.* v. *Rochester*, 205 U. S. 247; *Trask* v. *McGuire*, 18 Wall. 391; *Shields* v. *Ohio*, 95 U. S. 319; *Maine Central R. R.* v. *Maine*, 96 U. S. 49; *Railroad*

Co. v. *Georgia*, 98 U. S. 359; *Yazoo R. R.* v. *Adams*, 180 U. S. 1; *Grand Rapids &c. R. R.* v. *Osborn*, 193 U. S. 17; *San Antonio Traction Co.* v. *Altgelt*, 200 U. S. 304.

Whether the exemption claimed is total or a commuted tax rate it stands upon the same principle. *Great Northern Ry.* v. *Minnesota*, 216 U. S. 207.

A lessee in perpetuity is the owner of property for the purpose of taxation. Civ. Code Georgia, 1911, § 1018; *Penick* v. *Atkinson*, 139 Georgia, 649; *Wells* v. *Mayor*, 87 Georgia, 397; *Perry* v. *Norfolk*, 220 U. S. 479; *Cincinnati College* v. *Yeatman*, 30 Oh. St. 276; *Street* v. *Columbus*, 75 Mississippi, 822; *Washington Market Co.* v. *Dist. of Col.*, 4 Mackay, 416.

The lessee, now the appellee, contracted to pay the taxes in question.

Neglect to pay taxes in the past is no reason for future exemption. *Wells* v. *Savannah*, 181 U. S. 547.

Neither the action nor the inaction of the Tax Department could raise an exemption. Art. 4, § 1, par. 1.

Mr. A. R. Lawton and *Mr. T. M. Cunningham, Jr.*, for appellee.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity brought by the Railway Company, the appellee, to prevent the collection of certain taxes, which, it is alleged, would be contrary to Article I, § 10, and to the Fourteenth Amendment of the Constitution of the United States. The case was heard on bill, demurrer and answer and certain agreed facts, and the District Court issued an injunction as prayed. 206 Fed. Rep. 107. The facts stripped of details not material to the question before us, are as follows: In 1912 the defendant issued executions against the plaintiff to collect *ad valorem* taxes on the "real estate, road bed, and franchise value,

after crediting . . . one-half of one per cent. of the net income, . . . on that portion of its property known in its system" respectively as the Augusta and Savannah Railroad and the Southwestern Railroad. These roads were built under special charters admitted to constitute irrepealable contracts, by which the property was not subject to be taxed higher than one-half of one per cent. upon the annual income—so that it may be assumed that the present taxes could not be sustained if the roads still were in the separate hands of the corporations that built them.

But in 1862, the Augusta and Savannah Railroad and in 1869 the Southwestern Railroad made leases of their respective roads and franchises to the Central Railroad and Banking Company of Georgia during the continuance of the charters of the lessors. In 1892 the property of the lessee went into the hands of a receiver, and the lessors, being allowed an election by the court, elected to allow the property to remain in his hands, which it did until a sale of the same and purchase, under a reorganization plan, by the appellee, the Central of Georgia Railway Company. In 1895 by agreement between the latter and the two lessors the leases were modified so as to run for one hundred and one years from November 1 of that year, renewable in like periods upon the same terms forever. Notwithstanding these leases the State has been content down to this time to collect from the lessors the tax provided for in their charter, but now, conceiving the State and its officers to have been mistaken, the Comptroller seeks to tax the whole property to the lessee.

The executions are for taxes on property of the plaintiff and must show jurisdiction to issue them. *Harris* v. *Smith*, 133 Georgia, 373, 374; *Equitable Building & Loan Ass'n* v. *State*, 115 Georgia, 746. Here the jurisdiction depends upon these roads being in effect the plaintiff's property as matter of law. If they are not, the attempt is an attempt

to tax the plaintiff upon property that it does not own. To decide whether these taxes are such an unjustified exaction we must turn to the legislation of the State, bearing in mind that the practical construction given to the law for nearly half a century is strong evidence that the plaintiff's contention is right. *Wright* v. *Georgia R. R. & Banking Co.*, 216 U. S. 420, 426; *Temple Baptist Church* v. *Georgia Terminal Co.*, 128 Georgia, 669, 680.

The charter of the Augusta and Waynesboro' Rail Road, afterwards the Augusta and Savannah, approved December 31, 1838, alongside of the taxing provision in § 13 to which we have referred, provided as follows in § 16: "That said Company shall at all times have the exclusive use of the said Rail Road, for the transportation or conveyance of merchandise, goods, wares, and freight of every kind, and passengers, over the said Rail Road, so long as they see fit to use this exclusive privilege, and said company shall be authorized to charge the same rates for freight or passage as are allowed in the charter of the Georgia Rail Road and Banking Company: Provided always, that said company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation of freight, or conveyance of passengers, with the privilege, to any individual or individuals, or other company, and for such term as may be agreed upon"—it being added that the Company in the exercise of the right of transportation, or the persons or company "so renting from said company . . . shall, so far as they act on the same, be regarded as common carriers." (Laws of 1838, p. 174, at p. 179.)

It will be perceived that when this section was drawn it was supposed that different persons might be allowed to put their carriages upon the new form of road, as perhaps may be seen even more clearly in other early charters in Georgia and elsewhere. And the revenue that was to be derived from the exclusive privilege granted might be

obtained by doing the whole business, by letting in others to share a part of it, or by making a lease of the whole. Any one of the three courses is permitted, one deemed as likely as another, and also so far as appears, all standing alike in the mind of the legislature in respect of any legal effect upon the other grant of rights.

The foregoing view of § 16 would lead us to believe that no change in the matter of tax exemption was expected to follow from the demise of the road, any more than it would have followed from the admission of another carrier to partial rights, or of an individual to carry his own goods. But that is only an introduction to further considerations. We cannot suppose that the Legislature meant either to practice a cunning deception or to make a futile grant. Therefore, we are unable to read the charter as making the exemption vain by reserving to the State an unlimited right to impose upon the lessee all that it had renounced as against the lessor. For that was to give notice to the parties, if they were supposed to know the law, that the exemption would be lost if the income was earned in one of the contemplated ways—or, if they were supposed ignorant, was to invite them to a bargain that was to have an unexpected and disastrous result.

After the charter came a special act of January 22, 1852 (Laws of 1852, p. 119), which authorized the Central Railroad and Banking Company "to lease and work for such time and on such terms as may be agreed on by the parties interested," the two roads with which we are concerned, among others, and reciprocally giving power to the corporations owning those roads "so to lease to the Central Railroad and Banking Company of Georgia their respective Railroads for such term of time and on such other terms as they respectively may deem best." In the interval the Rail Road had become a Railroad—but we see no ground for believing that there has been any change in the attitude of the State toward the pioneer enterprises

that it was encouraging a few years before. We still cannot suppose that it was inviting the lessors to lose the benefit of their exemption or the lessees to find themselves entrapped with a burden made possible only by accepting the invitation of the act.

We are not suggesting that the contract in the charters of the lessors passed by assignment to the lessee, nor are we implying that the property was exempted generally, into whosesoever hands it might come. We are dealing only with the specific transaction permitted and encouraged by the Acts of 1838 and 1852, and saying that we cannot reconcile it with our construction of those acts to allow that transaction to change the position for the worse. We construe those statutes as making the fee exempt from other taxation than that provided for, in favor as well of the lessee as of the lessor—the protection of the lessee being necessary in order to make good that promised to the lessor.

The present instruments, made in pursuance of the foregoing powers in October, 1895, purport to 'demise, lease and to farm let' the property for the term of one hundred and one years, renewable as above stated. The lessee covenants to pay a fixed rent semi-annually and various expenses incident to taking over the occupation of the road and there is a clause of reëntry in case of failure for six months to make the semi-annual payment as agreed. Meantime, however, the Code of 1861 had introduced distinctions, hard to grasp for one trained only in the common law of real property, between the usufruct of a tenant and an estate for years; Code of 1910, §§ 3685, 3687, 3690, 3691; and it is argued that these leases created estates of such a nature that the lessee was practically in the position of owner subject to a rent charge, and was taxable for the land. We agree that technical distinctions are to be avoided as far as may be in matters of taxation, and we are not curious to insist upon the differences be-

tween a lease, having about eighty-five years to run, that may, not must, be renewed in perpetuity, and a fee subject to a rent charge. But the disregard of technical distinctions is in the interest of substantial justice, not for the purpose of enabling the State to escape from a binding bargain. If we are right in our interpretation of the statute from which the parties to the leases got their powers, this later legislation of Georgia is immaterial or should not be construed as embracing an attempt to escape from a contract by a subtlety that almost defies ingenuity to understand. See *Wright* v. *Georgia R. R. & Banking Co.*, 216 U. S. 420, 432.

The executions, as we have said, must stand or fall on the jurisdiction that they disclose. They attempt to tax the fee as the property of the plaintiff. The injunction runs only against taxing the plaintiff as owner. We discuss nothing but the question before us. For the reasons that we have given we are of opinion that the taxes cannot be collected on the present executions. The court cannot take the place of the taxing power. *Yost* v. *Dallas County*, *ante*, p. 50. It follows that the injunction must be sustained.

Decree affirmed.

MR. JUSTICE LAMAR took no part in this decision.

MR. JUSTICE HUGHES with whom MR. JUSTICE PITNEY concurs, dissenting.

It has repeatedly been declared by this court to be settled law that tax exemptions, or tax limitations, are personal to the grantee, that is, are non-transferable and do not run with the property unless the legislature has explicitly provided otherwise. It has been held not to be enough that the grantee is authorized to make a conveyance of all its property, estate, privileges and fran-

chises. *Morgan* v. *Louisiana*, 93 U. S. 217; *Wilson* v. *Gaines*, 103 U. S. 417; *Louisville & Nashville R. R.* v. *Palmes*, 109 U. S. 244; *Memphis &c. R. R.* v. *Railroad Commission*, 112 U. S. 609; *Chesapeake & Ohio Ry.* v. *Miller*, 114 U. S. 176; *Picard* v. *Tennessee &c. R. R.*, 130 U. S. 637; *St. Louis &c. Ry.* v. *Gill*, 156 U. S. 649; *Norfolk & Western R. R.* v. *Pendleton*, 156 U. S. 667; *Phœnix Fire Ins. Co.* v. *Tennessee*, 161 U. S. 174; *Rochester Railway* v. *Rochester*, 205 U. S. 236. As the court said in the last-mentioned case (p. 248) after fully reviewing the authorities: "A legislative authorization of the transfer of 'the property and franchises,' . . . of 'the property,' . . . of 'the charter and works,' . . . or of 'the rights of franchise and property,' . . . is not sufficient to include an exemption from the taxing or other power of the State, and it cannot be contended that the word 'estate' has any larger meaning." And it was further held (p. 252) that it must be regarded as the established rule "that a statute authorizing or directing the grant or transfer of the 'privileges' of a corporation, which enjoys immunity from taxation or regulation, should not be interpreted as including that immunity." See also *Wright* v. *Georgia R. R. & Banking Co.*, 216 U. S. 420, 437. The controlling principle of these decisions is that, in view of the supreme importance of the taxing power of the State, every doubt must be resolved in favor of its continuance. "This salutary rule of interpretation is founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirement of the grants, construed *strictissimi juris*." *Memphis &c. R. R.* v. *Railroad Commission*, *supra* (p. 617). "If the legislature can lay aside a power devolved upon it for the good of the whole people of the State, for the benefit of a private party, it must speak in such unmistakable terms that they will not admit of any

reasonable construction consistent with the reservation of the power." *Picard* v. *Tennessee &c. R. R.*, *supra*, (p. 641).

I do not find a word in the statutes of Georgia which confers any immunity from the taxing power upon this appellee. The question relates to *its* interest, not to that of the original companies. What that interest or property may be, and how it is to be assessed, is another question. The first inquiry is whether the appellee has any immunity under the contract clause and that, I submit, is answered, when it is found that it has no contract of its own and no stipulation for a transfer to it of the immunity of others.

The principle which precludes the implication of such a transfer applies equally to leases—even leases for ordinary periods. A lessee is in no better position to claim tax exemptions, or limitations, than a mortgagee, or a purchaser at a foreclosure sale, who under legal authority takes all the property, franchises, and privileges, of the mortgagor. The question as to a leasehold interest was presented in *Jetton* v. *University of the South*, 208 U. S. 489. There, the State had granted an exemption to the University of one thousand acres of land. The University gave leases of lots within this tract and thus a village community was developed. An effort was made by the State to tax the property against the University upon the ground that the leases took it out of the exemption. But the state court held otherwise; the property could not be taxed against the University. *University of the South* v. *Skidmore*, 87 Tennessee, 155. Thereupon the State, under new legislation authorizing the taxing of leasehold interest, assessed the lessees, and the University with the lessees brought suit in the Federal court to enjoin the collection of the taxes upon the ground of impairment of contract. The Circuit Court entered a decree in favor of the University and enjoined the assessment. On the appeal to this court, it was urged in support of the decree that,

in taxing the leased property, the tax was placed upon the only use to which the property could be put in order that it might be made of benefit to the University. Indeed, it was said that the assessment under the legislative act destroyed the value of the exemption; that is, that it was necessary to protect the lessee in order to save the contract right. But this court overruled these contentions. It was thought to be 'plain that an exemption granted to the owner of the land in fee does not extend to an exemption from taxation of an interest in the same land, granted by the owner of the fee to another person as a lessee for a term of years.' The immunity of the one gave no immunity to the other, and the contract of exemption did not imply 'in the most remote degree' that the State would not thereafter 'so change its mode of assessment as to reach the interest of a lessee directly.' The State taxed what it had a right to tax, the lessee's interest, even though it could not tax the University. The exemption, said the court, 'lasts only so long as the university owns the lands, and when it conveys a certain interest in them to a third person it no longer owns that interest, which at once becomes subject to the right of the State to tax it.' In the present case, it may be assumed that, what the appellee has, it has acquired lawfully, but it cannot claim to be immune from taxation or plead the contract of another.

I emphasize this, for it seems to me that its full recognition is important to a proper determination of the case, and that what is denied to the appellee under the contract clause should not be asserted and permitted to have a dominating effect under another name. Nor would there be any basis for an imputation of unfair dealing or sharp practice, in case a State undertakes to tax the property of a company which itself has no immunity from taxation, simply because its grantor had an immunity which it was not able to transfer. The appellee says in

its argument that it 'is not claiming any tax exemptions,' and, as in fact it appears to have none, we should deal with the case upon this footing.

What then is the relation of the appellee to the property in question? Its predecessor, the Central Railroad & Banking Company of Georgia, had leased the railroad properties of the Augusta & Savannah and Southwestern companies, respectively, in perpetuity, or during the entire existence of the lessor companies. The property of the Central Railroad & Banking Company of Georgia was sold under foreclosure in 1895, and the appellee was organized as a successor corporation and leases to it of the railroad properties in question were executed by both the original companies 'for the full term of one hundred and one years, and renewable in like periods upon the same terms forever.' The rental in each case was the fixed sum of five per cent. on the amount of the capital stock then outstanding, that is to say, the sum of $51,145 in the case of the Augusta & Savannah Company and $259,555 in the case of the Southwestern Company. In short, under what is termed a lease the appellee took the entire property to hold, if it pleased, in perpetuity, subject to an annual charge of the amounts specified.

Dealing with the substance of things, as we must when the Constitution of the United States is involved—and not with mere forms or names—I am unable to see how an *ad valorem* tax against the appellee upon the property which it thus holds is a violation of due process of law under the Fourteenth Amendment. Under a system which tolerates such incongruities as the taxing of the entire value of the land to the owner of the equity of redemption, while the interest of the mortgagee is separately taxed, it would seem to be difficult to find ground for a constitutional objection to the treatment of the holder of a perpetual lease as virtual owner. See *J. W. Perry Co.* v. *Norfolk*, 220 U. S. 472, 478. In the language of Mr. Chief

Justice Bleckley in *Wells* v. *Savannah*, 87 Georgia, 397, 399 (see 181 U. S. 531, 544, 545): "The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true owner of the property for the time being. This holds equally of a city lot or of all the land in the world. Where taxation is *ad valorem*, values are the ultimate objects of taxation, and they to whom the values belong should pay the taxes. Land sold or by a contract of bargain and sale demised forever subject to a perpetual rent, is taxable as corporeal property; and in private hands the rent also is taxable as an incorporeal hereditament. The tax on the former is chargeable to the purchaser or perpetual tenant, and on the latter to the owner of the rent." It can hardly be said that it makes a constitutional difference that a so-called lessee, who may enjoy forever if it chooses, has also the privilege of giving up the property at the renewal dates. Nor do I understand it to be important, under the Federal Constitution, how the interest of the appellee—which in substance is ownership—is technically described. Surely, the Fourteenth Amendment is not concerned with mere technicalities of tenure; these, the State is free to abolish. And it should be added that we do not have here any question of double taxation, as the State has credited to the appellee against the tax demanded the one-half of one per cent., upon the net income, which was payable by the original companies and the payment of which the appellee had assumed.

In considering the constitutional capacity of the State, we are dealing of course with the question as to what it may do by the exercise of all the power it possesses, and not merely with the interpretation of its existing statutes. *Castillo* v. *McConnico*, 168 U. S. 674, 683. I recognize fully the difficulties in this case, so far as it has to do with the interpretation and application of the Georgia tax laws. And if it were the decision of the court as a mere matter of

construction of the local law—in the absence of a controlling local decision—that the statutes of Georgia did not justify the assessment actually made, I should withhold this expression of dissent; for that would leave the matter, as I conceive it should be left, within the control of the courts and legislature of the State, so far as the mere imposition of an *ad valorem* tax upon the property held and enjoyed by the appellee is concerned.

