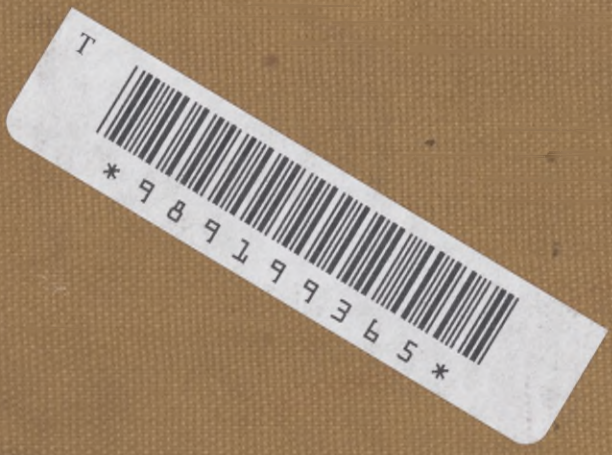

UNITED STATES REPORTS

VOLUME 243

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1916

ERNEST KNAEBEL

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1917

NOTICE

The price of this volume is fixed by statute (§ 226, Judicial Code, 36 U. S. Statutes at Large, 1153) at one dollar and seventy-five cents. Cash must accompany the order. The purchaser must pay the cost of delivery.

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.
WILLIS VAN DEVANTER, Associate Justice.
MAHLON PITNEY, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
JOHN H. CLARKE, Associate Justice.

THOMAS WATT GREGORY, Attorney General.
JOHN WILLIAM DAVIS, Solicitor General.
JAMES D. MAHER, Clerk.
FRANK KEY GREEN, Marshal.

[1] For allotment of The Chief Justice and Associate Justices among the several circuits see next page.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, OCTOBER TERM, 1916.[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, LOUIS D. BRANDEIS, Associate Justice.

For the Third Circuit, MAHLON PITNEY, Associate Justice.

For the Fourth Circuit, EDWARD D. WHITE, Chief Justice.

For the Fifth Circuit, J. C. MCREYNOLDS, Associate Justice.

For the Sixth Circuit, WILLIAM R. DAY, Associate Justice.

For the Seventh Circuit, JOHN H. CLARKE, Associate Justice.

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

For the Ninth Circuit, JOSEPH MCKENNA, Associate Justice.

October 30, 1916.

[1] For next previous allotment see 241 U. S., p. iv.

TABLE OF CASES REPORTED

PAGE

Abella *v.* People of Porto Rico 627
Amendment of Rule 37, section 4. 623
American Bank Note Co. *v.* Blue Ridge Electric Co. 644
American Locomotive Co., Park Square Automobile Station *v.* 633
American Warehouse & Trading Co., Pendleton *v.* 643
Appam, The Steamship, ... 124
Apperson, Hendrickson, Judge, *v.* 640
Arias *v.* Veloso 662
Arkansas, State of, Union Sand & Material Co. *v.* 652
Arrington, United States *v.* 661
Atlantic Coast Line R. R., Woods *v.* 645
Atlas Transportation Co., Lee Line Steamers *v.* . 643

Babbitt, Trustee, *v.* Reed 648
Babbitt, Trustee, Reed *et al.*, Executors, *v.* . . 648
Backus, Commr. of Immigration, Healy *v.* . . 657
Backus, Commr. of Immigration, Marshall *v.* . 657
Baker *v.* Schofield, Receiver. 114
Baldwin Co., Howard Co. *v.* 636
Baltimore & Ohio R. R. *v.* Leach 639
Banks, Nashville, Chattanooga & St. Louis Ry. *v.* 626
Bay *v.* Merrill & Ring Logging Co. 40
Beaver River Power Co. *v.* United States . . 389
Beck, Ewert *v.* 642
Berg, Prize Master of "Appam," *v.* British & African Steam Nav. Co. 124
Berg, Prize Master of "Appam," *v.* Harrison, Master of "Appam" 124
Black, Judge, Weil *v.* 660
Bleakly, Auditor, Hawkins *v.* 210

PAGE

Blue Ridge Electric Co., American Bank Note Co. *v.* 644
Blue Ridge Interurban Ry., Hendersonville Light & Power Co. *v.* 563
Bond *v.* Hume 15
Bonvillain *v.* Howell, Trustee 640
Bowersock *v.* Smith, Administratrix 29
Brandt *v.* Morgan, Warden 661
Brent, Simpson, Trustee, *v.* 639
British & African Steam Nav. Co., Berg, Prize Master of "Appam" *v.* 124
Brooklyn Eastern District Terminal, United States *v.* 647
Brooks, Receiver, *v.* Empire Trust Co. 655
Bunting *v.* State of Oregon 426
Bush Construction Co., Withnell *v.* 633
Butler, Southern Railway *v.* 646