But I am unable to concur in the view that the tax here sought to be collected violates the Constitution of the United States.

I am authorized to say that MR. JUSTICE PITNEY concurs in this dissent.

MR. JUSTICE MCREYNOLDS also dissents.

WRIGHT, COMPTROLLER GENERAL OF GEORGIA, *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

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

No. 162. Argued January 29, 1915.—Decided March 22, 1915.

Wright v. *Central Ry. of Georgia*, *ante*, p. 674, followed to effect that under the statutes of Georgia and the leases involved in this action executions for *ad valorem* taxes on railroads, the owners whereof were exempted by statute from a greater tax than a specified per cent on the income, could not be enforced against those in possession of the railroads as lessees.

The fact that owners of a railroad, who are exempted by statute from paying a greater tax than a specified per cent on the income thereof, lease the entire road to another company does not open the right of the State to tax such lessees on the fee of the property.

In this case the exemption of the lessor from taxation on its road which it has leased applies to betterments and improvements made by the lessee such as the lessor would have made to meet enlarging business and so also as to rolling stock substituted for that of the lessor and which under the lease belongs to the lessor.

Railroad property jointly used with exempted property but not part of the road originally exempted may be subject to assessment but not in one assessment covering both the classes of property.

201 Fed. Rep. 1023, modified and affirmed.

THE facts are stated in the opinion.

Mr. Samuel H. Sibley, with whom *Mr. John C. Hart* was on the brief, for petitioner. (For abstract of argument see *ante*, p. 675.)

Mr. Alex C. King, with whom *Mr. Jos. B. Currey*, *Mr. Bryan Currey*, *Mr. R. C. Alston* and *Mr. Philip H. Alston* were on the brief, for respondents and cross petitioners.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by the railroad companies, respondents, to prevent the collection of a tax upon the Georgia Railroad, operated by them under a lease and assessed to them as their property. The District Court made a decree for the plaintiff with certain exceptions, which was affirmed on appeal and cross appeal by the Circuit Court of Appeals for the reasons given by the District Court. 199 Fed. Rep. 454. 201 Fed. Rep. 1023.

The main question is similar to that disposed of in *Wright* v. *Central of Georgia Railway Company*, just decided, *ante*, p. 674.

By its charter granted on December 21, 1833 (Laws of 1833, p. 256) the stock of the Company and its branches is subject only to a 'tax not exceeding one-half one per cent. per annum on the net proceeds of their investments.' § 15. This language is interpreted and held to constitute

a binding contract in *Wright* v. *Georgia Railroad and Banking Co.*, 216 U. S. 420. So it is admitted that the present tax could not be levied on the lessor. By § 12 of the same charter the Company is authorized to "rent or farm out all or any part of their exclusive right of transportation or conveyance of persons, on the rail-road or railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon." So the State has convenanted that the Company's property shall be exempt from tax except upon its income which it is authorized to make in any of three ways. And as bearing on the different uses of the Company's franchise that were deemed possible in that day, as we remarked in the other case, we may add that by § 13, if any persons intrude upon the railroad by any manner of use thereof they shall forfeit to the Company all the vehicles and animals that may be so intrusively introduced and used; that by § 14 the Company, if it sees fit to farm out any part of its exclusive right, may prescribe the value and size of vehicles to be used or pass on its road, and the locomotive power; and that by § 22, the Company, if it prefers, instead of railroads may construct common roads and use steam carriages thereon.

The plaintiffs are operating the roads in question under a lease made to one Wadley to whose rights they have succeeded. *Georgia Railroad & Banking Co.* v. *Maddox*, 116 Georgia, 64. This instrument purported, in the language quoted above from § 12 of the charter, to 'rent and farm out' the privileges and roads of the lessor for a term of ninety-nine years from April 1, 1881. For the reasons given in the other case we cannot believe that if the company saw fit to gain 'the net proceeds of their investments,' (to one-half of one per cent. of which their tax was limited), by letting the whole road instead of allowing others to introduce carriages, the statute silently opened the right to resume as against the lessee all that

had been renounced as against the lessor. If the fee of the roads is taxable to no one while the liability of the lessor to the above mentioned one-half of one per cent. remains, an attempt to collect a tax upon the fee from the plaintiffs is an attempt on the part of the State to tax the leased property which was completely beyond the reach of its taxing power except in so far as permitted by the contract, the obligations of which could not be impaired without a violation of the contract clause of the Constitution of the United States. Thus the particular features of the case in hand take it without the rule applied in *Rochester Railway* v. *Rochester*, 205 U. S. 236, and other kindred cases, from which we have no purpose to depart.

Some subordinate questions remain. Betterments and improvements of the demised road such as the lessor naturally would have made to meet the necessities of an enlarging business stand on the same footing as the original road and are exempt. *Wright* v. *Georgia R. R. & Banking Co.*, 216 U. S. 420, 427–432. *Gardner* v. *Georgia R. R. & Banking Co.*, 117 Georgia, 522, 532. The rolling stock substituted for or added to that turned over to the lessees became the property of the lessor as soon as acquired and also is exempt like that of which it took the place. The lessee covenants to return the property in as good condition as it was then in, and the lease provides that 'the property substituted for and added to that which is hereby rented and farmed out, shall be the property of' the lessor. 'Shall be' obviously means shall be when so substituted. It is not confined to such substituted property as may be on hand at the end of the lease. The lessor is to be kept continuously the owner of an equipped road. The Railroads not being domiciled in Georgia are not taxable there for stock and bonds of other companies merely appearing to be owned by them. Some necessary and proper improvements were made by the lessor before the lease and paid for by the proceeds of

bonds issued by it. We do not perceive why they should be put on a different footing from the others. And we are not prepared to say that terminals, &c., added to the demised property belonging to the lessor, although brought with $225,000 of money belonging to the lessees, were not reasonable betterments and exempt.

The Atlanta terminals require separate treatment. Besides so much of them as was embraced in the lease, there seems to be other land belonging to the West Point Company, and other land again of the Louisville and Nashville Railroad. By an agreement between the plaintiffs and the West Point Company this property is converted into and used as a joint terminal. The assessment complained of deals with this as a separate entity and item, and in the decree is excepted from the injunction. It appears to us that so much of the property as is part of the exempted line still is exempt. It is used for the purposes of the line, although the relations have become more complex. The rest may be subject to taxation, but not in this assessment. The decree will be modified in this respect, but otherwise is affirmed.

Decree modified and affirmed.

MR. JUSTICE LAMAR took no part in the decision.

Dissenting: MR. JUSTICE HUGHES, MR. JUSTICE PITNEY, MR. JUSTICE MCREYNOLDS.

NEWMAN ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA, *v.* LYNCHBURG INVESTMENT CORPORATION.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 163. Argued March 3, 1915.—Decided March 22, 1915.

The fact that a statute requiring notice has been construed in a number of cases in the jurisdiction as meaning the method used in the case is an important element to be considered by the courts in construing it.

The notice required by § 491 c of subd. 1 of Ch. 15 of the Code of the District of Columbia requiring public notice of not less than twenty days to be given of the institution of a condemnation proceeding construed as meaning that notice shall be given twenty days before the time set and not that it shall be given on twenty distinct days before that time.

This court assumes that a special act directing condemnation proceedings adjudicates the benefits as a whole and leaves open all questions as to any particular lots. It is error for the trial court not to instruct that the burden is on the District to establish by preponderance of evidence the extent of special benefits accruing to a particular parcel.

The jury in a condemnation proceeding should be instructed as to their duty in regard to considering dedications of land taken.

Assessments for benefits cannot be separated, and error in charging in that respect cannot be corrected, by reversal of the judgment in part.

Although the intermediate appellate court may have erred in basing its reversal of the lower court on the matter of most general importance in a case in this court on certiorari if its judgment was correct on other points it should be affirmed.

40 App. D. C. 130, affirmed.

THE facts are stated in the opinion.

Mr. Conrad H. Syme and *Mr. James Francis Smith* for petitioners:

The notice as published satisfied the requirements of the law.

In regard to dedications no instructions were requested nor exception taken. Therefore the judgment should not be reviewed. *Met. R. R. Co.* v. *District of Columbia,* 195 U. S. 332.

The reasonableness of the verdict is a question for trial judge and is not reviewable. *Col. Heights Realty Co.* v. *McFarland,* 217 U. S. 547, 560.

No injustice is shown.

The burden of proof is not upon the petitioners. *Bauman* v. *Ross,* 167 U. S. 548; *Wight* v. *Davidson,* 181 U. S. 371; *Henderson* v. *Macfarland,* 33 Apps. D. C. 317; *Baltimore* v. *Smith,* 80 Maryland, 458.

The vacation of verdict *in toto,* notwithstanding two parties only excepting, was error. *Briscoe* v. *MacFarland,* 32 App. D. C. 167; § 491h of D. C. Code.

In support of these contentions see also *Aldis* v. *South Park,* 171 Illinois, 424; *Allen* v. *Kerr,* 13 Lea (Tenn.), 256; *Andrews* v. *Ohio & Miss. Ry.,* 14 Indiana, 169; *Armstrong* v. *Scott,* 3 Greene (Iowa), 433; *In re Bassford,* 50 N. Y. 510; *Boswell* v. *Otis,* 9 How. 336, 350; *Bouldin's Case,* 23 Maryland, 328; *Central Savings Bank* v. *Baltimore,* 71 Maryland, 515; *Dologny* v. *Smith,* 3 Louisiana, 418, 423; *District of Columbia* v. *Cemetery,* 5 App. D. C. 497; *Drainage District* v. *Campbell,* 154 Missouri, 151; *German Bank* v. *Stumpf,* 73 Missouri, 311, 314; *Harrison* v. *Newman,* 71 Kansas, 325; *Jenkins* v. *Pierce,* 98 Illinois, 646; *Johnson* v. *Dorsey,* 7 Gill, 269, 286; *Land Co.* v. *Loan Co.,* 52 Nebraska, 410; *Leffler* v. *Armstrong,* 4 Iowa, 487; Lewis on Eminent Domain, 579; *Baltimore* v. *Little Sisters,* 56 Maryland, 400; *McGilvery* v. *Lewiston,* 13 Idaho, 338; *Muskingum Turnpike* v. *Ward,* 13 Ohio, 120; Paige & Jones on Taxation, 763; *P., W. & B. R. R.* v. *Shipley,* 71 Maryland, 515; *Royal Ins. Co.* v. *South Park,* 175 Illinois, 491; *Stine* v. *Wilkson,* 10 Missouri, 75; *Washington* v.

Bassett, 15 R. I. 563; *Weld* v. *Rees*, 48 Illinois, 428; *White* v. *Malcolm*, 15 Maryland, 529.

Mr. Joseph W. Cox and *Mr. W. C. Sullivan*, with whom *Mr. J. J. Darlington*, *Mr. A. E. L. Leckie* and *Mr. John A. Kratz* were on the brief, for respondents:

Failure to consider dedications in making assessments of benefits as directed by statute requires the verdict of the jury to be set aside.

Injustice will result to the respondents if verdict is allowed to stand.

The provision of the Code which was disregarded in the making of assessments is mandatory, and such disregard necessitates the setting aside of the verdict.

Even if the provision were not mandatory, the plain error involved in disregarding it requires that the verdict be set aside.

The notice as published was not sufficient to authorize the making of assessments.

The burden of proof was upon the District to show the extent of benefits.

Numerous authorities sustain these contentions.

Mr. Justice Holmes delivered the opinion of the court.

This was a proceeding by the petitioners for the extension and widening of Colorado Avenue and Kennedy Street in the District of Columbia, under a special act of June 30, 1911, c. 1, 37 Stat. 1. A jury was summoned, assessed the damages for the land to be condemned for the purpose, found that the lots described in a schedule would be benefited to the amounts set forth, and assessed those sums against them. The verdict was objected to and excepted to by the respondents, but was confirmed by the Supreme Court. On appeal the judgment was reversed by the Court of Appeals of the District. 40 App. D. C. 130.

The first ground of reversal was that the notice of the proceedings was insufficient, which, if true, will cast a cloud upon a great number of condemnations that have been made heretofore. The condemnation is a proceeding *in rem* under and in accordance with subchapter one, of chapter 15, of the District Code. By § 491c of that subchapter the court is to "cause public notice of not less than twenty days to be given of the institution of such proceeding, by advertisement in three daily newspapers published in the District of Columbia," etc. The order in this case directs publication "once in the Washington Law Reporter and on six secular days in the Washington Evening Star, the Washington Herald, and the Washington Post, . . . commencing at least twenty days before" January 9, 1912, the date fixed for appearance. The objection and the decision of the Court of Appeals was that the order did not follow the statute because the statute requires that notice shall be published in three daily papers for at least twenty days.

The respondents are concerned only as parties assessed for the betterment. As such they could not be mentioned by name in the notice since by the statute the jury decides what land is benefited as well as the sum with which it shall be charged. Section 491g. It is necessary, of course, that due precautions should be taken to see that they get notice in fact. This consideration together with the requirement that the publication shall be in a daily paper and its view of the meaning of the words led the Court of Appeals to the conclusion to which it came. Nevertheless we are of a different opinion. The statute means that notice shall be given either not less than twenty days before the time set or on twenty distinct days before that time. We think it means the former. As to the usage of speech, when we speak of giving a week's or a month's notice we mean a notice that is a week or a month before the event. The fact that the statute has been so construed

in a great number of cases in the District, a list of which has been submitted to us, is important not only as confirmation of our view but as a reason for taking it if we felt more doubt than we do. It seems to be the prevailing rule in the state courts although there are decisions on the other side. Publication in daily papers is explained sufficiently by their being the papers that business men are most likely to read. It was said that construed as we construe it the statute would be satisfied if a single publication were made a year before the day. The answer is that the court fixes the notice and will see that no injustice is done. It should be observed further that the statute itself is notice of everything except the time and place of the proceeding. It locates exactly upon the face of the earth the extensions to be made and gives their length and width. We are of opinion that the order of publication complied with the law.

The other questions brought before us by the certiorari are of no general importance and may be disposed of in a few words. They concern the conduct of the trial, matters that in the absence of very clear error we leave to the local courts. It was held to be error not to instruct the jury that the burden was upon the District to establish by a preponderance of evidence the extent of the special benefits accruing to the property to be charged. We may assume that the special act has adjudicated the extent of the benefits as a whole, *Briscoe* v. *District of Columbia*, 221 U. S. 547, 551, but it leaves open all questions as to any particular lot. Those elements of the petitioners' case remained for them to prove.

A matter more insisted upon by the Court of Appeals is that the jury were not instructed to take into consideration the dedication of land for the improvement and the value of the land so dedicated, as the Code requires that they should be. Section 491g. The court was satisfied from an examination of the record that the jury did not

consider valuable dedications made by the respondents. The argument is very strong that the court was right on the matter of fact, and as the jury were not instructed as to their duty we accept the conclusion of the Court of Appeals. We also agree with that court that the assessments for benefits cannot be separated and therefore that the error cannot be corrected by a reversal of the judgment in part. The result is that although the Court of Appeals erred upon the matter of most general importance its judgment reversing that of the Supreme Court must be affirmed.

Judgment affirmed.

DAVIS *v.* COMMONWEALTH OF VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 184. Argued March 9, 1915.—Decided March 22, 1915.

The business of taking in one State orders for portraits made in another State is interstate commerce, and if the original order contemplates an option on the part of the purchaser to have a frame also sent from the other State, the business is one affair and exempt from imposition of license fee by the State in which the sale is made.

THE facts are stated in the opinion.

Mr. John Winston Read and *Mr. Thomas J. Christian* for plaintiff in error.

Mr. Christopher B. Garnett, with whom *Mr. John Garland Pollard,* Attorney General of the State of Virginia, was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was convicted of peddling without a license. His defence was that if applied to his dealings the Virginia law would interfere with commerce among the States, contrary to Article I, § 8 of the Constitution. The facts are as follows. The Empire Art Institute of New York sent soliciting agents to Virginia who took orders on a blank furnished by the Company. These blanks stated that the Company would place a limited number of a 'new Aquarell Portrait' 'at cost of material, India Ink $1.98 and Water Color $3.96,' and the one exhibited went on: "On or about Apr. 10, 1911, we agree to deliver to the holder of this contract a fully finished Ink Portrait ———x——— as shown by our salesman. Mrs. T. P. Morrisette agrees to pay $1.98 for the portrait when delivered. We do not compel you to take frames from us but owing to the delicate nature of the work all portraits are delivered in appropriate frames which this ticket entitles you to select at wholesale prices." On receipt of such order the Company shipped the portrait when prepared and, in a separate parcel, frames suitable for them to an agent, in this case the plaintiff in error. The latter put the pictures into appropriate frames and then delivered the portraits, offering the customer a choice of three different styles of frames, the customer taking one or not at his will.