California, State of, *v.* Deseret Water, Oil & Irrigation Co. 415
California Adjustment Co., Southern Pacific Co. *v.* 650
California, Industrial Accident Comm. of, *v.* Southern Pacific Co. 656
Carr, Pennsylvania R. R. *v.* 587
Cayser, Thomsen *v.* 66
Central Aguirre Co., Semidey *v.* 652
Central Trust Co. *v.* Texas Company . . 647, 648
Centralia, City of, *v.* Titlow, Receiver . . . 656
Chamberlin *v.* Mullings 635
Chambers, Trustee, *v.* Continental Trust Co. . 654
Chesapeake & Ohio Ry., McAllister, Administratrix, *v.* 302
Chesapeake & Ohio Ry. *v.* Shaw 626
Chicago & Alton R. R. *v.* McWhirt 422
Chicago Great Western R. R. *v.* Manning . . 643
Chicago, Milwaukee & St. Paul Ry., Raymond *v.* 43
Clark, Administratrix, Washington Ry. & Elec. Co. *v.* 649

PAGE

Cleveland, Cincinnati, Chicago & St. Louis Ry. *v.* Ohme 642
Coats-Fordney Logging Co., Grays Harbor Logging Co. *v.* 251
Cohen, Trustee, *v.* Samuels 634, 650
Cohn *v.* Malone, Trustee 634, 649
Colorado, State of, State of Wyoming *v.* . . 622
Continental Trust Co., Chambers, Trustee, *v.* . 654
Cook, Administratrix, Union Pacific R. R. *v.* . 654
Copiah County, Smith *v.* 650
County Commrs., Oklahoma County, Harper *v.* . 631
County Commrs., Oklahoma County, Southern Surety Co. *v.* 625
Cramp & Sons Ship & Engine Bldg. Co. *v.* International Curtis Marine Turbine Co. . . 637
Creager, Hendrickson, Judge, *v.* 640
Crenshaw, Clerk, Hiller *et al.*, Sureties, *v.* . . 634
Cress, United States *v.* 316
Cropp Concrete Machine Co., Reed *v.* . . . 649
Cullman Brothers, United States *v.* . . . 97

Davis, Hayden *v.* 636
Davis, United States *v.* 570
De Pass *v.* United States 625
Deseret Water, Oil & Irrigation Co., State of California *v.* 415
Detroit Rock Salt Co. *v.* Swift & Co. . . 635
Diaz *v.* People of Porto Rico 627
District of Columbia, Tyrrell, Administratrix, *v.* . 1
Donohue *v.* Vosper 59
Doyle *v.* Hamilton Fish Corporation . . . 649
Duggan, Missouri Pacific Ry. *v.* . . . 657

Edwards *v.* Keith, Collector of Internal Revenue 638
Elliott & Co., United States *v.* 97
Elmore, Fentress Coal & Coke Co. *v.* . . . 652
Emerson *v.* Sweetser 660

PAGE
Empire Trust Co., Brooks, Receiver, *v.* . . 655
Enterprise Irrigation District *v.* Farmers Mutual Canal Co. 157
Ewert *v.* Beck 642
Ex parte Hathaway 629
Ex parte Prince 627
Ex parte Wintner 625
Ezzard, Lacy, Liquidating Agent, *v.* . . . 631

Faber, G. W., Inc., United States *v.* . . . 97
Farmers Mutual Canal Co., Enterprise Irrigation District *v.* 157
Fentress Coal & Coke Co. *v.* Elmore . . 652
Five Per Cent. Discount Cases 97
Floyd County, Rome Railway & Light Co. *v.* . . 257
Fortuna *v.* People of Porto Rico 659
Fort Worth Savings Bank & Trust Co., Lee *v.* . 646
Fourth National Bank, Pennington *v.* . . 269
Frederick, Trustee, *v.* Metropolitan Life Ins. Co. 646

Gannon *v.* Johnston 108
Gardner, Hendrickson, Judge, *v.* . . . 641
Gardner *v.* Western Union Telegraph Co. . . 644
General Electric Co. *v.* New York Central & Hudson River R. R. 636
Georgia Coast & Piedmont R. R. *v.* Loewenthal . 644
Gilcrease *v.* McCullough 653
Ginsberg, United States *v.* 472
Glasgow Navigation Co. *v.* Munson S. S. Co. . 643
Gleason *v.* Thaw 656
Gold Issue Mining & Milling Co., Pennsylvania Fire Ins. Co. *v.* 93
Gooch, Presbyterian Home Hospital *v.* . . 655
Goode *v.* United States 661
Gordon, Sergeant-at-Arms, Marshall *v.* . . 521
Gould *v.* Hyde Park Water Co. 630
Gradwell, United States *v.* 476

PAGE
Granada *v.* Sta. Maria 661
Gratiot County State Bank *v.* Johnson, Trustee . 645
Grays Harbor Logging Co. *v.* Coats-Fordney Logging Co. 251
Greenbrier Distilling Co., Louisville & Nashville R. R. *v.* 659
Guaranty Trust Co., North German Lloyd, Clmt. S. S. Kronprinzessin Cecilie, *v.* 637

Hambly, United States *v.* 476
Hamilton Fish Corporation, Doyle *v.* 649
Hanssens *v.* North German Lloyd 653
Harding *et al.*, Trustees, Lazarus, Michel & Lazarus *v.* 662
Harper *v.* County Commrs., Oklahoma County . 631
Harrison, Master of "Appam," Berg, Prize Master of "Appam," *v.* 124
Hathaway, *Ex parte* 629
Hathaway *v.* Martindale *et al.*, Receivers . . 651
Hawkins *v.* Bleakly, Auditor 210
Hayden *v.* Davis 636
Healy *v.* Backus, Commr. of Immigration . . 657
Henderson, Administratrix, Union Pacific R. R. *v.* 654
Hendersonville Light & Power Co. *v.* Blue Ridge Interurban Ry. 563
Hendrickson, Judge, *v.* Apperson . . . 640
Hendrickson, Judge, *v.* Creager 640
Hendrickson, Judge, *v.* Gardner 641
Hendrickson, Judge, *v.* Hocker 641
Hendrickson, Pennsylvania Tunnel & Terminal R. R. *v.* 633
Hendrickson, Judge, *v.* Sterling Land & Inv. Co. 641
Henry, Nashville, Chattanooga & St. Louis Ry. *v.* 626
Henry Co., United States *v.* 97
Herndon *v.* Sloan 638
Hertzberg *v.* United States 654
Hiller *et al.*, Sureties, *v.* Crenshaw, Clerk . . 634

PAGE

Hocker, Hendrickson, Judge, *v.* 641
Hocking Valley Ry., Swift & Co. *v.* . . . 281
Home Insurance Co., Williams *v.* . . . 639
Horn *v.* Mitchell, U. S. Marshal . . . 247
Hornby, Lynch, Collector, *v.* 640
Howard Co. *v.* Baldwin Co. 636
Howell, Trustee, Bonvillain *v.* 640
Huertas *v.* Montes, Warden, ... 628
Hume, Bond *v.* 15
Hyde Park Water Co., Gould *v.* . . . 630

Illinois Central R. R., United States *v.* . . 659
Illinois Surety Co. *v.* Standard Underground Cable Co. 651
Industrial Accident Comm. of California *v.* Southern Pacific Co. 656
Interboro Brewing Co. *v.* Standard Brewery Co. 639
International Curtis Marine Turbine Co., Cramp & Sons Ship & Engine Bldg. Co. *v.* . . . 637
International Lumber Co. *v.* United States . . 661
International Typesetting Machine Co., Mergenthaler Linotype Co. *v.* 642
Intertype Corporation, Mergenthaler Linotype Co. *v.* 642

Jennings *v.* Smith 635
Johnson, Sowers *v.* 662
Johnson, Trustee, Gratiot County State Bank *v.* 645
Johnston, Gannon *v.* 108
Jones *et al.*, Commissioners, People's National Bank *v.* 659
Jones *et al.*, South Carolina Tax Commission, National Loan & Exchange Bank *v.* . . . 658

Kalamazoo City Savings Bank, National City Bank *v.* 647
Kansas, State of, Terry *v.* 662
Keith, Collector of Internal Revenue, Edwards *v.* 638

PAGE

Kelly, Executrix, *v.* Pennsylvania R. R. . . 646
Kelly, United States *v.* 316
Kenofskey, United States *v.* 440
Keystone Wood Co. *v.* Susquehanna Boom Co. . 655
Kilayco *v.* United States 628
Kinsolving, McGoldrick Lumber Co. *v.* . . 632
Knott, Comptroller, Pullman Co. *v.* . . . 447
Kronprinzessin Cecilie, North German Lloyd, Clmt., *v.* Guaranty Trust Co. 637
Kuhn, Trustee, Standard Fashion Co. *v.* . . 647

Lacy, Liquidating Agent, *v.* Ezzard . . . 631
La Montagne's Sons, United States *v.* . . . 97
Lane, Secretary of Interior, State of New Mexico *v.* 52
Latta, Rivers & Harbors Imp. Co. *v.* . . . 649
Layton, Louisville & Nashville R. R. *v.* . . 617
Lazarus, Michel & Lazarus *v.* Harding *et al.*, Trustees 662
Leach, Baltimore & Ohio R. R. *v.* 639
Lee *v.* Fort Worth Savings Bank & Trust Co. . 646
Lee Line Steamers *v.* Atlas Transportation Co. . 643
Lehigh Valley R. R. *v.* United States . . 412, 444
Lie, Master of "Selja" *v.* San Francisco & Portland S. S. Co. 291
Loewenthal, Georgia Coast & Piedmont R. R. *v.* . 644
Lorick, Seaboard Air Line Ry. *v.* . . . 572
Lorsch & Co., United States *v.* 97
Lott *v.* Pittman, Sheriff 588
Louisville & Nashville R. R. *v.* Greenbrier Distilling Co. 659
Louisville & Nashville R. R. *v.* Layton . . 617
Lowell *v.* Sweetser 660
Lynch, Collector, *v.* Hornby 640
Lynch, Collector, *v.* Turrish 639