The court below thought that the purchase of the frames was to be regarded as a separate transaction occurring wholly in Virginia. Whether or not this was its technical aspect as an executed contract, it often has been pointed out that commerce among the States is a practical not a technical conception. The preliminary contract bound the Company to furnish a chance to take a frame with the portrait. Obviously it was contemplated that the frames would be sent from New York as well as the pictures, as

in practice they were, and although the bargain was not complete until the Company's offer was accepted in Virginia, the furnishing of the opportunity was a part of the interstate transaction. From the point of view of commerce the business was one affair. *Dozier* v. *Alabama*, 218 U. S. 124. *Crenshaw* v. *Arkansas*, 227 U. S. 389. *Browning* v. *Waycross*, 233 U. S. 16, 21.

Judgment reversed.

DALTON ADDING MACHINE COMPANY *v.* THE STATE CORPORATION COMMISSION OF THE COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 190. Submitted March 8, 1915.—Decided March 22, 1915.

The rule that courts should not stop state officers charged with enforcing laws from performing their statutory duty for fear they should perform it wrongly applies especially in cases of taxes and license fees.

One carrying on business which he claims is interstate, and on which the State imposes a license tax, has an adequate remedy at law by paying the tax under protest and raising the constitutional question in a suit to recover it; and where, as in this case, no special hardship is shown, the general rule that equity will not enjoin the collection of taxes where there is an adequate remedy at law applies.

213 Fed. Rep. 889, affirmed.

THE facts are stated in the opinion.

Mr. Thomas A. Banning and *Mr. Samuel Walker Banning* for appellant.

Mr. John Garland Pollard, Attorney General of the State of Virginia, and *Mr. Christopher B. Garnett* for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from an order of three Judges denying a preliminary injunction as prayed in the appellant's bill. The bill alleges that the appellant is a Missouri corporation, having its factory in Missouri, that it obtains orders for its machines in Virginia through drummers, considers and accepts or rejects them in Missouri, and, if it accepts, forwards the machine from its factory. In some cases the possible customer is allowed to try a machine previously forwarded and in the hands of the Virginia agent, and if he is accepted as a purchaser and desires to keep it, is permitted to do so. The appellant contends that its business in Virginia is wholly interstate. A statute of Virginia requires foreign corporations doing business there to obtain a license from the State Corporation Commission, to pay a fee, &c., and it is alleged that the Commission threatens to take proceedings to enforce the statute and the penalties provided for disobeying it against the appellant, contrary to Article I, § 8, of the Constitution. The appellant further alleges that it has reason to fear and fears a multiplicity of proceedings and the imposition of many fines and that it will suffer irreparable loss from even a temporary interference with its affairs, through loss of sales and prestige, help to its competitors and encouragement of similar proceedings in other States. 213 Fed. Rep. 889.

The court below remarked that it was not contended that the statute was unconstitutional but was alleged only that it was feared that it might be enforced in such a way as to contravene the Commerce Clause and suggested that if proceedings should be instituted by the Commission there would be a hearing before it, with a right to appeal to the Supreme Court of Appeals, and, upon a proper showing, to take the case to this court, and that there was nothing to indicate that the Commis-

sion would not give the appellant a fair hearing or would attempt to enforce the law against it in an oppressive way. On this ground, without expressing an opinion as to the liability of the appellant under the statute, it held that no case for an injunction was made out.

We agree with the District Court in its conclusion and in its grounds. Like it we leave on one side the merits of the appellant's claim of immunity and confine ourselves to deciding that no reason is shown for anticipating the ordinary course of the law. We also leave aside the question whether the action of the Commission is or is not the action of a court protected from interference on the part of the courts of the United States. Rev. Stat., § 720. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226, 230. The general principle is that it is not for the courts to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly. *First Nat. Bank of Albuquerque* v. *Albright*, 208 U. S. 548, 553. Especially is this true in the matter of collecting taxes and license fees. *Boise Artesian Hot & Cold Water Co.* v. *Boise City*, 213 U. S. 276. The appellant has an adequate remedy at law in its right to raise the constitutional question if proceedings are taken against it, or, it seems, to recover the money if it pays under protest. No special circumstances are shown, that we can notice, to take this case out of the ordinary rule. *Indiana Mfg. Co.* v. *Koehne*, 188 U. S. 681, 690.

Decree affirmed.

GREAT NORTHERN RAILWAY COMPANY *v.* HOWER.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 88. Submitted November 11, 1914.—Decided March 22, 1915.

Bona fide purchase is an affirmative defense which the grantee must set up in order to defeat the claim of one seeking to have a trust declared in lands patented, if the bill is otherwise sufficient.

Rev. Stat., § 2291, is specific in its requirements that in order to obtain a patent for a homestead, the applicant must have actually resided upon or cultivated the same for a term of five years.

While the law deals tenderly with one going in good faith on the public lands, with a view of making a home thereon, the right is a statutory one, and, in such a case as this, it is essential to show compliance with the statute as a prerequisite to obtaining a patent.

Although acting in good faith, settlement upon land other than that included in the entry is not sufficient; and in this case so *held* as to an entry for one quarter-section where the entryman, through mistake, built his home on another quarter-section and at a point about one-quarter of a mile from the land entered, notwithstanding he did make a trail and build a stable on the land entered.

69 Washington, 380, reversed.

THE facts, which involve the construction of Rev. Stat., § 2291, and the necessity of the homesteader making improvements on the land entered, are stated in the opinion.

Mr. E. C. Lindley, Mr. Thomas R. Benton, Mr. F. V. Brown and *Mr. F. G. Dorety* for plaintiff in error.

Mr. Eugene G. Kremer and *Mr. J. A. Coleman* for defendants in error:

In *Moore* v. *Robbins*, 96 U. S. 530, 535; *Baldwin* v. *Stark*, 107 U. S. 463; *Bohall* v. *Dilla*, 114 U. S. 47; *Lee* v. *Johnson*, 116 U. S. 48; *Gonzales* v. *French*, 164 U. S. 342, relied on by plaintiff in error, the patent of the United States was supported against an attempt to set it aside,

and in none of these cases had the right of a *bona fide* purchaser intervened.

In this case, the rights of *bona fide* purchasers have intervened. Defendants in error are *bona fide* purchasers for value and without notice, and their rights will be protected by this court. *United States* v. *Burlington*, 98 U. S. 334; *Colorado Coal Co.* v. *United States*, 123 U. S. 307; *United States* v. *Cal. & Ore. Land Co.*, 148 U. S. 31.

There is no disputed question of fact to be considered by the court. All matters involved have been the subject of investigation by the Department. The only claim insisted upon is that there was a mistake of law by the Department. Carter could not, as matter of fact, in any new suit dispute or controvert the facts found in this suit, though as matter of law he might have the right to do so.

In the absence of fraud or mistake, the decisions of the Land Department upon questions of fact in all matters properly before it, must be regarded as conclusive, and where a patent has issued and transfers have been made to others, the rights so acquired can be overturned only upon the clearest evidence, but where the doubt rests upon a mixed question of law and of fact, and when the court cannot so separate them as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive. *Marquez* v. *Frisbie*, 101 U. S. 800; *Shepley* v. *Cowan*, 91 U. S. 331; *Lee* v. *Johnson*, 116 U. S. 49.

The prevailing and long continued construction of the act by the Land Department is entitled to great weight in determining the questions raised. *Hewitt* v. *Schultz*, 180 U. S. 139; *Moore* v. *Cormove*, 180 U. S. 167.

Mr. Justice Day delivered the opinion of the court.

The Great Northern Railway Company filed its amended complaint against James A. Hower, individually and as

Trustee, Anna H. Hower, his wife, Nonpareil Consolidated Copper Company, Nicholas H. Rudebeck, and James McCreery Realty Company, in the Superior Court of the State of Washington, in and for the county of Snohomish, seeking to establish title to the northeast quarter of Section 2, Township 27 north, Range 10 east, Willamette Meridian, in said county and State. Defendants appeared and demurred upon the ground, among others, that the amended complaint did not state facts sufficient to constitute a cause of action. The Superior Court sustained the demurrer, and upon appeal to the Supreme Court of the State of Washington, judgment on the demurrer dismissing the suit was affirmed (69 Washington, 380), and the case was brought here.

Various paragraphs of the bill allege the selection of the lands in controversy by the complainant's grantor, the St. Paul, Minneapolis & Manitoba Railway Company, under the provisions of the act of Congress of August 5, 1892 (c. 382, 27 Stat. 390), which selection was made on March 24, 1894. Other paragraphs of the bill allege the filing of an application by one Melvin J. Carter on April 18, 1899, in the District Land Office to enter the northeast quarter of Section 2, Township 27 north, Range 10 east, under the homestead laws of the United States, Carter claiming that he had settled on the land December 1, 1893. The complaint recites the controversy between the Railway Company and Carter before the district land officers, and the taking of testimony, which, it is alleged, showed that Carter on September 19, 1893, purchased the improvements of a former settler upon a tract of unsurveyed land on the left bank of the north fork of the Skykomish River a short distance below the mouth of a tributary of said river known as Trout Creek; that he thereupon established a residence in the cabin of the former settler, and commenced the construction of a new dwelling house which he finished in the spring of 1894; that he moved his

family into this dwelling house and had continued to reside therein and on said land with his family to the time of said hearing; that his improvements consisted of the dwelling house and a small clearing in which he set out trees and shrubbery and raised vegetables from year to year. It is alleged that the evidence taken at the hearing further showed that Carter's improvements were all situated on the left bank of the north fork of the Skykomish River, about two or three hundred feet from said river and about one-half mile below the mouth of said Trout Creek, and not upon the land applied for by Carter under the homestead law; that on the evidence alleged, the register and receiver, on August 28, 1903, held and decided that Carter had duly settled upon the land claimed by him during the month of September, 1893, and had continued to reside upon, improve and cultivate said land to the time of said hearing on June 1, 1903, and that he should be allowed to enter the land applied for under the homestead law and that the railway company's selection thereof should be cancelled.

It was further charged that upon appeal to the Commissioner of the General Land Office, the Railway Company alleged among other things that the evidence showed that the dwelling house and other improvements of Carter were not on the land selected by said railway company and applied for by Carter, but were and at all times had been situated more than three-eighths of a mile from said land; that the Commissioner of the General Land Office, on March 23, 1904, held and decided that said Carter had settled upon the land upon which his improvements were made in the fall of 1893, and that he had commenced his residence thereon with his family in the spring of 1894 and had continued to reside upon and improve same. The Commissioner further held that the evidence taken tended to show that Carter's improvements were all situated on the Northwest Quarter of

Section 2, Township 27 north, Range 10 east, and not on the Northeast Quarter of said Section 2, and ordered a further hearing.

It was alleged that on the further hearing before the register and receiver of the Seattle Land Office on December 16, 1904, the evidence conclusively showed that the improvements, including the dwelling house and residence of Carter, were all situated on Lot 2 of said Section 2, Township 27 north, Range 10 east; that said Lot 2 is located in and is a part of the Northwest Quarter of the Northwest Quarter of said section, and that the east line of said lot is located a quarter of a mile west of the west line of the Northeast Quarter of Section 2; that the evidence taken at the hearing further showed that at some time prior to said hearing Carter had constructed or taken part in the construction of a trail up Trout Creek and extending over and across a part of the Northeast Quarter of Section 2; that about the year 1899 there had been constructed on the northwesterly part of the Northeast Quarter of Section 2 a small stable or barn and that Carter had at times used said stable or barn for storage purposes; and that upon the evidence taken at said rehearing the register and receiver of said Seattle Land Office held and decided, on January 21, 1905, that all of said Carter's improvements were located on said Lot 2 of said Section 2.

The complaint further alleged that on the thirtieth day of June, 1905, the Commissioner of the General Land Office, on the evidence taken at the rehearing, held and decided that on September 19, 1893, Melvin J. Carter purchased the claim, cabin and improvements of a former settler; that he built for himself and family a new cabin on the claim purchased; that he lived in the cabin and cultivated a small tract of land on the claim; that about a year after his settlement Carter constructed trails across Section 2 and up Trout Creek for the purpose of getting to dif-

ferent places on his claim; that he also built a barn or stable and used it for storing supplies; that a part of the trails and the stable or barn were on the Northeast Quarter of Section 2, and that the dwelling house and cultivated land were all on the Northwest Quarter of said Section 2 about one-fourth of a mile west of the west line of the Northeast Quarter of said section; that notwithstanding that the evidence produced at said rehearing failed to show that Carter ever resided upon, improved or cultivated any part of the Northeast Quarter of Section 2, and did conclusively show that Carter's dwelling house and cultivated land and improvements, except only said trails and stable or barn, which were constructed after the railway company's selection of said land, were situated more than one-fourth of a mile from Northeast Quarter and the Commissioner of the General Land Office found such to be the facts, said Commissioner wrongfully and unlawfully, it is alleged, and in fraud of the railway company's rights to the land and to complete its selection thereof and to receive the patent of the United States therefor, held, as a matter of law, that Carter's residence was established and maintained in good faith and in the belief that his dwelling house was upon the land embraced in his homestead application and that such residence, taken in connection with the subsequent construction of trails and the stable or barn on the Northeast Quarter of said Section 2, was a constructive residence on said Northeast Quarter, and that said Carter should be permitted to make homestead entry of said land and that the selection thereof by the St. Paul, Minneapolis & Manitoba Railway Company should be canceled.

The complaint further alleged that the Railway Company appealed to the Secretary of the Interior from the decision of the Commissioner of the General Land Office, alleging that Carter's dwelling house and improvements were situated more than a quarter of a mile from the

Northeast Quarter; that he had never resided upon, occupied, cultivated or in any manner improved the land embraced in his homestead application; and that his acts did not constitute a settlement upon said Northeast Quarter within the meaning of the homestead law; that on the twenty-third day of November, 1905, the Secretary of the Interior passing on said appeal, held the facts in the case to be as found by the Commissioner in his decision, and on the facts, wrongfully and in fraud of the right of the Railway Company to said land, held and decided as a matter of law that as Carter was shown to have been a *bona fide* homestead settler upon unsurveyed land at the time the Railway Company made selection of the Northeast Quarter of said Section 2 and subsequently complied with the law as to residence and improvements, he was constructively a settler upon said Northeast Quarter, and that his application to enter the land under the homestead law should be allowed and the selection thereof by the Railway Company canceled.

It was further averred that the Railway Company's selection of the Northeast Quarter of Section 2 was canceled, pursuant to the decision of the Secretary of the Interior, and that afterwards, on the sixteenth day of March, 1906, said Melvin J. Carter was permitted to make, and did make, homestead entry on the Northeast Quarter of Section 2, and that on May 16, 1906, he made the final proofs required, and received a final entry certificate for the land; and that thereafter, on the eighth day of March, 1907, patent of the United States was issued to Carter, conveying to him the legal title to said lands.

It is also averred that the decisions of the Commissioner of the General Land Office and the Secretary of the Interior, and the cancellation of the Railway Company's selection, were wrongfully and erroneously made through a mistake of law, in this, that it was in and by said decisions held that the settlement and residence of Carter

upon a tract of land situated one-fourth of a mile distant from the land sought to be entered by him was constructively, and within the meaning of the homestead law of the United States, a settlement upon the land last mentioned.

It was further averred, that on the ninth day of July, 1906, prior to the issuing of patent of the United States to Carter, said Melvin J. Carter and Clara Carter, his wife, granted to the defendant, James A. Hower, as Trustee, their right, title and interest in said Northeast Quarter of Section 2, Township 27 north, Range 10, east, and that the beneficiaries of the trust created by the deed, or the terms and conditions thereof, are not set forth in the deed, and plaintiff has no knowledge or information concerning the beneficiaries or the terms and conditions of the trust; and it was further averred that the defendant Nonpareil Consolidated Copper Company claims an interest or estate in said Section 2 adverse to plaintiff, but that plaintiff has no knowledge or information concerning the nature or extent of the interest so claimed. A like allegation is made as to the defendants Nicholas H. Rudebeck and James McCreery Realty Company. It is averred that the interest of the said defendants, if any they have, is subsequent, subordinate and inferior to the claim of the plaintiff.

The prayer is that the plaintiff be adjudged the owner of the title, and the defendants decreed and required to convey the same to it.

The Supreme Court of Washington affirmed the judgment of the lower court, sustaining the demurrer, upon the ground that the decisions of the Land Department should be followed, and that Carter's homestead entry was duly and properly approved. Apart from this ground of decision, it is argued by the defendants in error that the judgment was properly sustained in view of the want of allegation that the defendants in error—purchasers, so far as

appears, in good faith, and without notice of the claims of the plaintiff in error—had knowledge or notice of the plaintiff's claims, or such notice as the law requires as to the alleged invalidity of the title as would deprive them of the rights of *bona fide* purchasers.

It will be noticed that the allegations of the bill are that the deed to Hower, as Trustee, was made on July 6, 1906, before the patents issued on the eighth day of March, 1907, to Carter, but after the hearings and decisions to which we have referred, and after May 6, 1906, when Carter made the final proofs of settlement and cultivation required by § 2291, Rev. Stat., and after he had received final entry certificate for the lands upon that date.

Under these circumstances, it is said the grantee had such title as might be conveyed, notwithstanding the patent had not issued, and the rights of a *bona fide* purchaser will be protected. *United States* v. *Clark*, 200 U. S. 601.