McAllister, Administratrix, *v.* Chesapeake & Ohio Ry. 302

PAGE
McBoyle, Union National Bank *v.* . . . 26
McCluskey, Administrator, *v.* Marysville & Northern Ry. 36
McComas, Northern Pacific Ry. *v.* . . . 653
McCullough, Gilcrease *v.* 653
McDonald *v.* Mabee 90
McGoldrick Lumber Co. *v.* Kinsolving . . 632
McKenney, Mount Vernon & Marshall Hall Steamboat Co. *v.* 655
McKibbin, Philadelphia & Reading Ry. *v.* . . 264
McWhirt, Chicago & Alton R. R. *v.* . . . 422
Mabee, McDonald *v.* 90
Macwilliam *v.* President Suspender Co. . . 636
Malone, Trustee, Cohn *v.* 634, 649
Manitou Springs Mineral Water Co., Schueler *v.* 645
Manning, Chicago Great Western R. R. *v.* . . 643
Marceline, City of, Sidey *v.* 651
Maria, Granada *v.* 661
Marshall *v.* Backus, Commr. of Immigration . 657
Marshall *v.* Gordon, Sergeant-at-Arms . . 521
Martindale *et al.*, Receivers, Hathaway *v.* . . 651
Marysville & Northern Ry., McCluskey, Administrator, *v.* 36
Mayers *v.* Union R. R. 656
Melvin, Norfolk & Western Ry. *v.* . . . 660
Memphis Street Ry. *v.* Moore, Administrator . 299
Mergenthaler Linotype Co. *v.* International Typesetting Machine Co. 642
Mergenthaler Linotype Co. *v.* Intertype Corporation . 642
Merriam Co., Saalfield Publishing Co. *v.* . . 651
Merrill & Ring Logging Co., Bay *v.* . . . 40
Metropolitan Life Ins. Co., Frederick, Trustee, *v.* . 646
Mexico-Wyoming Petroleum Co. *v.* Valentine . 637
Meyers & Son, United States *v.* 97
Michigan Central R. R. *v.* Tripp . . . 648
Miller, Wellsville Oil Co. *v.* 6
Missouri Pacific Ry. *v.* Duggan 657

PAGE
Mitchell, U. S. Marshal, Horn *v.* . . . 247
Mobile & Ohio R. R., Thompson, Auditor, *v.* . 658
Montes, Warden, Huertas *v.* 628
Moore, Administrator, Memphis Street Ry. *v.* . 299
Moore, St. Joseph & Grand Island Ry. *v.* . . 311
Morehead, United States *v.* 607
Morgan, Warden, Brandt *v.* 661
Motion Picture Patents Co. *v.* Universal Film Mfg. Co. 502
Mountain Timber Co. *v.* State of Washington . 219
Mount Vernon & Marshall Hall Steamboat Co. *v.* McKenney 655
Muller & Co., United States *v.* 97
Mullings, Chamberlin *v.* 635
Munson S. S. Co., Glasgow Navigation Co. *v.* . 643

Nashville, Chattanooga & St. Louis Ry. *v.* Banks 626
Nashville, Chattanooga & St. Louis Ry. *v.* Henry 626
National City Bank *v.* Kalamazoo City Savings Bank 647
National Loan & Exchange Bank *v.* Jones *et al.*, South Carolina Tax Commission . . . 658
New *et al.*, Receivers, Wilson, U. S. Attorney, *v.* . 332
New Jersey, State of, Nones *v.* 650
New Mexico, State of, *v.* Lane, Secretary of Interior 52
New York Central R. R. *v.* White . . . 188
New York Central & Hudson River R. R., General Electric Co. *v.* 636
Nones *v.* State of New Jersey 650
Norfolk & Western Ry. *v.* Melvin . . . 660
Northern Pacific Ry. *v.* McComas . . . 653
North German Lloyd, Clmt. S. S. Kronprinzessin Cecilie, *v.* Guaranty Trust Co. . . . 637
North German Lloyd, Hanssens *v.* . . . 653
North German Lloyd, Rantoul *v.* . . . 652
Notarbartolo, Zavaglia *v.* 628
Nunn *v.* United States 389

PAGE

O'Hara *et al.*, Industrial Welfare Comm. of Oregon, Simpson *v.* 629
O'Hara *et al.*, Industrial Welfare Comm. of Oregon, Stettler *v.* 629
Ohme, Cleveland, Cincinnati, Chicago & St. Louis Ry. *v.* 642
Oklahoma County, Commrs. of, Harper *v.* . . 631
Oklahoma County, Commrs. of, Southern Surety Co. *v.* 625
Olivit Brothers, Pennsylvania R. R. *v.* . . 574
Oneal *v.* Stewart 645
Openhym & Sons, United States *v.* 97
Oregon, State of, Bunting *v.* 426
Oregon, Industrial Welfare Comm. of, Simpson *v.* 629
Oregon, Industrial Welfare Comm. of, Stettler *v.* 629
Oregon & California R. R. *v.* United States . . 549
O'Toole, United States *v.* 476
Owensboro *v.* Owensboro Water Works Co. . . 166
Owensboro Water Works Co., Owensboro *v.* . 166
Pakas *v.* United States 647
Park Square Automobile Station *v.* American Locomotive Co. 633
Park & Tilford, United States *v.* 97
Pease *v.* Rathbun-Jones Eng. Co. 273
Pendleton *v.* American Warehouse & Trading Co. 643
Pennington *v.* Fourth National Bank 269
Pennsylvania Fire Ins. Co. *v.* Gold Issue Mining & Milling Co. 93
Pennsylvania R. R. *v.* Carr 587
Pennsylvania R. R., Kelly, Executrix, *v.* . . 646
Pennsylvania R. R. *v.* Olivit Brothers 574
Pennsylvania Tunnel & Terminal R. R. *v.* Hendrickson 633
People's National Bank *v.* Jones *et al.*, Commissioners 659
Philadelphia & Reading Ry. *v.* McKibbin . . 264
Pittman, Sheriff, Lott *v.* 588

PAGE

Poland, United States *v.* 653
Porto Rico, People of, Abella *v.* 627
Porto Rico, People of, Diaz *v.* 627
Porto Rico, People of, Fortuna *v.* . . . 659
Presbyterian Home Hospital *v.* Gooch . . 655
President Suspender Co., Macwilliam *v.* . . 636
Prince, *Ex parte* 627
Pulaski Co., United States *v.* 97
Pullman Co. *v.* Knott, Comptroller . . . 447

Radford, Selling *v.* 46
Randle, Washington Loan & Trust Co., Trustee, *v.* 635
Rantoul *v.* North German Lloyd . . . 652
Rathbun-Jones Eng. Co., Pease *v.* . . . 273
Raymond *v.* Chicago, Milwaukee & St. Paul Ry. 43
Red Jacket, Jr., Coal Co. *v.* United Thacker Coal Co. 644
Reed, Babbitt, Trustee *v.* 648
Reed *et al.*, Executors, *v.* Babbitt, Trustee . . 648
Reed *v.* Cropp Concrete Machine Co. . . . 649
Richards, U. S. Marshal, Tillinghast *v.* . . 629
Rivers & Harbors Imp. Co. *v.* Latta . . . 649
Rome Railway & Light Co. *v.* Floyd County. . 257
Rosen *v.* United States 637
Rowell, United States *v.* 464
Rule 37, section 4, Amendment of . . . 623

Saalfield Publishing Co. *v.* Merriam Co. . . 651
St. Louis, Iron Mountain & Southern Ry. *v.* Starbird, Administrator 592
St. Louis, San Franscisco & Texas Ry. *v.* Smith, Administratrix 630
St. Joseph & Grand Island Ry. *v.* Moore . . 311
Sam, United States *ex rel.*, *v.* Wallis, Asst. Commr. of Immigration 654
Samuels, Cohen, Trustee, *v.* . . . 634, 650
San Francisco & Portland S. S. Co., Lie, Master of "Selja" *v.* 291

PAGE
Schofield, Receiver, Baker *v.* 114
Schueler *v.* Manitou Springs Mineral Water Co. . 645
Seaboard Air Line Ry. *v.* Lorick 572
Seaboard Air Line Ry. *v.* Williams, Administratrix 631
Security Trust & Savings Bank, Trustee, Staats Co. *v.* 121
Selgas & Co., United States *v.* 97
Selling *v.* Radford 46
Semidey *v.* Central Aguirre Co. 652
Shaw, Chesapeake & Ohio Ry. *v.* 626
Sheridan *v.* United States 638
Sidey *v.* City of Marceline 651
Simpson, Trustee, *v.* Brent 639
Simpson *v.* O'Hara *et al.*, Industrial Welfare Comm. of Oregon 629
Sims *v.* Stark 642
Sloan, Herndon *v.* 638
Smith, Administratrix, Bowersock *v.* 29
Smith *v.* Copiah County 650
Smith, Jennings *v.* 635
Smith, Administratrix, St. Louis, San Francisco & Texas Ry. *v.* 630
South Carolina Tax Comm., National Loan & Exchange Bank *v.* 658
Southern Pacific Co. *v.* California Adjustment Co. 650
Southern Pacific Co., Industrial Accident Comm. of California *v.* 656
Southern Railway *v.* Butler 646
Southern Railway Co. in Mississippi, Thompson, Auditor, *v.* 658
Southern Surety Co. *v.* County Commrs., Oklahoma County 625
Sowers *v.* Johnson 662
Staats Co. *v.* Security Trust & Savings Bank, Trustee 121
Sta. Maria, Granada *v.* 661
Standard Brewery Co., Interboro Brewing Co. *v.* 639

PAGE

Standard Fashion Co. *v.* Kuhn, Trustee . . 647
Standard Underground Cable Co., Illinois Surety Co. *v.* 651
Starbird, Administrator, *v.* St. Louis, Iron Mountain & Southern Ry. 592
Stark, Sims *v.* 642
Sterling Land & Inv. Co., Hendrickson, Judge, *v.* 641
Stettler *v.* O'Hara *et al.*, Industrial Welfare Comm. of Oregon 629
Stewart, Oneal *v.* 645
Straus *v.* Victor Talking Machine Co. . . 490
Superior Court of Washington for Chehalis County, State of Washington *ex rel.* Grays Harbor Logging Co. *v.* 251
Susquehanna Boom Co., Keystone Wood Co. *v.* . 655
Sweetser, Emerson *v.* 660
Sweetser, Lowell *v.* 660
Swift & Co., Detroit Rock Salt Co. *v.* . . 635
Swift & Co. *v.* Hocking Valley Ry. . . . 281

Terry *v.* State of Kansas 662
Texas Company, Central Trust Co. *v.* . 647, 648
Thaw, Gleason *v.* 656
Thompson, Auditor, *v.* Mobile & Ohio R. R. . 658
Thompson, Auditor, *v.* Southern Ry. Co. in Mississippi 658
Thomsen *v.* Cayser 66
Tillinghast *v.* Richards, U. S. Marshal . . . 629
Titlow, Receiver, City of Centralia *v.* . . . 656
Travelers Ins. Machine Co., United States Fidelity & Guaranty Co. *v.* 632
Tripp, Michigan Central R. R. *v.* . . . 648
Turrish, Lynch, Collector, *v.* 639
Tyrrell, Administratrix, *v.* District of Columbia . 1