It is the contention of the defendant in error that it appearing in the complaint that the grantee had complied with the requirements of the law and everything was complete except the issuance of the patent, it was necessary to further aver that the purchaser had knowledge or notice of the supposed mistakes or wrongs charged in order to deprive him of the benefit which inheres in the position of a *bona fide* purchaser. And this it is contended is the effect of *United States* v. *Clark*, 200 U. S. *supra*. But the position of a *bona fide* purchaser is not to be assumed from the allegations of the complaint, which do no more than state the several transfers without any allegation showing affirmatively that the defendants are *bona fide* purchasers for value, in which event only could this defense be successfully made by demurrer to the complaint. *Bona fide* purchase is an affirmative defense, which the grantee must set up in order to defeat the right of the railroad company to have a trust declared in the lands in question, if the bill is otherwise sufficient for that purpose. This matter was

directly involved and considered in *Wright, Blodgett Company, Limited*, v. *United States*, decided February 23, 1915, *ante*, p. 397, and it is only necessary in this connection to refer to that case.

The question then is, was there sufficient compliance with the homestead law to entitle Carter to the benefit thereof? It is not contended that the courts may refuse to follow the conclusions of the Land Office, based upon testimony as to matters of fact, but the insistence is that there is here such a clear mistake of law upon the facts found as to entitle the complainant to the relief sought. As it is stipulated in the decision on the demurrer that the findings of the officers of the Interior Department may be looked to, they must be had in mind in addition to the facts already recited from the complaint. Upon the appeal to the Commissioner of the Land Office from the finding of the Register and Receiver, that official held:

"I, therefore, have no doubt of the good faith of Carter in his present application, and he now offers to amend his application so as to include the land which the Government finally determines his improvements are placed upon, and to drop from either the eastern or the southern boundary of his claim sufficient land to enable him to include the actual tracts upon which his improvements are located; provided the Department finally holds that his homestead improvements are not upon the N. E. ¼.

"The patenting of Lot 2 to E. B. Carter and Lot 1 which lies between him and N. E. ¼ to the railway company, place them beyond the jurisdiction of this office, and the suggested adjustment cannot be had, and the only relief that can be extended to him is to award him the N. E. ¼, upon the principle of constructive residence, which, I think, may in all equity and justice be applied in his case; he made some improvements on the N. E. ¼, believed he was residing on that quarter and lived there six years in that belief, and made application for that

tract, so believing; therefore under the decisions of the Department in *Kendrick* v. *Doyle*, 12 L. D. 67; *Noe* v. *Tipton*, 14 L. D. 447; *Staples* v. *Richardson*, 16 L. D. 248, and others, I rule that Carter's residence in good faith in a house believed to be upon the land, covered by his application is a constructive residence on such land, and that since said residence antedates the selection of the railroad company he had the better right thereto.

"I therefore hold the company's selection of the said N. E. ¼ for rejection, subject to appeal, with a view to permitting Melvin J. Carter to perfect homestead entry thereof should this decision become final."

Upon appeal to the Secretary of the Interior, it was decided, among other things, as follows:

"It is evident from the testimony and circumstances in the case that when Melvin J. Carter purchased the cabin and improvements of Doolin and built the new house into which he moved with his family, the land being then unsurveyed, he intended to claim land extending to the east of said improvements. This is shown from the fact he built the barn, made the trails and posted notice of his claim over a quarter of a mile to the east, as shown in the case. It does not appear why he did not apply for Lot 1, or fractional N. E. ¼ of N. W. ¼, situated between his house and the land applied for. It does appear, however, that several surveys of the land, either public or private, had been made, and that the situation was confusing as to the lines and stakes even to those accustomed to looking up lines and corners. As Carter tendered his homestead application directly after the filing of the plat, presumably he still believed that his house was located on the N. E. ¼.

"As he is shown to have been a *bona fide* homestead settler upon unsurveyed land at the time the railway company made selection thereof, and subsequently has made a good compliance with the law as to residence and improvements, the Department is of the opinion that his

application for the tract in question should be allowed. As the railway company made selection of the entire section, it loses no more land than it would if Carter had applied for said lot 1 with sufficient in the N. E. ¼ to make 160 acres.

"Your office decision holding in favor of Carter is affirmed and upon his perfecting his application for said N. E. ¼ of Sec. 2, T. 27, N. R. 10 E., the railway company's selection thereof will be canceled."

The statute of the United States (Rev. Stat., § 2291) is specific in its requirements that in order to obtain a patent for a homestead the applicant must have actually resided upon or cultivated the same for a term of five years succeeding the filing of the claim, etc.[1]

The question therefore is, was an actual residence within the meaning of the statute sufficiently shown to comply with these provisions? It is true, as the Supreme Court of Washington stated in its opinion in this case, referring to the opinion of this court in *Ard* v. *Brandon*, 156 U. S. 537, 543, "the law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon." This is as it should be, and the courts have shown a commendable disposition to uphold one who has acted in good faith in entering upon the public lands for this purpose. Nevertheless, the right is a statutory one, and in this case it was essential to show actual residence upon the land as a prerequisite to the granting of a patent and obtaining title to the same.

Conceding that Carter acted in entire good faith, and that he meant to comply with the law, it is nevertheless the fact that his settlement was upon, and the land cultivated was in, a different quarter-section from that which

[1] Since this case arose the statute has been amended so as to require a habitable house upon the land, and actual residence and cultivation for the term of three years. Act of June 6, 1912, c. 153, 37 Stat. 123; U. S. Compiled Stats., V. 2, § 4532.

he undertook to enter, and the quarter which he contends for was separated from the one which he occupied by a forty-acre tract. It is true that some time during his occupancy a trail was laid out, and a small stable constructed on the northeast quarter. But the fact remains that his residence and improvements by way of cultivation were upon a quarter-section entirely separate and apart from the one to which title is now claimed. It seems to us to be going too far to say that, because of the trail to the northeast quarter and the small stable thereon, and the notices posted upon it, there was a constructive residence on that quarter, although the actual residence was upon the other quarter.

We have been cited to no cases in the Land Department which go so far as is required in this instance in order to support title. We have been unable to find anything in our own decisions which would sanction such liberal treatment of the statutory requirement as to residence.

In *Talkington's Heirs* v. *Hempfling*, 2 L. D. 46, the house of the entryman was by mistake built thirty yards outside of the lines of his claim, and was occupied in good faith in the belief that it was on the land claimed. In *In re Lewis C. Huling*, 10 L. D. 83, the house was built just across the line in the belief that it was actually inside the limits and upon the land claimed by the entryman. In *Kendrick* v. *Doyle*, 12 L. D. 67, the entryman was honestly mistaken as to the limits of his claim, owing to conflicting surveys, and his house was built in a corner where the boundary line admittedly was in doubt, but the correct survey showed the house to be a little outside the line. In *Staples* v. *Richardson*, 16 L. D. 248, the entryman discovered that he had built his house outside his limits, and razed it and built another house inside the supposed limits, but found that house to be outside, and built a third house, this time within the line limits. In *Keogle* v. *Griffith*, 13 L. D. 7, the claimant's first dwelling was

about forty rods from his land boundary. Upon discovering the mistake he built another house upon the land entered. In *Lindsay* v. *Hawes*, 2 Black, 554, the claimant's dwelling house was on the boundary line of the land claimed. A similar situation existed in *Silver* v. *Ladd*, 7 Wall. 219. In each of these cases the residence was held sufficient to satisfy the requirement of the statute. On the other hand, both the Department and this court have held in a number of cases, that residence upon one tract of land will not support a preëmption or homestead claim to another and distinct tract, even where the claimant has made substantial improvements upon the latter. In *Guyton* v. *Prince*, 2 L. D. 143, the claimant had purchased from a railroad company a tract which adjoined that of his homestead entry; two cabins had been built upon the homestead land, one by Prince, besides a stable, smoke-house and other buildings. The land was cultivated after entry, but at no time did the claimant reside upon the land, contenting himself with a few stays of a week or two at a time, and living in his dwelling upon the land purchased from the railroad company. His claim to homestead was denied because of his failure to reside upon the land claimed. The case of *Thomas D. Harten*, 10 L. D. 130, is somewhat similar, the claimant having purchased a possessory right to a tract of land embracing the homestead attempted to be claimed, and resided on the tract purchased, intending thereby to claim the entire tract. When the land was surveyed, his house was found to be 200 feet distant from the line of the homestead, while his garden and spring, as well as some out-buildings, were on the homestead tract. He cultivated the homestead tract, and shortly after his homestead entry built a house upon the homestead tract, residing since his entry thereon one night each month, hoping thus to establish his residence. The Department held this to be no residence, however, and denied his

claim. In *re Edson O. Parker*, 8 L. D. 547, Parker made scrip location of unsurveyed land, and after the survey was made, made further entry under the homestead laws for the remaining three-quarters of the section. His residence and most of his improvements were on the scrip claim, until he made his homestead entry, when he removed upon the lands embraced in said entry. It was held that he was not a settler on the homestead land until he moved his residence thereon. In the case of *Warren Bowen*, 41 L. D. 424, the settler had made an entry for a quarter-section of some surveyed lands, and upon presenting his homestead proof he included the adjacent quarter of some unsurveyed lands. His dwelling house was situated on the latter tract, where he had resided and had cultivated some five acres in the adjacent tract. His title to the unsurveyed lands was denied for reasons not necessary to be set forth here, and as to the surveyed tract his claim was denied because of lack of residence upon the proper section. In *Ferguson* v. *McLaughlin*, 96 U. S. 174, it was held that under § 6 of the act of March 3, 1853, c. 145, 10 Stat. 244, a settler upon unsurveyed public lands in California has no valid claim to preëmpt a quarter-section, or any part thereof included in his settlement, unless it appears by the Government surveys, when the same are made and filed in the local land office, that his dwelling-house was on that quarter-section.

In *St. Paul &c. Ry.* v. *Donohue*, 210 U. S. 21, this court summarized the requisites concerning preëmptions and homesteads essential to the acquirement of the rights intended by the statute, and said, at page 33:

"As a result of this review of the legislation concerning preëmptions and homesteads and of the settled interpretation continuously given to the same, we think there is no merit in the proposition that a homesteader who initiates a right as to either surveyed or unsurveyed land, and

complies with the legal regulations, may not, when he enters the land, embrace in his claim land in contiguous quarter-sections, if he does not exceed the quantity allowed by law, and provided that his improvements are upon some portion of the tract and that he does such acts as put the public upon notice of the extent of his claim."

In this case it appears that the residence was not upon any part of the tract claimed by the homesteader; nor was the residence upon a contiguous tract of land, but was entirely separate and apart from the land claimed. Under these circumstances we are constrained to the conclusion that the complaint, upon its face, made a case entitling the plaintiff in error to the relief sought. As we have said, the rights of a *bona fide* purchaser, if such exist in this case, must be affirmatively set up by answer and sustained by proof. In the brief for the defendants in error a contention is made that the plaintiff is estopped from asserting a claim to the quarter-section in question by reason of having wrongfully obtained a patent for the land actually settled upon by Carter and having failed or refused to surrender that tract when the contest was pending in the land office, but it is enough to say of this that the facts upon which the contention is rested are not sufficiently disclosed in the complaint to require or justify its consideration at this time. If there be facts warranting such a contention they should be distinctly set forth in the answer and appropriately proved.

We think the court below erred in sustaining the demurrer to the complaint, and it follows that its judgment must be reversed, and the case remanded to the Supreme Court of Washington for further proceedings not inconsistent with this opinion.

Reversed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* SPRING RIVER STONE COMPANY.

ERROR TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI.

No. 158. Submitted January 27, 1915.—Decided March 22, 1915.

Where the shipper has paid full freight charges computed on full weight of shipment equalling minimum capacity of cars applied for and permitted for the class of traffic by the filed tariff, he cannot afterwards be compelled to pay an excess on recomputation of charges based on minimum capacity of larger cars supplied by the carrier on account of shortage of the size applied for, all parties having acted in good faith.

Without modifying the rule announced in former decisions in respect to the obligation on both carrier and shipper to strictly observe the lawful tariff, *held* under the special circumstances of this case, failure to show that the carrier did not comply with the rules in regard to noting the fact that the smaller cars were supplied for its own convenience, does not require the shipper to pay charges on the marked capacity of the cars actually used.

169 Mo. App. 109, affirmed.

THE facts are stated in the opinion.

Mr. S. H. West, Mr. E. A. Haid, Mr. Roy F. Britton, Mr. C. C. Collins and *Mr. H. C. Barker* for plaintiff in error:

Common carriers by railroad engaged in interstate commerce are required by the acts of Congress regulating commerce to collect the rates published in the schedules or tariffs on file with the Interstate Commerce Commission. *G., C. & S. F. Ry.* v. *Hefley*, 158 U. S. 98; *Tex. & Pac. Ry.* v. *Mugg*, 202 U. S. 242; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Tex. & Pac. Ry.* v. *Abilene Cotton Co.*, 204 U. S. 426; *Tex. & Pac. Ry.* v. *Cisco Oil Co.*, 204

U. S. 449; *Albers Commission Co.* v. *Kan. City So. Ry.*, 223 U. S. 573; *Robinson* v. *Balt. & Ohio R. R.*, 222 U. S. 506; *Ill. Cent. R. R.* v. *Henderson Elevator Co.*, 226 U. S. 441; *Poor Grain Co.* v. *C., B. & Q. R. R.*, 12 I. C. C. 418; *Blinn* v. *Sou. Pac. Co.*, 18 I. C. C. 430; *Gerber* v. *Wabash Ry.*, 63 Mo. App. 145; *Sutton* v. *St. L. & S. F. R. R.*, 159 Mo. App., 685; *Dunne* v. *St. L. S. W. Ry.*, 166 Mo. App. 372.

Shippers are presumed to know the provisions of tariffs duly published and filed with the Interstate Commerce Commission, and rates named in such tariffs are not the subject of contract between carriers and shippers. *Chi. & Alt. Ry.* v. *Kirby*, 225 U. S. 155; *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491; *M., K. & T. Ry.* v. *Harriman*, 227 U. S. 656; *Bost. & Maine Ry.* v. *Hooker*, 233 U. S. 97; *Balt. & Ohio R. R.* v. *New Albany Co.*, 94 N. E. Rep. 906; *Mires* v. *Railroad*, 134 Mo. App. 379; *Drey* v. *Mo. Pac. Ry.*, 156 Mo. App. 178; *United States* v. *Miller*, 223 U. S. 599.

The shipping ticket prepared by respondent's employé and signed by appellant's agent is a "bill-of-lading." A bill of lading is the carrier's receipt for goods delivered to it for transportation. It may also contain the contract of carriage, but this is not necessary to make the instrument a bill of lading. Porter on Bills-of-Lading; Standard Dictionary; Webster's New Int. Dict.; Century Dict.; *Cope* v. *Cordova*, 2 Rawle (Pa.), 202; *The Mayflower*, 16 Fed. Cas. 1250; Hutchinson on Carriers.

The provision of the tariffs requiring that the shipper's order for cars of certain capacity be noted on the bill of lading to authorize the use of the marked capacity of the cars so ordered as the minimum weight on the shipments, is a "regulation affecting the charges" within the meaning of § 6 of the Act to Regulate Commerce; such regulations are a part of the contract of shipment which automatically determine the rates to be charged and must be complied with by both shipper and carrier. *Bost. & Maine Ry.* v.

Hooker, 233 U. S. 97; *C., R. I. & P.* v. *Cramer*, 232 U. S. 490; *M., K. & T. Ry.* v. *Harriman*, 227 U. S. 656.

Mr. Thomas Hackney for defendant in error.

Mr. Justice McReynolds delivered the opinion of the court.

A controversy between the Railway Company and defendant shipper concerning freight charges was adjusted by computing them upon the actual weight of the merchandise transported. Afterwards, claiming that the reckoning should have been upon the minimum capacity of cars used, the Railway Company sued for the difference between the two results. Defendant relied upon the settlement and also full payment; the trial court directed a verdict for it; this was approved upon appeal (169 Mo. App. 109); and the cause is here by writ of error.

Plaintiff in error operates a road extending northward from Fort Worth, Texas, which connects through an intermediate one with the St. Louis and San Francisco Railroad whose line reaches Carthage, Missouri, where defendant is engaged in quarrying, selling and shipping stone. Having been advised by plaintiff in error's commercial agent that the rate on stone in cars of 50,000 pounds capacity to Fort Worth was 27½ cents per hundred, defendant contracted to deliver five carloads to a purchaser located there. The local agent of the initial carrier at Carthage was informed that such cars would be required for the proposed shipments, and in November and December, 1908, he was requested by telephone to supply them. Cars of that size were scarce and for its own convenience the Railroad Company furnished five larger ones—60,000 to 88,000 pounds—in which the shipments were made, the weight in each instance being less than the marked minimum but appropriate for a 50,000 pound car.

When these arrived at Fort Worth charges of 27½ cents per hundred, marked capacity, were demanded. They were paid and immediately thereafter the shipper presented a claim for the amount exacted above a reckoning based on actual weights. Careful investigation was promptly made and in February, 1909, the excess was refunded. All parties acted with knowledge of the facts, in good faith and without purpose to evade the law.

Upon the theory that it was bound to collect freight charges according to car capacity and that the settlement was prohibited by regulations of the Interstate Commerce Commission, two years thereafter plaintiff in error commenced this action to recover what it had repaid.

At the trial the way-bills were not introduced, their absence was not accounted for, and their contents do not appear. No carrier's order book was produced. The shipper received no bill of lading, but the Railway Company offered to introduce alleged copies of five signed by the Carthage agent. They were rejected because not properly identified, and no further effort was made to prove their contents. Five so-called shipping tickets were put in evidence. These requested the initial carrier to accept the freight, and upon them appears the following signed by its agent: "This shipment is tendered and received subject to the terms and conditions of the Company's Uniform Bill of Lading. All conditions herein to the contrary are cancelled."

The applicable duly filed tariff schedule specified freight rate on stone between Carthage and Fort Worth as 27½ cents per hundred when loaded in 50,000 pound cars. It also provided that "minimum weight will be the marked capacity of car on stone;" and Item No. 81 was in these words: "The following rule will be observed in assessing the freight charges for the minimum weights, according to capacity of car: 'When the carrier cannot furnish car of capacity ordered by shipper, and for his own convenience

provides a car of greater capacity than the one ordered by the shipper, it may be used on the basis of the minimum carload weight fixed in tariff applied on size of car ordered by shipper, but in no case less than the actual weight. Capacity of car ordered, number of the order, and date of same to be shown in each instance on the bill of lading and the carrier's way-bill.' In no case must shipment be billed at minimum weight of a car of less capacity than in service on initial line."

The so-called shipping tickets may not be treated as bills of lading within the requirement; upon their face they refer to "the Company's Uniform Bill of Lading," and plaintiff in error undertook to introduce alleged copies of bills of that character. The facts concerning the way-bills are undisclosed. It is not possible, therefore, to ascertain from the record the contents of any of the bills.

In effect the Railway Company now contends that, as the evidence fails affirmatively to show the notations required by Rule 81, the law imposes an absolute obligation upon the shipper to pay charges estimated upon the marked capacity of cars utilized notwithstanding the settlement and good faith of all parties. To this position we cannot give assent. In the circumstances the initial carrier was charged with the duty of making these notations; and for the purposes of this suit the shipper might assume compliance with that duty—he was not required to establish actual performance. He only sought and received what was authorized by the tariff on file. Larger cars than he requested were supplied for the carrier's special accommodation, and the commands of the applicable rule addressed to the latter imposed the clerical task of recording information within its peculiar knowledge upon documents for whose preparation it was responsible.

Nothing herein is intended to modify conclusions announced in former opinions in respect of the obligation

upon both carrier and shipper strictly to observe lawful tariffs. We determine only the narrow point adequate for disposition of this cause upon the particular facts revealed by an unsatisfactory record.

The judgment of the court below is

Affirmed.

W. S. TYLER COMPANY *v.* LUDLOW-SAYLOR WIRE COMPANY.

APPEAL FROM AND PETITION FOR CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 441, 622. Argued December 15, 1914; petition for writ of certiorari submitted December 15, 1914.—Decided March 22, 1915.

Paying an agent, who is also employed by another corporation, to solicit orders to be executed at its home office and sharing expenses with another corporation of an office in the District in which a suit for infringement of patent is brought, *held* in this case not to amount to having a regular and established place of business which would subject a foreign corporation to the jurisdiction of the Federal court under the act of March 31, 1897, c. 395, 29 Stat. 695.

Where an agent solicits an order in one State and forwards it to his principal at its home office in another State and the goods are shipped direct by the principal the sale is consummated in the latter State and does not constitute an infringement of patent in the former State.

Where appeal is properly prosecuted and certiorari is also asked from the same judgment of the Circuit Court of Appeals, the latter will be denied.

THE facts are stated in the opinion.

Mr. Charles C. Linthicum, with whom *Mr. J. Negley Cooke* and *Mr. D. Anthony Usina* were on the brief, for appellant and petitioner:

There was an established place of business and an in-

fringement committed in New York. *American Stoker Co.* v. *Underfeed Stoker Co.*, 182 Fed. Rep. 642; *Chadeloid Chemical Co.* v. *Chicago Finishing Co.*, 180 Fed. Rep. 770; *Chicago Tool Co.* v. *Phila. Tool Co.*, 118 Fed. Rep. 852; *Westinghouse Co.* v. *Stanley Co.*, 116 Fed. Rep. 641; *S. C.*, 121 Fed. Rep. 101.

Mr. James P. Dawson and *Mr. William E. Garvin* for appellee and respondent, submitted.

Memorandum opinion by MR. JUSTICE MCREYNOLDS, by direction of the court.

Alleging infringement of its patent and asking appropriate relief appellant, an Ohio corporation, instituted this proceeding in equity against the Ludlow-Saylor Wire Company, a corporation organized under the laws of Missouri, in the United States District Court for the Southern District of New York. Objection to the jurisdiction was sustained and a direct appeal to this court allowed.

The cause is properly here upon the appeal and the application for certiorari heretofore presented (No. 622) must be denied.

The act of March 3, 1897, c. 395, 29 Stat. 695, provides: "That in suits brought for the infringement of letters patent the circuit [now district] courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership or corporation, shall have committed acts of infringement and have a regular and established place of business. . . ."

Evidence was introduced to show that appellee had the requisite place of business in New York City and also had committed an act of infringement by making a sale there. The trial court held neither claim was established.

The Wire Company is a manufacturer of screens, with plant and home office at St. Louis, Missouri. For some eighteen months in 1911 and 1912 it employed Guerin, upon whom process was served, as "Eastern Representative," paying him a small salary, commission on sales, and traveling expenses. During this period he was also employed by another corporation which rented a room in the building at No. 30 Church Street, New York City, and there he maintained headquarters as representative of both concerns—the rent and stenographer's wages being apportioned between them according to agreement. His duty to appellee was "to solicit orders [and] forward them when received to the home office for execution." Considering all the facts disclosed we think them insufficient to support the allegation that appellee had a regular and established place of business at 30 Church Street within the intendment of the statute. *Green* v. *Chicago, Burlington & Quincy Railway*, 205 U. S. 530, 533.

The circumstances attending only one sale appear in the record and this was negotiated by the purchaser in order that it might afford the basis for a suit. Guerin received and forwarded, and his principal accepted, the order for goods which were thereafter manufactured and shipped by express to the purchaser in New York City. This sale was consummated at St. Louis and did not constitute an infringement of appellant's patent within the district where suit was brought. *Westinghouse Electric & Mfg. Co.* v. *Stanley Electric Mfg. Co.*, 116 Fed. Rep. 641.

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Public interest cannot be invoked as justification for demands passing limits of constitutional protection. *Northern Pacific Ry.* v. *North Dakota* 585

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2. *Who can raise question of constitutionality:* One not within class penalized by state police statute cannot attack constitutionality. *Mutual Film Corp.* v. *Kansas* 248

Person whose rights not directly affected or threatened not entitled to call upon this court to construe orders, acts and provisions of Constitution. *Stearns* v. *Wood* 75

Importer of moving pictures without standing to attack state statute penalizing exhibitors or those permitting exhibitions; nor can he enlarge character of police statute by asserting constitutional rights. *Mutual Film Corp.* v. *Kansas* 248

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3. *Generally:* Judgment without process absolutely void under Constitution and principles of natural justice. *Simon* v. *Southern Ry. Co.* 115

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II. **Congress, Powers and Duties of.** See **Congress.**

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Legislation of State of New York of 1905, empowering city to acquire lands for new water supply, not unconstitutional as impairing obligation of contract of charter rights of corporation authorized to acquire property in same watershed under Railroad Act, no proceedings having been taken by it beyond filing of map. *Id.*

Exercise of freedom of contract involves making engagement, which if fulfilled prevents for the time any inconsistent course of conduct. *Coppage* v. *Kansas*. 1

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Switching empty cars to and from connection with interstate railroad to side track within terminal of another railroad for purpose of loading with goods intended for interstate commerce, constitutes part of such commerce which Congress has regulated to exclusion of States. *Id.*

2. *State interference:* State law interfering with right or act of sending beer from one State to another, or with handling same, conflicts with Constitution. *Kirmeyer* v. *Kansas*. . . 568

Kansas moving picture censorship act of 1913 does not interfere with interstate commerce. *Mutual Film Corp.* v. *Kansas*. 248

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Order 295 of Louisiana Railroad Commission, relative to switching cars between connecting carriers and conformity to rates established, held burden upon and attempt to regulate interstate commerce. *Illinois Central R. R.* v. *Louisiana R. R. Comm.*. 157

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Liberty and property are co-existent rights recognized by Fourteenth Amendment and are without state interference. *Id.*

Article 55, Code of Practice of Louisiana, relative to right of one sued in possessory action to bring petitory action, is not unconstitutional under Fourteenth Amendment. *Grant Timber Co.* v. *Gray*. 133

2. *Due process of law:* Kansas statute of 1909, making it unlawful for employers to coerce, etc., employés not to join or remain members of labor organizations, as applied to this case, held repugnant to due process clause of Fourteenth Amendment. *Coppage* v. *Kansas*. 1

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Section 2564, Rem. & Bal. Code of Washington, held not unconstitutional as applied in case of one indicted for publishing article encouraging and inciting that which jury found was breach of state laws against indecent exposure. *Fox* v. *Washington* ... 273

Ohio moving picture censor act of 1913 not violative of Constitution as depriving of due process of law. *Mutual Film Corp.* v. *Ohio Industrial Comm.*.. 230

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Hours of labor of women employed as pharmacists and student nurses in hospitals is subject to legislative control; and limiting such service to eight hours a day or maximum of forty-eight hours a week is not unconstitutional as denial of due process of law. *Bosley* v. *McLaughlin*. 385

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Maximum intrastate rates on coal in carload lots fixed by c. 51, Laws of North Dakota, held unreasonable and amounting to attempt to take property of carrier without due process of law. *Northern Pacific Ry.* v. *North Dakota*. 585

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3. *Liberty of contract:* Liberty of contract guaranteed by due process clause of Fourteenth Amendment is freedom from arbitrary restraint, not immunity from reasonable regulation in public interest. *Miller* v. *Wilson*. 373

State may place reasonable restraints upon liberty of contract without violating due process provision of Fourteenth Amendment and this includes prescribing methods for compensation of coal miners. *Rail & River Coal Co.* v. *Ohio Industrial Comm.*. 338

Limit of reasonable exertion of protective authority of State over women not overstepped and liberty of contract unduly abridged by statute prescribing eight hours a day or forty-eight hours a week as maximum of labor. *Miller* v. *Wilson* 373

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Master and servant's coextensive liberty of contract not subject to legislative discrimination. *Coppage* v. *Kansas* 1

Constitutional freedom of contract does not mean freedom to break contract without accountability. *Id.*

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State legislature may recognize degrees of harm and confine restrictions to those classes where it deems need greatest and prohibition of law need not be all embracing. *Id.*

There is room for reasonable classification in prescribing rates. *Northern Pacific Ry.* v. *North Dakota*. 585

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Freedom of contract and right of private property recognizes legitimacy of inequalities of fortune. *Id.*

Right to contract for services is within right of personal liberty and that of private property. *Id.*

Employer and employé may insist that stipulation as to ground for terminating employment shall be a *sine que non* of inception or continuance of employment. *Id.*

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Statutory provision, not legitimate police regulation, not made such by form, or title declaring purpose within police power. *Coppage* v. *Kansas* 1

Decision of constitutionality of state statute not dependent upon form or declared purpose of the law, but upon its operation and effect as applied and enforced by State; and in these matters judgment of state court is not controlling. *Id.*

In absence of decision of state court to contrary, a state statute giving court power to enforce by mandamus or otherwise an order to have a tax assessed, not construed as authorizing court to collect the tax itself. *Yost* v. *Dallas County* 50

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Constitutional freedom of contract does not mean freedom to break contract without accountability. *Id.*
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State police statute regulating basis for compensation of miners on run of mine subject to regulations of industrial commission, but which makes orders of commission only *prima facie* reasonable and provides for prompt judicial review, and does not prevent employers from screening coal as they desire for marketing it, amply protects rights of employers. *Rail & River Coal Co.* v. *Ohio Industrial Comm.*.. 338

See **Master and Servant.**

EMPLOYERS' LIABILITY ACT:

Act of 1906 held applicable to accident occurring on interstate train in District of Columbia as local statute and not one contemplated by cl. 6, § 250, Judicial Code. *Washington, A. & Mt. V. Ry. Co.* v. *Downey*.... 190

Where there are substantive differences between state and Federal statutes in regard to defenses of assumption of risk and contributory negligence, proceeding under former is reversible error. *Toledo, St. L. & W. R. R.* v. *Slavin*.... 454

Where evidence shows that although case brought under state statute plaintiff was injured in interstate commerce, objection that he cannot recover under Federal Act not technical rule of pleading but matter of substance. *Id.*

Sufficiency of instructions as to assumption of risk. *Seaboard Air Line* v. *Padgett*.... 668

If proof sufficient to justify submission of case to jury on question of assumption of risk, refusal to instruct verdict for defendant not reversible error. *Id.*

EQUAL PROTECTION OF THE LAW:

Cases involving questions of:

Bosley v. *McLaughlin*.... 385

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EQUITY:

Rule that equity will not enjoin collection of taxes where adequate remedy at law, applied. *Dalton Machine Co.* v. *Virginia*.... 699

ESTATES OF DECEDENTS:

Personal property goes primarily to executor or administrator who passes to legatees or distributees residue after settlement of estate. *United States* v. *Jones*.... 106

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Interest of legatees and distributees, prior to ascertainment of surplus after administration of estate, not absolute but contingent within meaning of § 29 of War Revenue Act of 1898 and § 3 of Refunding Act of 1902. *Id.*

What liable to tax imposed by act. *Id.*

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Owner's statement of condition of record title of property in Porto Rico not necessarily effective to enlarge scope of encumbrance or estop owner. *Gallardo* v. *Noble* 135

EVIDENCE:

Two reports of Interstate Commerce Commission in same proceeding, the later affirmatively showing it to be supplemental, read together. *Meeker & Co.* v. *Lehigh Valley R. R.* 412

Statute making findings and reparation order of Commission *prima facie* evidence of facts therein stated is merely rule of evidence and not unconstitutional as abridging right of trial by jury or denying due process of law. *Id.*

Report of Interstate Commerce Commission holding rate excessive and declaring reasonable rate, and reparation order based thereon, held properly admitted as *prima facie* evidence of facts therein contained in another and identical proceeding between same parties which could have been consolidated. *Meeker* v. *Lehigh Valley R. R.* 434

Sufficiency in suit to cancel patent. *Wright-Blodgett Co.* v. *United States.* 397

Immunity from self-incrimination. *Burdick* v. *United States.* 79

EXCEPTIONS. See **Appeal and Error.**

EXECUTIVE POWER:

Quære, whether President may exercise pardoning power before conviction. *Burdick* v. *United States* 79

See **President.**

FACTS:

Under §§ 649, 700, 1011, Rev. Stat., as amended, findings of fact have effect of verdict of jury, and this court does not reverse but merely determines whether they support judgment. *United States* v. *United States Fidelity Co.* 512

This court takes facts as found by state court, unless Federal right denied by finding shown by record to be unsupported

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by evidence, or a conclusion of law as to Federal right and finding of fact are so commingled as to make analysis of latter necessary. *Northern Pacific Ry.* v. *North Dakota* ... 585

On writ of error under § 237, Jud. Code, finding of facts analyzed where necessary to determine whether purported finding so interwoven with question of law involving Federal right as to amount to decision thereof. *Norfolk & West. Ry.* v. *West Virginia* 605

Existence of preference forbidden by Act to Regulate Commerce a question of fact. *Pennsylvania Co.* v. *United States* 351

See **Practice and Procedure.**

FEDERAL QUESTION:

Constitutional question cannot be imported into case by allegation in pleading of vested right of property in contracts or their performance and that refusal to perform amounts to deprivation of such property. *McCormick* v. *Oklahoma City* 657

Federal questions asserted as basis for jurisdiction of this court must have been presented or suggested to court below. *Olympia Mining Co.* v. *Kerns* 211

Where demurrer to complaint resulting in dismissal contains express statement that its basis is statute of limitations, plaintiff has opportunity to assert impairment of Federal right by application of statute. *Id.*

Where interstate character of transaction the basis of suit inferable from pleadings and decision turns on construction of Anti-trust Act, Federal question involved. *Wilder Mfg. Co.* v. *Corn Products Co.* 165

Contention that § 2 of act of 1909, regulating importation of opium, is unconstitutional as beyond power of Congress, held frivolous. *Brolan* v. *United States* 216

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What allowable under §§ 8, 16, Act to Regulate Commerce. See *Meeker & Co.* v. *Lehigh Valley R. R.* 412, 434

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FERRIES:

Congress may regulate interstate transportation by ferry. *Wilmington Transp. Co.* v. *California R. R. Comm.* 151

In absence of action by Congress, State may prevent unreasonable charges for ferriage from point of departure within borders. *Id.*

FIFTH AMENDMENT: PAGE

Order of Interstate Commerce Commission requiring interstate carrier to receive and transport over its terminals carload interstate freight from one carrier having physical connection with its lines on same terms on which it performs such service for other connecting carriers similarly situated, is not an appropriation of terminal property in violation of due process provision of Fifth Amendment. *Pennsylvania Co.* v. *United States* 351

FINDINGS OF FACT. See **Facts.**

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FOREIGN COMMERCE:

Congress has power to prohibit importations in foreign commerce and to punish knowingly concealing or moving merchandise unlawfully imported. *Brolan* v. *United States* 216

In absence of action by Congress, State may prevent exorbitant charges for transportation, part of which may be over high seas, where both origin and termination within State. *Wilmington Transp. Co.* v. *California R. R. Comm.* 151

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FOURTEENTH AMENDMENT:

Inhibits state restriction of liberty or property rights as public welfare. *Coppage* v. *Kansas* 1

An individual has no inherent right to join a labor union and remain in employ of one unwilling to employ a union man. *Id.*

State may not indirectly strike down rights of liberty or property by invoking police power to remove inequalities resultant from such rights. *Id.*

Liberty and property are co-existent rights recognized by Fourteenth Amendment and are without state interference. *Id.*

Employer and employé have constitutional right to dispense with services and quit service, respectively, on account of affiliation or non-affiliation with labor union. *Id.*

State may place reasonable restraints upon liberty of contract without violating due process provision of Fourteenth Amendment and this includes prescribing methods for compensation of coal miners. *Rail & River Coal Co.* v. *Ohio Industrial Comm.* 338

Liberty of contract guaranteed by due process clause is free-

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dom from arbitrary restraint, not immunity from reasonable regulation in public interest. *Miller* v. *Wilson* 373
Kansas statute of 1909, making it unlawful for employers to coerce, etc., employés not to join or remain members of labor organizations, as applied to this case, held repugnant to due process clause of Fourteenth Amendment. *Coppage* v. *Kansas*..... 1
State may protect established possession of property from disturbance by anything other than process of law. *Grant Timber Co.* v. *Gray* 133
Article 55, Code of Practice of Louisiana, relative to right of one sued in possessory action to bring petitory action, is not unconstitutional. *Id.*
Judgment without process absolutely void under Constitution and principles of natural justice. *Simon* v. *Southern Ry. Co.*..... 115

FRAUD. See **Judgments and Decrees; Patents.**

FRAUDULENT CONVEYANCES. See **Bankruptcy.**

FREEDOM OF CONTRACT. See **Constitutional Law.**

FREEDOM OF SPEECH AND PRESS:
Exhibition of moving pictures a business and not part of press or organ of public opinion within meaning of Ohio constitution. *Mutual Film Corp.* v. *Ohio Industrial Comm.* 230, 247
Ohio moving picture censor act of 1913 not violative of Constitution as abridging freedom of speech. *Mutual Film Corp.* v. *Ohio Industrial Comm.*..... 230
Kansas moving picture censorship act of 1913 does not abridge liberty of opinion. *Mutual Film Corp.* v. *Kansas*.. 248

GEORGIA:
Taxes based on ownership of property cannot be enforced against lessee of the property under statutes and leases involved. *Wright* v. *Central of Georgia Ry.*..... 674
Statutes relative to taxation of certain railroads held to make fee exempt from taxation other than that provided for in favor of lessee as well as lessor. *Wright* v. *Central of Georgia Ry.*..... 674
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GOVERNMENT CONTRACTS. See **Contracts.**

GOVERNMENTAL POWERS AND FUNCTIONS: PAGE

While legislature declares policy of the law and fixes legal principles to control in given cases, an administrative body may be empowered to ascertain facts and conditions to which such policy and principles applicable. *Mutual Film Corp.* v. *Ohio Industrial Comm.*. 230, 247

See **Congress; Delegation of Power; President; States.**

GRANTOR AND GRANTEE:

Where corporation organized simply to take title to lands and its first business was to record deeds from owners of practically all of its stock, and there is doubt as to whether they were actually delivered until then, difference in legal personality gives latter no greater rights than former; and fact that third parties held stock of the corporation as collateral for debts of principal stockholder did not alter situation. *Linn & Lane Timber Co.* v. *United States* 574

HEIRSHIP. See **Indians.**

HEPBURN ACT:

Considerations in construing. See *United States* v. *Louisville & Nashville R. R. Co.* 318

HOMESTEADS. See **Public Lands.**

HOSPITALS:

Validity of regulation of hours of service of women employed in. See *Bosley* v. *McLaughlin* 385

HOURS OF LABOR:

Reasonable regulations limiting hours of labor of women are within scope of state legislative action. *Miller* v. *Wilson* . . . 373

Limit of reasonable exertion of protective authority of State over women not overstepped and liberty of contract unduly abridged by statute prescribing eight hours a day or forty-eight hours a week as maximum of labor. *Miller* v. *Wilson* 373

Bosley v. *McLaughlin*. 385

Hours of labor of women employed as pharmacists and student nurses in hospitals is subject to legislative control; and limiting such service to eight hours a day or maximum of forty-eight hours a week is not unconstitutional as denial of due process of law or invasion of liberty of contract. *Bosley* v. *McLaughlin*. 385

Exception of graduate nurses from operation of statute limiting hours of service of women not so arbitrary, either as

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to female pharmacists or student nurses in hospitals, as to make statute denial of equal protection of the law. *Id.*
California statute of 1911, relative to hours of service of women, not unconstitutional either as unwarranted invasion of liberty of contract or as denying equal protection of the law. *Miller* v. *Wilson* 373
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IMMUNITY OF WITNESSES. See **Criminal Law; Witnesses.**

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IMPORTS. See **Customs Law.**

INDIANA:
Safety appliance statute superseded by Federal act so that penalties imposed by former not recoverable as to cars operated on interstate railroads although engaged only in intrastate traffic. *Southern Ry. Co.* v. *Railroad Comm. of Indiana.* 439

INDIANS:
Qualification in § 6, act of 1908, removing restrictions upon alienation of allotments to members of Five Civilized Tribes, means Federal, not state, law. *Truskett* v. *Closser.* 223
Title under lease made by guardian of Indian minor pursuant to provisions of act of May 27, 1908, held superior to that under lease made by minor after removal of disabilities by state court under state law. *Id.*
Laws of Oklahoma, continued by Enabling Act, conferring rights of majority on minors, not effective against action of Congress in act of 1908 relative to disposition of allotments of minor members of Five Civilized Tribes. *Id.*
Under act of May 27, 1908, 35 Stat. 312, probate courts of Oklahoma have jurisdiction over disposition of property of Indian minors, subject to rules and regulations of Secretary of Interior. *Id.*
Oklahoma courts have held that under § 7 of Original Creek Agreement of 1901, non-citizen husband not to be counted in determining distributive shares for purpose of allotment, but under tribal laws entitled to take as heir of deceased wife allottee. *Reynolds* v. *Fewell.* 58
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The construction of an Indian tribal law by the Supreme Court of Oklahoma, while reviewable here, will not be overturned in debatable case when rule has long governed transfers of property. *Reynolds* v. *Fewell*. 58

Provision of Supplemental Creek Agreement of 1902 as to law governing descent and distribution of allotments not interpretation but repeal of similar provision in Original Agreement of 1901, without affecting its meaning as to cases governed by it. *Id.*

Quære as to ascertainment of heirship of deceased allottee who took under § 28 of Original Creek Agreement. *Shellenbarger* v. *Fewell* 68

Active exercise of Federal authority in suppressing introduction of liquor into Indian country under act of March 1, 1895, held suspended pending exertion of state authority on subject prescribed by Oklahoma Enabling Act. *Joplin Mercantile Co.* v. *United States* 531

Oklahoma Enabling Act did not repeal acts of 1892 and 1897, prohibiting introduction of liquor into Indian country within Oklahoma either as to interstate or intrastate shipments, but as to intrastate transactions made act of 1895 unenforceable. *Id.*

Construction and sufficiency of indictment for conspiring to introduce liquor into Indian country. *Id.*

INDICTMENT:

Construction and sufficiency of indictment for conspiring to introduce liquor into Indian country. *Joplin Mercantile Co.* v. *United States* 531

IN FORMA PAUPERIS:

Suits *in forma pauperis* under act of 1892 as amended by act of 1910, allowable in the same discretion as to merit as under former act granting right to plaintiff in court of first instance. *Kinney* v. *Plymouth Rock Squab Co*. 43

Allowance of right to prosecute writ of error from this court *in forma pauperis* subject to judicial discretion as to good faith and merit. *Id.*

Denial of right to prosecute writ of error *in forma pauperis* where, in absence of petition, proposed transcript discloses lack of merit. *Id.*

INFRINGEMENT OF PATENT. See **Patents.**

INJUNCTION: PAGE

Enforcement of judgment obtained by fraud or without service of process may be enjoined by Federal court. *Simon* v. *Southern Ry. Co.* 115

Section 720, Rev. Stat., does not affect this jurisdiction. *Id.*

Rule obtains whether case one removed from state court to, or originally commenced in, Federal court. *Id.*

Judgment by default against foreign corporation in suit based on cause of action arising in another State, where in absence of resident agent service of process was made on Secretary of State under state law, is absolutely void and Federal court may enjoin. *Id.*

Rule that equity will not enjoin collection of taxes where adequate remedy at law, applied. *Dalton Machine Co.* v. *Virginia* 699

Enforcement of state police statute not enjoined as violative of equal protection of the law where bill fails to show as to attacking party any injury warranting resort to equity. *Bosley* v. *McLaughlin*. 385

INSPECTION OF BOOKS AND PAPERS:

What contemplated by § 20, Act to Regulate Commerce, as amended. See *United States* v. *Louisville & Nashville R. R. Co.*. 318

INSTRUCTIONS TO JURY:

Sufficiency as to assumption of risk. See *Seaboard Air Line* v. *Padgett*. 668

INTEREST:

Surety, if answerable at all for interest beyond penalty of bond can only be held for such as accrues from unjustly withholding payment after notice of default. *United States* v. *United States Fidelity Co.* 512

Delay of Government in pressing claim against contractor for partial payments received, not waiver of interest. *Id.*

INTERSTATE COMMERCE:

1. *What constitutes:* Character of commerce tested by actual transaction, not by methods employed, distance between points, or domicil or character of parties. *Kirmeyer* v. *Kansas* 568

Character of transaction controlled by substance, not form. *Heyman* v. *Hays*. 178

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The essential nature of the movement of freight and not

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form of bill of lading determines character of commerce involved. *Illinois Central R. R.* v. *Louisiana R. R. Comm.*.. 157

Business of taking in one State orders for portraits made in another is interstate commerce, and if original order contemplates option on part of purchaser to have frame also sent from other State, the business is one affair and exempt from license fee in State where sale made. *David* v. *Virginia* 697

Section 3 of Act to Regulate must be read in connection with amendments to, and subsequent provisions of, the act, by which term transportation covers entire carriage and services in connection with receipt and delivery of property, including terminal facilities. *Pennsylvania Co.* v. *United States*. 351

2. *Power of Congress over:* Power of Congress to regulate interstate commerce, when exercised, is exclusive and *ipso facto* supersedes existing state legislation on subject. *Southern Ry. Co.* v. *Railroad Comm. of Indiana* 439

Congress may regulate interstate transportation by ferry. *Wilmington Transp. Co.* v. *California R. R. Comm.* 151

3. *Power of States over:* In absence of action by Congress, State may prevent unreasonable charges for ferriage from point of departure within borders. *Wilmington Transp. Co.* v. *California R. R. Comm*..... 151

Switching empty cars to and from connection with interstate railroad to side track within terminal of another railroad for purpose of loading with goods intended for interstate commerce, constitutes part of such commerce which Congress has regulated to exclusion of States. *Illinois Central R. R.* v. *Louisiana R. R. Comm.*. 157

4. *Preferences and discriminations:* Section 3 of Act to Regulate forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; and whether such exists is a question of fact. *Pennsylvania Co.* v. *United States*.... 351

Prohibitions against unjust discriminations relate to giving preferences by means of consent judgments or waivers of defenses. *Phillips Co.* v. *Grand Trunk West. Ry.*. 662

5. *Reparation:* Measure of damages to shipper is pecuniary loss inflicted upon him as result of giving rebates to other; and such loss must be proved, as to which findings raise presumption. *Meeker & Co.* v. *Lehigh Valley R. R.*..... 412

Allowance of counsel fees under §§ 8, 16, Act to Regulate, is for services in action on award and not those in proceeding

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before Commission. *Meeker & Co.* v. *Lehigh Valley R. R.* 412, 434
When and to what extent question as to allowance of counsel fees under § 16 of Act to Regulate open in this court. *Meeker & Co.* v. *Lehigh Valley R. R.* 412
Two reports of Commission in same proceeding, the later affirmatively showing it to be supplemental, read together. *Id.*
Report of Commission holding rate excessive and declaring reasonable rate, and reparation order based thereon, held properly admitted as *prima facie* evidence of facts therein contained in another and identical proceeding between same parties which could have been consolidated. *Meeker* v. *Lehigh Valley R. R.* 434
Finding of commission in general investigation as to unreasonableness of advance in rate on specified commodity inures to benefit of every shipper who has paid rate and who asserts claim within time fixed by law. *Phillips Co.* v. *Grand Trunk West. Ry.* 662
Shipper paying charges prior to Hepburn Act and commencing proceedings more than year after passage of act cannot recover on strength of finding of commission as to unreasonableness of rate made in general proceeding to which he was not party. *Id.*
Facts stated in order of reparation by Commission held to sustain award. *Meeker & Co.* v. *Lehigh Valley R. R.* 412
Objections to portions of reports of Commission awarding reparation waived by failure to direct trial court's attention thereto. *Id.*
Quære, as to responsibility of connecting carrier for reparation before hearing by Commission. *Phillips Co.* v. *Grand Trunk West. Ry.* 662
Purpose of joint resolution postponing effective date of Act of 1906 was to cause act to speak and operate at end of postponed period as if that time of its passage, giving full year after expiration of extended period for presenting accrued claims. *Meeker & Co.* v. *Lehigh Valley R. R.* 412
Effect of § 16 of Act to Regulate as amended in 1906 was to extend time for invoking action by Commission on complaints for damages to two years from accrual of claim, but until one year after passage of act as to all claims accruing before its passage. *Meeker & Co.* v. *Lehigh Valley R. R.*, 412, 434
In amending § 16, Act to Regulate, Congress intended to

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take all claims, other than those already barred, out of operation of state laws and subject them to uniform limitations of its own creation. *Meeker & Co.* v. *Lehigh Valley R. R.*..... 412

Limitations in § 1047, Rev. Stat., do not relate to a liability accruing under §§ 8, 9, 14, 16 of Act to Regulate, but only to suits involving punitive penalties. *Id.*

6. *Burdens on and interference with:* State law interfering with right or act of sending beer from one State to another, or with handling same, conflicts with Constitution. *Kirmeyer* v. *Kansas*..... 568

Selling of liquor under strictly mail order business and delivery within State to carrier for through interstate shipment, beyond control of State. *Heyman* v. *Hays*..... 178

Southern Operating Co. v. *Hays*..... 188

Moving picture films brought from one State into another subject to police regulation of latter, even before delivery by consignee to exhibitor. *Mutual Film Corp.* v. *Ohio Industrial Comm*..... 230, 247

Where provisions for censorship of moving pictures relate only to films intended for exhibition within State and they are distributed to persons within State for exhibition, there is no burden imposed on interstate commerce. *Id.*

State may not impose privilege tax on concern doing strictly interstate business because goods within State are capable of use in intrastate business and receive attention within State. *Heyman* v. *Hays*..... 178

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Scope of protection against state burdens on right to do interstate commerce. *Id.*

Order of state railroad commission requiring carriers to exchange freight and passengers in accordance with provision of act establishing commission, construed by state court as relating only to intrastate commerce, held not to disregard needs of, or be burden upon, interstate commerce. *Michigan Cent. R. R.* v. *Michigan Railroad Comm*..... 615

Presumption that state court will not so construe and enforce order of railroad commission as to interfere with or obstruct interstate commerce. *Id.*

State may not exclude from its limits corporation engaged in interstate commerce. *Heyman* v. *Hays*..... 178

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In absence of action by Congress, State may exercise reasonable authority as to matters of interstate or foreign commerce which are distinctly local in character. *Wilmington Transp. Co.* v. *California R. R. Comm.*. 151

Relation of State to, and power over, interstate commerce. *Heyman* v. *Hays*. 178

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Order 295 of Louisiana Railroad Commission, relative to switching cars between connecting carriers and conformity to rates established, held burden upon and attempt to regulate interstate commerce. *Illinois Central R. R.* v. *Louisiana R. R. Comm.* 157

Kansas moving picture censorship act of 1913 does not interfere with interstate commerce. *Mutual Film Corp.* v. *Kansas*. 248

Ohio moving picture censor act of 1913 not violative of Constitution as burden on interstate commerce. *Mutual Film Corp.* v. *Ohio Industrial Comm*. 230

7. *Tariffs, conclusiveness of:* Amount to which liability of carrier limited and additional rate for additional liability must be stated in filed tariff and equally applicable. *Pierce Co.* v. *Wells, Fargo & Co*. 278

Legality of contract for limited liability depends upon acceptance of parties and upon filed tariff and requirement of shipper to take notice and be bound thereby. *Id.*

Rule that conclusiveness of filed tariff rates does not relate to attempted fraudulent acts or billings, not applicable where transaction open and above board, character of goods known to both parties, and shipper competent to agree. *Id.*

8. *Passes:* Permission given to carriers subject to Act to Regulate to interchange passes includes interchange between those subject and those not subject to act. *United States* v. *Erie R. R. Co*. 259

Exchange of passes between carriers justified. *Id.*

9. *Inspection of accounts, etc., of carriers:* Section 12 of Act to Regulate does not make provision for inspection of accounts and correspondence of carriers authorized by Commission; that feature being added by Hepburn Act amending § 20. *United States* v. *Louisville & Nashville R. R. Co*. . . 318

Section 20 of Act to Regulate does not provide for compulsory inspection of correspondence of carriers, but is limited to accounts, including records, documents and memoranda. *Id.*