Union National Bank *v.* McBoyle . . . 26
Union Pacific R. R. *v.* Cook, Administratrix . 654

PAGE
Union Pacific R. R. *v.* Henderson, Administratrix 654
Union R. R., Mayers *v.* 656
Union Sand & Material Co. *v.* State of Arkansas 652
United States *v.* Arrington 661
United States *v.* Beaver River Power Co. . . 389
United States *v.* Brooklyn Eastern District Terminal 647
United States *v.* Cullman Brothers . . . 97
United States *v.* Cress 316
United States *v.* Davis 570
United States, De Pass *v.* 625
United States *v.* Elliott & Co. 97
United States *v.* G. W. Faber, Inc. . . . 97
United States *v.* Ginsberg 472
United States, Goode *v.* 661
United States *v.* Gradwell 476
United States *v.* Hambly 476
United States *v.* Henry Co. 97
United States, Hertzberg *v.* 654
United States *v.* Illinois Central R. R. . . 659
United States, International Lumber Co. *v.* . 661
United States *v.* Kelly 316
United States *v.* Kenofskey 440
United States, Kilayco *v.* 628
United States *v.* La Montagne's Son . . . 97
United States, Lehigh Valley R. R. *v.* . . 412, 444
United States *v.* Lorsch & Co. 97
United States *v.* Meyers & Son 97
United States *v.* Morehead 607
United States *v.* Muller & Co. 97
United States *v.* Nunn 389
United States *v.* Openhym & Sons . . . 97
United States, Oregon & California R. R. *v.* . . 549
United States *v.* O'Toole 476
United States, Pakas *v.* 647
United States *v.* Park & Tilford 97
United States *v.* Poland 653
United States *v.* Pulaski Co. 97

PAGE
United States, Rosen *v.* 637
United States *v.* Rowell 464
United States *v.* Selgas & Co. 97
United States, Sheridan *v.* 638
United States *v.* Utah Power & Light Co. . . 389
United States *v.* Waller 452
United States *ex rel.* Ng. Sam *v.* Wallis, Asst. Commr. of Immigration 654
United States *v.* Wile Sons & Co. 97
United States *v.* Wood & Selick 97
United States Fidelity & Guaranty Co. *v.* Travelers Ins. Machine Co. 632
United Thacker Coal Co., Red Jacket, Jr., Coal Co. *v.* 644
Universal Film Mfg. Co., Motion Picture Patents Co. *v.* 502
Utah Power & Light Co. *v.* United States . . 389

Valentine, Mexico-Wyoming Petroleum Co. *v.* . 637
Van Thyn *v.* Wolf, Receiver 641
Veloso, Arias *v.* 662
Victor Talking Machine Co., Straus *v.* . . 490
Vosper, Donohue *v.* 59

Waller, United States *v.* 452
Wallis, Asst. Commr. of Immigration, United States *ex rel.* Ng. Sam *v.* 654
Washington, State of, Mountain Timber Co. *v.* . 219
Washington, State of, *ex rel.* Grays Harbor Logging Co. *v.* Superior Court of Washington for Chehalis County 251
Washington Loan & Trust Co., Trustee, *v.* Randle 635
Washington Ry. & Elec. Co. *v.* Clark, Administratrix 649
Weil *v.* Black, Judge 660
Wellsville Oil Co. *v.* Miller 6
Western Union Telegraph Co., Gardner *v.* . . 644
White, New York Central R. R. *v.* 188

PAGE

Wile Sons & Co., United States *v.* . . . 97
Williams *v.* Home Insurance Co. . . . 639
Williams, Administratrix, Seaboard Air Line Ry. *v.* 631
Wilson, U. S. Attorney, *v.* New *et al.*, Receivers . 332
Wintner, *Ex Parte* 625
Withnell *v.* Bush Construction Co. . . . 633
Wolf, Receiver, Van Thyn *v.* 641
Wood & Selick, United States *v.* . . . 97
Woods *v.* Atlantic Coast Line R. R. . . . 645
Wyoming, State of, *v.* State of Colorado . . 622

Zavaglia *v.* Notarbartolo 628

TABLE OF CASES

CITED IN OPINIONS.