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Right of inspection of what included within § 20 of Act to Regulate, as amended by Hepburn Act, includes accounts, etc., kept and made prior to latter act. *Id.*

10. *Original Package Doctrine:* Original package doctrine does not extend to moving picture films transported, delivered and used as in this case. *Mutual Film Corp.* v. *Ohio Industrial Comm.*.....230, 247

As to character of packages in which goods transported. See *Kirmeyer* v. *Kansas*..... 568

11. *Wilson Act, application of:* Transportation is not complete until delivery to consignee or expiration of reasonable time therefor, and prior thereto Wilson Act not applicable. *Kirmeyer* v. *Kansas*..... 568

12. *Generally:* In construing Hepburn Act, history of origin and report of Commission recommending passage may be referred to. *United States* v. *Louisville & Nashville R. R. Co.* 318

Principles governing the operation of the commerce clause of the Constitution. *Heyman* v. *Hays*..... 178

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Where shipper has paid full freight charges computed on full weight of shipment equalling minimum capacity of cars applied for and permitted for the class of traffic by the filed tariff, he cannot afterwards be compelled to pay an excess on recomputation of charges based on minimum capacity of larger cars supplied by the carrier on account of shortage of the size applied for, all parties having acted in good faith; and failure to show that carrier did not comply with rules in regard to noting fact that smaller cars were supplied for its own convenience, does not require shipper to pay charges on marked capacity of the cars actually used. *St. Louis S. W. Ry.* v. *Spring River Stone Co.*..... 718

See **Interstate Commerce Commission.**

INTERSTATE COMMERCE COMMISSION:

1. *Jurisdiction of:* No authority beyond that already conferred by Act to Regulate Commerce can be derived by Commission from resolution passed by only one branch of Congress. *United States* v. *Louisville & Nashville R. R. Co.* 318

It is for the Commission to correct unreasonableness in limitation of liability; until then the amount specified in filed tariff stands. *Pierce Co.* v. *Wells, Fargo & Co.*..... 278

2. *Orders within jurisdiction:* Commission may make such orders relative to terminal facilities as will prevent creation

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of monopolies within prohibitions and limitations of Anti-trust Act. *Pennsylvania Co.* v. *United States* 351
Jurisdiction exists to require interstate carrier to receive and transport over its terminals carload interstate freight from one carrier having physical connection with its lines on same terms as applied to other connecting carriers similarly situated; and such an order is not unconstitutional. *Id.*
Order of Commission requiring interstate carrier to receive and transport over its terminals carload interstate freight from one carrier having physical connection with its lines on same terms on which it performs such service for other connecting carriers similarly situated, is regulation of terminal facilities within power properly delegated by Congress. *Id.*
3. *Awards of reparation:* Under § 16 of Act to Regulate, as amended in 1906, report awarding reparation need not state evidential facts, but must contain findings of ultimate facts, which are taken as *prima facie* true. *Meeker & Co.* v. *Lehigh Valley R. R.* 412
Statute making findings and reparation order of Commission *prima facie* evidence of facts therein stated is merely rule of evidence and not unconstitutional as abridging right of trial by jury or denying due process of law. *Id.*
4. *Judicial power over:* Courts cannot set aside order of Commission in regard to interchange of freight by carriers which does not contravene any constitutional limitation and is within authority of that body and supported by testimony. *Pennsylvania Co.* v. *United States* 351
5. *Generally:* Unenforced ruling of Commission without weight accorded to contemporaneous construction of statute. *United States* v. *Erie R. R. Co.* 259
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While court below may not allow persons not parties to intervene in settling decree on mandate, this court may take action on original petition for intervention here. *Evens & Howard Brick Co.* v. *United States* 210
Persons not entitled to intervene in court below because not parties may be entitled to be heard in this court concerning decree in so far as it may operate prejudicially to their rights. *United States* v. *St. Louis Terminal* 194

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tion of liquor into Indian country under act of March 1, 1895, held suspended pending exertion of state authority on subject prescribed by Oklahoma Enabling Act. *Joplin Mercantile Co.* v. *United States* 531

Oklahoma Enabling Act did not repeal acts of 1892 and 1897, prohibiting introduction of liquor into Indian country within Oklahoma either as to interstate or intrastate shipments, but as to intrastate transactions made act of 1895 unenforceable. *Id.*

Construction and sufficiency of indictment for conspiring to introduce liquor into Indian country. *Id.*

Selling of liquor under strictly mail order business and delivery within State to carrier for through interstate shipment, beyond control of State. *Heyman* v. *Hays*..... 178

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Transportation is not complete until delivery to consignee or expiration of reasonable time therefor, and prior thereto Wilson Act not applicable. *Kirmeyer* v. *Kansas*..... 568

JUDGMENTS AND DECREES:

Enforcement of judgment obtained by fraud or without service of process may be enjoined by Federal court. *Simon* v. *Southern Ry. Co.* 115

Section 720, Rev. Stat., does not affect this jurisdiction. *Id.*

Rule obtains whether case one removed from state court to, or originally commenced in, Federal court. *Id.*

Judgment without process absolutely void under Constitution and principles of natural justice. *Id.*

Quære, whether act of foreign corporation against whom judgment entered amounted to doing business within state. *Id.*

Judgment by default against foreign corporation in suit based on cause of action arising in another State, where in absence of resident agent service of process was made on Secretary of State under state law, is absolutely void and Federal court may enjoin. *Id.*

Controlling effect of judgment of state court. See *Coppage* v. *Kansas* 1

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JUDICIAL CODE:

Section 237 construed. *Olympia Mining Co.* v. *Kerns*.... 211

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Section 250, cl. 6, construed. *Washington, A. & Mt. V. Ry.* v. *Downey* 190

JUDICIAL DISCRETION:
As to allowing suits *in forma pauperis*. *Kinney* v. *Plymouth Rock Squab Co.* 43
In allowing prosecution of writ of error *in forma pauperis*. *Id.*

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JURISDICTION:
I. **Generally.**
This court has jurisdiction to review question as to effect of proceedings in bankruptcy and discharge as bar to debt held by bankruptcy court to be not provable. *Lesser* v. *Gray* . . . 70
This court does not sit as a revisory board to substitute its judgment for that of the legislature or its administrative agent. *Northern Pacific Ry.* v. *North Dakota* 585
This court will review particular items of a schedule of rates where a commodity has been segregated and carrier required to transport it at loss or without substantial compensation. *Id.*
Although Federal court may have made orders continuing case in which petition for removal and bond filed, and even dismissed it for want of jurisdiction, if question of its authority had never been presented to or decided by it, state court not bound to respect such orders as conclusive of question of jurisdiction. *Iowa Central Ry.* v. *Bacon.* 305
While court below may not allow persons not parties to intervene in settling decree on mandate, this court may take action on original petition for intervention here. *Evens & Howard Brick Co.* v. *United States* 210
Enforcement of judgment obtained by fraud or without service of process may be enjoined by Federal court. *Simon* v. *Southern Ry. Co.*. 115
Section 720, Rev. Stat., does not affect this jurisdiction. *Id.*
Rule obtains whether case one removed from state court to, or originally commenced in, Federal court. *Id.*
Of Federal Court not affected by state statute regulating venue or establishing rules of procedure. *Id.*
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II. **Jurisdiction of this court.**
1. *Over judgments of Circuit Court of Appeals;* Controversy

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over distribution of fund in hands of trustee in bankruptcy, proceeds of property attached by creditor, within four months of petition, lien of which has been preserved to estate, is one arising in bankruptcy proceedings, appealable under Circuit Court of Appeals Act and not controlled by § 25 of Bankruptcy Act. *Globe Bank* v. *Martin* 288

Although jurisdiction of Federal court may have been invoked solely on account of diverse citizenship, if object of suit quieting title to grant of former sovereign, depending on treaty and laws of United States and acts of Federal officers thereunder, this court has jurisdiction to review. *Wilson Cypress Co.* v. *Del Pozo*..... 635

Where bill presents case of diversity of citizenship only, decree of Circuit Court of Appeals final. *McCormick* v. *Oklahoma City*..... 657

2. *Over judgments of District Courts:* Authority to review case from District Court where constitutional question not frivolous involved, embraces duty of determining all questions, including those otherwise within exclusive jurisdiction of District Court. *Brolan* v. *United States*..... 216

Contention that § 2 of act of 1909, regulating importation of opium, is unconstitutional as beyond power of Congress, held frivolous and affording no basis for jurisdiction under § 238, Judicial Code. *Id.*

3. *Over judgments of Court of Appeals of District of Columbia:* Test of jurisdiction of this court under cl. 6, § 250, Judicial Code, is character of statute and not that of act to which statute applies. *Washington, A. & Mt. V. Ry. Co.* v. *Downey*..... 190

Law of United States within meaning of cl. 6, § 250, Judicial Code, only such as not local in application to District of Columbia. *Id.*

Statute of United States, general in application but declared unconstitutional except as it relates to District of Columbia and Territories, is not a law of the United States within meaning of cl. 6, § 250, Judicial Code. *Id.*

Employers' Liability Act of 1906 held applicable to accident occurring on interstate train in District of Columbia as local statute and not one contemplated by cl. 6, § 250, Judicial Code. *Id.*

4. *Over judgments of state courts:* Power to review under § 237, Jud. Code, rests upon substance as well as form and

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cannot arise from mere assertion of formal right which is void of merit and frivolous. *Seaboard Air Line* v. *Padgett* 668

In reviewing under § 237, Jud. Code, case arising under Employers' Act, court may not consider non-Federal questions not essential to recovery thereunder. *Id.*

Where highest state court reversed holding that Federal Employers' Liability Act applied to case, this court has jurisdiction to review under § 237, Judicial Code. *Toledo, St. L. & W. R. R.* v. *Slavin* 454

Where highest state court, in overruling demurrer, affirmed that Federal Constitution guaranteed freedom of speech, but held statute on which indictment based valid in that respect and not bad for uncertainty, citing cases decided by this court as authority, jurisdiction to review exists under § 237, Judicial Code. *Fox* v. *Washington*. 273

Jurisdiction not existent under § 237, Judicial Code, to review judgment of state court sustaining demurrer to complaint grounded on statutory limitations, unless Federal questions, basis for such jurisdiction, presented or suggested to court below. *Olympia Mining Co.* v. *Kerns*..... 211

The construction of an Indian tribal law by the Supreme Court of Oklahoma, is reviewable here. *Reynolds* v. *Fewell* 58

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III. **Of Circuit Court of Appeals.** See *supra*, II, 1.

IV. **Of District Courts.**

Where petition alleges damages in excess of $2,000, but prayer for recovery is for less, jurisdictional amount lacking and filing of petition and bond not effective to remove. *Iowa Central Ry.* v. *Bacon*. 305

Foreign corporation held not to have had a regular and established place of business in district which would subject it to jurisdiction of Federal court under act of March 3, 1897. *Tyler Co.* v. *Ludlow-Saylor Wire Co*. 723

Court without power to appoint commission to levy tax for payment of county bonds on failure to act of officers appointed for that purpose under state statute. *Yost* v. *Dallas County* 50

Of suit on county bonds where diversity of citizenship exists. *Id.*

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V. **Of Interstate Commerce Commission.** See **Interstate Commerce Commission.**

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VI. **Of state courts.**

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Under act of May 27, 1908, 35 Stat. 312, probate courts of Oklahoma have jurisdiction over disposition of property of Indian minors, subject to rules and regulations of Secretary of Interior. *Truskett* v. *Closser* 223

Quære as to jurisdiction of suit on transitory cause of action against foreign corporation arising in another State based on service of process on agent voluntarily appointed by corporation. *Simon* v. *Southern Ry. Co.* 115

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Kansas moving picture censorship act of 1913 is valid exercise of police power, does not interfere with interstate commerce, abridge liberty of opinion, or delegate legislative power. *Mutual Film Corp.* v. *Kansas* 248

Kansas statute of 1909, making it unlawful for employers to coerce, etc., employés not to join or remain members of labor organizations, as applied to this case, held repugnant to due process clause of Fourteenth Amendment. *Coppage* v. *Kansas* 1

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LABOR UNIONS:

An individual has no inherent right to join a labor union and remain in employ of one unwilling to employ a union man. *Coppage* v. *Kansas* 1

Employers and employés and labor organizations bound by one rule of liberty. *Id.*

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Lessee of railroads built under special charters containing irrepealable contracts against taxation at higher than specified per cent. on income, not subject to ad valorem tax as owner of the property. *Wright* v. *Central of Georgia Ry.* . . . 674

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Exemption of lessor railroad from taxation on its leased road held applicable to betterments made by lessee and to substituted rolling stock. *Wright* v. *Louisville & Nashville R. R.* 687

That owners of railroad, exempt by statute from other than specified tax on income, lease entire road, does not open right of State to tax lessee on fee of property. *Id.*

Taxes based on ownership of property cannot be enforced

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against lessee of the property under statutes of Georgia and leases involved. *Wright* v. *Central of Georgia Ry.* 674
Title under lease made by guardian of Indian minor pursuant to provisions of act of May 27, 1908, held superior to that under lease made by minor after removal of disabilities by state court under state law. *Truskett* v. *Closser* 223

LIBERTY AND PROPERTY:
Liberty and property are co-existent rights recognized by Fourteenth Amendment and are without state interference. *Coppage* v. *Kansas*. 1
State may not indirectly strike down rights of liberty or property by invoking police power to remove inequalities resultant from such rights. *Id.*
Fourteenth Amendment inhibits state restriction of liberty or property rights as public welfare. *Id.*
An individual has no inherent right to join a labor union and remain in employ of one unwilling to employ a union man. *Id.*
Employers and employés and labor organizations bound by one rule of liberty. *Id.*
Condition precedent to employment that employé agree to refrain from affiliation with labor union not an infringement of constitutional freedom. *Id.*

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diligence shown in getting service, running of statute is interrupted and rights of United States saved. *Linn & Lane Timber Co.* v. *United States* 574

Where secret transfer of wrongfully held land is made through medium of corporation for purpose of busying United States with wrong person until statute has run, service on such person held to avoid statute. *Id.*

Purpose of joint resolution postponing effective date of Commerce Act of 1906 was to cause act to speak and operate at end of postponed period as if that time of its passage, giving full year after expiration of extended period for presenting accrued claims. *Meeker & Co.* v. *Lehigh Valley R. R.*... 412

Effect of § 16 of Act to Regulate Commerce as amended in 1906 was to extend time for invoking action by Commission on complaints for damages to two years from accrual of claim, but until one year after passage of act as to all claims accruing before its passage. *Meeker & Co.* v. *Lehigh Valley R. R.* 412, 434

In amending § 16, Act to Regulate Commerce, Congress intended to take all claims, other than those already barred, out of operation of state laws and subject them to uniform limitations of its own creation. *Meeker & Co.* v. *Lehigh Valley R. R.* 412

Limitations in § 1047, Rev. Stat., do not relate to a liability accruing under §§ 8, 9, 14, 16 of Act to Regulate Commerce, but only to suits involving punitive penalties. *Id.*

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Order 295 of Railroad Commission, relative to switching cars between connecting carriers and conformity to rates established, held burden upon and attempt to regulate interstate commerce. *Illinois Central R. R.* v. *Louisiana R. R. Comm.* 157

Article 55, Code of Practice, relative to right of one sued in possessory action to bring petitory action, is not unconstitutional under Fourteenth Amendment. *Grant Timber Co.* v. *Gray*..... 133

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MANDAMUS:

Where Interstate Commerce Commission has applied for mandamus broader than law permits, and no amendment made narrowing demand, but petition dismissed without prejudice, proper practice is to affirm order and not reverse so as to grant relief within limits of law. *United States* v. *Louisville & Nashville R. R. Co.* 318

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Decision and mandate in case under Anti-trust Act not to be interpreted as safeguarding one public interest by destroying another, or as making movement of transportation freer in some channels by obstructing it in others. *United States* v. *St. Louis Terminal* 194

MASSACHUSETTS:

Sufficiency under Massachusetts law of delivery of goods sold or mortgaged. *Duffy* v. *Charak* 97

MASTER AND SERVANT:

Right to contract for services is within right of personal liberty and that of private property. *Coppage* v. *Kansas* .. 1

Employer and employé have constitutional right to dispense with services and quit service, respectively, on account of affiliation or non-affiliation with labor union. *Id.*

Employer and employé may insist that stipulation as to ground for terminating employment shall be a *sine que non* of inception or continuance of employment. *Id.*

An individual has no inherent right to join a labor union and remain in employ of one unwilling to employ a union man. *Id.*

Employers and employés and labor organizations bound by one rule of liberty. *Id.*

Master and servant's coextensive liberty of contract not subject to legislative discrimination. *Id.*

Condition precedent to employment that employé agree to refrain from affiliation with labor union not an infringement of constitutional freedom. *Id.*

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a taking of property without due process of law, nor interference with and regulation of interstate commerce. *Michigan Cent. R. R.* v. *Michigan Railroad Comm.* 615

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Coal mining proper subject for police regulation; measure of relief for determination of legislature. *Rail & River Coal Co.* v. *Ohio Industrial Comm.* 338

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Under Missouri practice, sustaining of demurrer by some of defendants and allowing plaintiff to take involuntary nonsuit as to them with leave to set it aside, does not end suit as to them and make the case removable as to remaining non-resident defendants. *American Car Co.* v. *Kettelhake* . . 311