	PAGE
Adair *v.* United States, 208 U. S. 161	376, 381, 382, 383, 386
Adams *v.* Burke, 17 Wall. 453	501
Adams Express Co. *v.* Croninger, 226 U. S. 491	349, 582, 583, 595
Alabama Great Southern Ry. *v.* Thompson, 200 U. S. 206	426
Allen *v.* Alleghany Co., 196 U. S. 458	97
Allen *v.* Catlin, 9 Wash. 603	278
American Silver Mfg. Co. *v.* Wabash Ry., 156 S. W. Rep. 830	598
American Sugar Ref. Co. *v.* Louisiana, 179 U. S. 89	568
Anderson *v.* Cincinnati Southern Ry., 86 Ky. 44	320
Anderson *v.* Dunn, 6 Wheat. 204	534, 537, 541, 542
Appleby *v.* Buffalo, 221 U. S. 524	625, 627
Arkansas Southern R. R. *v.* German Natl. Bank, 207 U. S. 270	165
Armstrong *v.* United States, 182 U. S. 243	625
Ashley *v.* Ryan, 153 U. S. 436	519
Atherton *v.* Fowler, 91 U. S. 143	83
Atlantic Coast Line R. R. *v.* North Carolina Corporation Comm., 206 U. S. 1	350, 384
Atlantic Coast Line R. R. *v.* Riverside Mills, 219 U. S. 186	349, 596
Atlantic Coast Line R. R. *v.* Thomasville Live Stock Co., 13 Ga. App. 102	598
Aubuchon *v.* Bender, 44 Mo. 560	289
Babbitt *v.* Finn, 101 U. S. 7	279
Bache *v.* Hunt, 193 U. S. 523	632
Bachtel *v.* Wilson, 204 U. S. 36	246
Bagdon *v.* Phila. & Reading Coal Co., 217 N. Y. 432	95
Bailey *v.* Bailey, 127 N. Car. 474	272
Bailey *v.* Baker Ice Machine Co., 239 U. S. 268	521
Bailey *v.* Missouri Pacific Ry., 184 Mo. App. 457	597
Baker *v.* Baker, Eccles & Co., 242 U. S. 394	91
Baker *v.* Cummings, 169 U. S. 189	118
Balt. & Ohio R. R. *v.* Interstate Com. Comm., 221 U. S. 612	200, 346, 349, 362, 378
Balt. & Ohio R. R. *v.* Whitacre, 242 U. S. 169	574, 626, 627, 632
Bank of Augusta *v.* Earle, 13 Pet. 519	22
Bank of Columbia *v.* Okely, 4 Wheat. 235	367
Banks *v.* Frazier, 111 Ky. 909	320, 322
Barbier *v.* Connolly, 113 U. S. 27	238
Barnes *v.* Pampel, 192 Fed. Rep. 525	124
Barney *v.* Keokuk, 94 U. S. 324	319
Barstow *v.* N. Y., N. H. & H. R. R., 143 N. Y. Supp. 983	598
Bartonshill Coal Co. *v.* Reid, 3 Macq. H. L. Cas. 266	199
Bauer *v.* O'Donnell, 229 U. S. 1	498, 501, 510, 515, 516
Beach *v.* Sterling Iron Co., 54 N. J. Eq. 65	330

PAGE

Beall *v.* New Mexico, 16 Wall. 535 278
Becquet *v.* MacCarthy, 2 B. & Ad. 951 91
Bedford *v.* United States, 192 U. S. 217 327
Bement *v.* National Harrow Co., 186 U. S. 70 520
Bender *v.* Pennsylvania Co., 148 U. S. 502 633
Benton *v.* Johncox, 17 Wash. 277 330
Berea College *v.* Kentucky, 211 U. S. 45 164
Bernardin, United States *ex rel.*, *v.* Butterworth, 169 U. S. 600 450, 451
Berry *v.* Snyder, 66 Ky. 266 320
Betsey, The, 3 Dall. 6 153
Bibb *v.* Allen, 149 U. S. 481 22
Bingham *v.* Bradley, 241 U. S. 511 249
Blair *v.* Chicago, 201 U. S. 400 178
Borgnis *v.* Falk Co., 147 Wis. 327 212
Boring *v.* Penniman, 134 Cal. 514 92
Bosley *v.* McLaughlin, 236 U. S. 385 357, 362
Boston & Maine R. R. *v.* Hooker, 233 U. S. 97 349
Bowling & Miami Inv. Co. *v.* United States, 233 U. S. 528 112, 113
Boyer, *Ex parte*, 109 U. S. 629 326
Bragg *v.* Gaynor, 85 Wis. 468 272
Brainard *v.* Buck, 184 U. S. 99 118
Brass Crosby's Case, 3 Wils. 188 534
Breeze *v.* Haley, 11 Colo. 351 289
Brolan *v.* United States, 236 U. S. 216 629
Brown *v.* Chadbourne, 31 Me. 9 321
Brown *v.* Louisiana & Missouri River R. R., 256 Mo. 522 424
Brown *v.* N. W. Mut. Life Ins. Co., 119 Fed. Rep. 148 278
Bunnell *v.* Bunnell, 25 Fed. Rep. 214 272
Burdett *v.* Abbot, 14 East, 1 534