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MORTGAGES:

Goods under attachment may be sold or mortgaged upon notice to officer, as effectively as though a true delivery made. *Duffy* v. *Charak.* 97

Sufficiency under Massachusetts law of delivery of goods sold or mortgaged. *Id.*

Holder of recorded mortgage on personalty in Massachusetts, made within four months of petition in bankruptcy, took possession after attachment of property and day before petition filed. Mortgagee held entitled to his security to extent mortgage represented cash advanced at time given. *Id.*

Mortgage on property in Porto Rico held one on crops and not on land. *Gallardo* v. *Noble* 135

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MOVING PICTURES:

Exhibition of moving pictures a business and not part of press or organ of public opinion within meaning of Ohio constitution. *Mutual Film Corp.* v. *Ohio Industrial Comm.* 230, 247

Moving picture films brought from one State into another subject to police regulation of latter, even before delivery by consignee to exhibitor. *Id.*

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Original package doctrine does not extend to moving picture films transported, delivered and used as in this case. *Id.*

Where provisions for censorship of moving pictures relate only to films intended for exhibition within State and they are distributed to persons within State for exhibition, there is no burden imposed on interstate commerce. *Id.*

While general terms of censorship may furnish no exact standard of requirements, they may become certain and useful guides in reasoning and conduct. *Id.*

Quære, whether moving pictures exhibited in other than places of amusement within Ohio censorship statute. *Id.*

Kansas moving picture censorship act of 1913 is valid exercise of police power, does not interfere with interstate commerce, abridge liberty of opinion, or delegate legislative power. *Mutual Film Corp.* v. *Kansas* 248

Importer of moving pictures without standing to attack state statute penalizing exhibitors or those permitting exhibitions; nor can he enlarge character of police statute by asserting constitutional rights. *Id.*

That an exchange for moving pictures can more conveniently subject films to censorship than exhibitors can does not give non-exhibiting owner of exchange standing to attack statute as to matters which affect only exhibitors. *Id.*

MUNICIPAL CORPORATIONS:

Authority of municipality to issue certificates of indebtedness carries authority to make them negotiable. *Denver* v. *Home Savings Bank* 101

No essential difference between municipal bonds and certificates of indebtedness. *Id.*

Presumption that authority to raise money by sale of municipal bonds and certificates of indebtedness carries authority to put same in marketable form. *Id.*

NATIONAL GUARD:

Officer whose personal rights are not directly violated or interfered with not entitled, in this court, to question validity and constitutionality of order issued by Secretary of War. *Stearns* v. *Wood* 75

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Legislation of 1905, empowering city to acquire lands for new water supply, not unconstitutional as impairing obligation of contract of charter rights of corporation authorized to acquire property in same watershed under Railroad Act, no proceedings having been taken by it beyond filing of map. *Ramapo Water Co.* v. *New York* 579

Railroad Act of New York requires corporation intending to exercise eminent domain not only to file maps of property to be taken but also to file written notice to the occupants thereof and mere filing of map does not create rights against the State. *Id.*

NORTH DAKOTA:

Maximum intrastate rates on coal in carload lots fixed by c. 51, Laws of North Dakota, held unreasonable and amounting to attempt to take property of carrier without due process of law. *Northern Pacific Ry.* v. *North Dakota* 585

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Imputation to corporation of knowledge of individual controlling it. *Linn & Lane Timber Co.* v. *United States* 574

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Exhibition of moving pictures a business and not part of press or organ of public opinion within meaning of Ohio constitution. *Mutual Film Corp.* v. *Ohio Industrial Comm.* 230, 247

Quære, whether moving pictures exhibited in other than places of amusement within Ohio censorship statute. *Id.*

Ohio moving picture censor act of 1913 not violative of Constitution as depriving of due process of law; as burden on interstate commerce; as abridging freedom of speech; or as delegating legislative authority. *Mutual Film Corp.* v. *Ohio Industrial Comm.*..... 230

Ohio Run of Mine or Anti-screen Law of 1914 is not unconstitutional under due process provision of Fourteenth

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Amendment; nor under provision of state constitution prescribing power of legislature. *Rail & River Coal Co.* v. *Ohio Industrial Comm.* 338

OKLAHOMA:

Enabling Act did not repeal acts of 1892 and 1897, prohibiting introduction of liquor into Indian country within Oklahoma either as to interstate or intrastate shipments, but as to intrastate transactions made act of 1895 unenforceable. *Joplin Mercantile Co.* v. *United States* 531

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Offer of pardon for offense connected with testimony sought not effective to deprive witness of immunity. *Id.*

Legislative immunity and pardon differentiated. *Id.*

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One not within class penalized by state police statute cannot attack constitutionality. *Mutual Film Corp.* v. *Kansas* 248

Importer of moving pictures without standing to attack state statute penalizing exhibitors or those permitting exhibitions; nor can he enlarge character of police statute by asserting constitutional rights. *Id.*

That an exchange for moving pictures can more conveniently subject films to censorship than exhibitors can does not give non-exhibiting owner of exchange standing to attack statute as to matters which affect only exhibitors. *Id.*

While court below may not allow persons not parties to in-

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tervene in settling decree on mandate, this court may take action on original petition for intervention here. *Evens & Howard Brick Co.* v. *United States*. 210

Persons not entitled to intervene in court below because not parties may be entitled to be heard in this court concerning decree in so far as it may operate prejudicially to their rights. *United States* v. *St. Louis Terminal*. 194

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Exchange of passes between carriers justified. *United States* v. *Erie R. R. Co*. 259

Permission given to carriers subject to Act to Regulate Commerce to interchange passes includes interchange between those subject and those not subject to act. *Id.*

PATENTS:

While patent obtained by fraud not void or subject to collateral attack, it may be directly assailed by Government in suit against patentee or grantee, which can only be sustained by proof producing conviction. *Wright-Blodgett Co.* v. *United States*. 397

Despite satisfactory proof of fraud in obtaining patent, if legal title has passed *bona fide* purchase for value is perfect defense which grantee must establish affirmatively in order to defeat Government's right to cancel. *Id.*

Foreign corporation held not to have had a regular and established place of business in district which would subject it to jurisdiction of Federal court under act of March 3, 1897. *Tyler Co.* v. *Ludlow-Saylor Wire Co*. 723

Where agent solicits order in one State and forwards it to principal at home office in another State and goods are shipped direct by principal, sale is consummated in latter State and does not constitute infringement in former. *Id.*

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Decision of state court as to application of police statute to state of facts not involved in record here, not anticipated. *Mutual Film Corp.* v. *Ohio Industrial Comm.* 230, 247

Question of unconstitutional delegation of legislative power not determined in case where delegate body non-existent. *Id.*

Contention not presented on pleadings nor involved in disposition of case below, not considered here. *Pierce Co.* v. *Wells, Fargo & Co.* 278

Objections to portions of reports of Interstate Commerce Commission awarding reparation waived by failure to direct trial court's attention thereto. *Meeker & Co.* v. *Lehigh Valley R. R.* 412

Ruling of highest state court as to enforcement of vendor's statutory lien is matter of state law not reviewable here. *Lehman* v. *Gumbel* 448

Where lower courts held land not taxable but did not pass on other questions of title involving questions of local law and weighing of conflicting evidence, this court in reversing will not finally pass on such other questions, but will remand for further proceedings. *Wilson Cypress Co.* v. *Del Pozo* 635

Disposition of case: Where Interstate Commerce Commission has applied for mandamus broader than law permits, and no amendment made narrowing demand, but petition dismissed without prejudice, proper practice is to affirm order and not reverse so as to grant relief within limits of law. *United States* v. *Louisville & Nashville R. R. Co.* 318

Where inferior state court attempts to proceed under attachment based on vendor's statutory lien filed within four months of petition in bankruptcy and state supreme court holds that there is no vendor's lien but only ordinary attachment, peremptory writ of prohibition against state court and relegating parties to bankruptcy court is the proper practice. *Lehman* v. *Gumbel* 448

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reverse but merely determines whether they support judgment. *United States* v. *United States Fidelity Co.* 512

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Judgment of state court as to operation and effect of state statute not controlling on this court when considering constitutionality. *Coppage* v. *Kansas* 1

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Power exercised to withdraw public lands from private acquisition has never been repudiated by Congress although subject to disaffirmance thereby. *United States* v. *Midwest Oil Co.*. 459

Land Department has constantly asserted power of Executive to withdraw unappropriated public lands. *Id.*

Long continued executive practice to withdraw public lands, known to and acquiesced in by Congress, raises presumption of legality. *Id.*

Congress may by implication grant power to Executive to administer public domain. *Id.*

No distinction in principle between power to make reservations of portions of public domain and that of withdrawing them from occupation. *Id.*

Executive withdrawal of public lands in aid of future legislation valid. *Id.*

Action of Congress in particular case not to be construed as denial of executive power to withdraw public lands in public interest, of which there is proof of congressional recognition. *Id.*

Silence of Congress equivalent to acquiescence and consent to continuance of executive practice. *Id.*

Act of 1910, authorizing President to withdraw lands, not to be construed as repudiating withdrawals already made. *Id.*

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Where Government relets contract with substantial differences, surety is not released from all obligation, but his liability is measured by actual loss sustained. *United States* v. *United States Fidelity Co.*..... 512
Liability of surety of building contractor becomes fixed on occurrence of default and is not released by failure of Government to have same kind of building erected. *Id.*
Surety, if answerable at all for interest beyond penalty of bond can only be held for such as accrues from unjustly withholding payment after notice of default. *Id.*
Surety of bankrupt has opportunity to share in estate and is barred by discharge, and this though contract for breach of which surety became liable was broken before bankruptcy and surety did not pay consequent damage until thereafter. *Williams* v. *United States Fidelity Co.*..... 549

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Judgment without process absolutely void under Constitution and principles of natural justice. *Id.*

Judgment by default against foreign corporation in suit based on cause of action arising in another State, where in absence of resident agent service of process was made on Secretary of State under state law, is absolutely void and Federal court may enjoin. *Id.*

State may require foreign corporation to designate agents upon whom service of process may be made or, in default, designate one for the purpose, when cause of action arises in State. *Id.*

Quære, whether statutory provision as to service on foreign corporation by service on Secretary of State is satisfied by service on Assistant Secretary in absence of Secretary. *Id.*

Where secret transfer of wrongfully held land is made through medium of corporation for purpose of busying United States with wrong person until statute has run, service on such person held to avoid statute. *Linn & Lane Timber Co.* v. *United States* 574

PROFESSIONAL SERVICES:

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Where inferior state court attempts to proceed under attachment based on vendor's statutory lien filed within four months of petition in bankruptcy and state supreme court holds that there is no vendor's lien but only ordinary attachment, peremptory writ of prohibition against state court and relegating parties to bankruptcy court is the proper practice. *Lehman* v. *Gumbel* 448

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Liberty and property are co-existent rights recognized by Fourteenth Amendment and are without state interference. *Coppage* v. *Kansas* 1

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Interest of citizens: Prior to initiation of some right given by law, citizen has no enforceable interest in public statutes nor private right in land the property of the people. *United States* v. *Midwest Oil Co.* 459

Homesteader to be entitled to patent must have actually resided upon and cultivated the land for a term of five years. *Great Northern Ry.* v. *Hower*. 702

Right of homesteader is statutory and it is essential to show compliance with the statute as prerequisite to obtaining patent. *Id.*

Although acting in good faith, settlement upon land other than that included in entry is not sufficient. *Id.*

Affidavits: Departmental rule requiring homesteader under § 2289, Rev. Stat., to make affidavit as to former entry is addressed to enforcement of laws administered by Land Department, is not inconsistent with any specific statutory provision, and oath required is administered by authority of law as provided in § 125, Criminal Code. *United States* v. *Smull* 405

As respects affidavits required by Land Department, § 125, Criminal Code, must be read in light of § 2246, Rev. Stat. *Id.*

When by valid regulation Land Department requires affidavit to be made before an otherwise competent officer, that officer is authorized to administer the oath under § 125, Criminal Code, and the false swearing is made a crime and the penalty is fixed therefor by Congress and not by Department. *Id.*

Power of Congress: Congress may by implication grant power to executive to administer public domain. *United States* v. *Midwest Oil Co.*. 459

Withdrawals of: Long acquiescence in practice of executive withdrawals of public lands opened by Congress raises presumption of authority. *United States* v. *Midwest Oil Co.*. . 459

Long continued executive practice to withdraw public lands, known to and acquiesced in by Congress, raises presumption of legality. *Id.*

Land Department has constantly asserted power of Executive to withdraw unappropriated public lands. *Id.*

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Power exercised by President to withdraw public lands from private acquisition has never been repudiated by Congress although subject to disaffirmance thereby. *Id.*

No distinction in principle between power of Executive to make reservations of portions of public domain and that of withdrawing them from occupation. *Id.*

Executive withdrawal of public lands in aid of future legislation valid. *Id.*

Action of Congress in particular case not to be construed as denial of executive power to withdraw public lands in public interest, of which there is proof of congressional recognition. *Id.*

Act of 1910, authorizing President to withdraw lands, not to be construed as repudiating withdrawals already made. *Id.*

Act of June 25, 1910, without effect on rights of locators acquired prior to withdrawal order of 1909 and ineffective to validate location made thereafter. *Id.*

Quære as to power of President, in absence of established practice, to withdraw. *Id.*

Cancellation of patents: Decision of Secretary of Interior that patents should be issued, obtained by fraud, not conclusive, but matter open for consideration by courts. *Linn & Lane Timber Co.* v. *United States*..... 574

Where bills to set aside patents for fraud filed and subpœnas delivered for service before statute has run, and reasonable diligence shown in getting service, running of statute is interrupted and rights of United States saved. *Id.*

Trusts in: Bona fide purchase an affirmative defense to claim of one seeking to have trust declared in lands patented. *Great Northern Ry.* v. *Hower* 702

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Statutes of Georgia relative to taxation of certain railroads held to make fee exempt from taxation other than that provided for in favor of lessee as well as lessor. *Id.*

That owners of railroad, exempt by statute from other than specified tax on income, lease entire road, does not open right of State to tax lessee on fee of property. *Wright* v. *Louisville & Nashville R. R.* 687

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There is a rebuttable presumption that rates fixed by State are reasonable and just. *Northern Pacific Ry.* v. *North Dakota* 585

This court will review particular items of a schedule of rates where a commodity has been segregated and carrier required to transport it at loss or without substantial compensation. *Id.*

Maximum intrastate rates on coal in carload lots fixed by c. 51, Laws of North Dakota, held unreasonable and amounting to attempt to take property of carrier without due process of law. *Id.*

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Two cent a mile passenger rate established by c. 41, Acts of 1907 of West Virginia, held unreasonable and an attempt to deprive carriers of property without due process of law. *Norfolk & West. Ry.* v. *West Virginia* 605

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Where suit removable state court loses jurisdiction on filing of petition and bond; but if on face of record and petition case appears non-removable, state court may proceed as if no application for removal. *Iowa Central Ry.* v. *Bacon* . . . 305

Where petition alleges damages in excess of $2,000, but prayer for recovery is for less, jurisdictional amount lacking and filing of petition and bond not effective to remove. *Id.*

Although Federal court may have made orders continuing case in which petition for removal and bond filed, and even dismissed it for want of jurisdiction, if question of its authority had never been presented to or decided by it, state court not bound to respect such orders as conclusive of question of jurisdiction. *Id.*

To make case removable because of non-resident defendant sued jointly with resident defendants, as to which latter case dismissed, such dismissal must have been voluntary act of plaintiff and to have so taken residents out of case as to leave controversy wholly between plaintiff and non-resident. *American Car Co.* v. *Kettelhake* 311

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Indiana safety appliance statute superseded by Federal act so that penalties imposed by former not recoverable as to cars operated on interstate railroads although engaged only in intrastate traffic. *Id.*

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May constitutionally prescribe eight hours a day or forty-eight hours a week as maximum of labor of women. *Miller* v. *Wilson* .. 373

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Reasonable regulations limiting hours of labor of women are within scope of state legislative action. *Miller* v. *Wilson*.. 373

May place reasonable restraints upon liberty of contract without violating due process provision of Fourteenth Amendment and this includes prescribing methods for compensation of coal miners. *Rail & River Coal Co.* v. *Ohio Industrial Comm*.. 338

Regulation of common carriers: Order of Michigan Railroad Commission requiring interchange of cars, freight and passengers, held within power of State, not to be a taking of property without due process of law, nor interference with and regulation of interstate commerce. *Michigan Cent. R. R.* v. *Michigan Railroad Comm*.. 615

May require carrier to permit its equipment to be hauled off its line by other carriers. *Id.*

May require carrier to permit its empty or loaded cars for purposes of loading or delivery of intrastate freight and to permit cars of other carriers loaded with such freight consigned to points on connecting line to be hauled from its line upon the connecting line for purposes of delivery. *Id.*

May compel carrier to accept loaded cars from another line and transport them over its own. *Id.*

May require two railroads to make connection between their tracks to facilitate interchange of traffic without affecting rights secured by Constitution. *Id.*

Have no arbitrary power over rates, and may not select commodity or class of traffic and require its transportation for less than cost or merely nominal compensation. *Northern Pacific Ry.* v. *North Dakota*.. 585

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Lessee of railroads built under special charters containing irrepealable contracts against taxation at higher than specified per cent. on income, not subject to ad valorem tax as owner of the property. *Id.*

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