PAGE

Caha *v.* United States, 152 U. S. 211 617
Caledonian Coal Co. *v.* Baker, 196 U. S. 432 451
California, State of, 28 L. D. 57 421
California, State of, 34 L. D. 613 421
California *v.* San Pablo & Tulare R. R., 149 U. S. 308 289
California *v.* Southern Pacific Co., 157 U. S. 229 58
Calispel Diking District *v.* McLeish, 63 Wash. 331 255
Callaway, County of, *v.* Foster, 93 U. S. 567 423
Camfield *v.* United States, 167 U. S. 518 405
Canal Appraisers *v.* People *ex rel.* Tibbits, 17 Wend. 571 322
Capital Natl. Bank *v.* First Natl. Bank of Cadiz, 172 U. S. 425 29, 631
Cardot *v.* Barney, 63 N. Y. 281 204
Case *v.* Kelly, 133 U. S. 21 120
Castillo *v.* McConnico, 168 U. S. 674 166
Catlett *v.* Brodie, 9 Wheat. 553 280
Causey *v.* United States, 240 U. S. 399 409
Central Land Co. *v.* Laidley, 159 U. S. 103 166
Central Trust Co. *v.* Lueders, 239 U. S. 11 124
Chapman, *In re*, 166 U. S. 661 538, 542, 547
Chappee *v.* Thomas, 5 Mich. 53 278
Charlotte, Columbia & Augusta R. R. *v.* Gibbes, 142 U. S. 386 245
Charman *v.* McLane, 1 Oreg. 339 278
Chemical Bank *v.* City Bank of Portage, 160 U. S. 646 29
Chemical Natl. Bank *v.* Hartford Deposit Co., 161 U. S. 1 631
Chenango Bridge Co. *v.* Paige, 83 N. Y. 178 322
Cherokee Nation *v.* Hitchcock, 187 U. S. 294 468

PAGE

Ches. & Ohio Ry. *v.* Cockrell, 232 U. S. 146 305, 311, 426
Ches. & Ohio Ry. *v.* Conley, 230 U. S. 513 354
Ches. & Ohio Ry. *v.* McLaughlin, 242 U. S. 142 604
Ches. & Ohio Ry. *v.* Warnock's Admr., 150 Ky. 74 308, 309
Chicago *v.* Sheldon, 9 Wall. 50 179, 180
Chicago & Alton R. R. *v.* Tranbarger, 238 U. S. 67 198, 425
Chicago, Burl. & Q. R. R. *v.* Chicago, 166 U. S. 226 367
Chicago, Burl. & Q. R. R. *v.* Harrington, 241 U. S. 177 45, 192
Chicago, Burl. & Q. R. R. *v.* Iowa, 94 U. S. 155 349
Chicago, Burl. & Q. R. R. *v.* McGuire, 219 U. S. 549 207
Chicago, Burl. & Q. Ry. *v.* United States, 220 U. S. 559 34, 620
Chicago, Ind. & Louisville Ry. *v.* Hackett, 228 U. S. 559 200
Chicago Junction Ry. *v.* King, 222 U. S. 222 626, 627, 632
Chicago, R. I. & Pac. Ry. *v.* Arkansas, 219 U. S. 453 354
Chicago, R. I. & Pac. Ry. *v.* Sturm, 174 U. S. 710 271
Chicago, R. I. & Pac. Ry. *v.* Zernecke, 183 U. S. 582 204
Child *v.* Starr, 4 Hill, 369 322
Choate *v.* Trapp, 224 U. S. 665 468, 470
Cimiotti Unhairing Co. *v.* American Fur Refg. Co., 158 Fed. Rep. 171 279
Cincinnati *v.* Louis. & Nash. R. R., 223 U. S. 390 217
Cincinnati, N. O. & Tex. Pac. Ry. *v.* Rankin, 241 U. S. 319 596
Cincinnati, N. O. & Tex. Pac. Ry. *v.* Rankin, 153 Ky. 730 598
Circuit Attorney, State *ex rel.* *v.* Cape Girardeau &c. R. R., 48 Mo. 468 423

PAGE

City Electric Ry. *v.* Floyd County, 115 Ga. 655 261, 263
Claflin *v.* Houseman, 93 U. S. 130 597
Clark Distilling Co. *v.* Western Maryland Ry., 242 U. S. 311 346
Clarke, *Ex parte*, 100 U. S. 399 482
Clerk's Office *v.* Huffsteller, 67 N. Car. 449 278
Clews *v.* Jamieson, 182 U. S. 461 22
Clingan *v.* C. C. C. & St. L. Ry., 184 Ill. App. 202 597
Coder *v.* Arts, 213 U. S. 223 124
Coe *v.* Armour Fertilizer Works, 237 U. S. 413 257
Coe *v.* Errol, 116 U. S. 517 38
Cole *v.* Hall, 103 Ill. 30 245
Commrs. of Canal Fund *v.* Kempshall, 26 Wend. 404 322
Consolidated Turnpike Co. *v.* Norfolk &c. Ry., 228 U. S. 596 625, 630, 631
Continental Paper Bag Co. *v.* Eastern Paper Bag Co., 210 U. S. 405 510, 519, 520, 521
Coosaw Mining Co. *v.* Farmers' Mining Co., 51 Fed. Rep. 107 279
Coppage *v.* Kansas, 236 U. S. 1 206, 381, 435
Corder's Admr. *v.* C. N. O. & T. P. Ry., 155 Ky. 536 309
County Commissioners *v.* Bryson, 13 Fla. 281 450
Coyle *v.* Oklahoma, 221 U. S. 559 217
Creswill *v.* Knights of Pythias, 225 U. S. 246 164, 601, 631
Crook *v.* Hewitt, 4 Wash. 749 330
Crooks *v.* Tazewell Coal Co., 263 Ill. 343 212
Cross *v.* Burke, 146 U. S. 82 249, 250
Crowell *v.* Randell, 10 Pet. 368 598
Cudahy Packing Co. *v.* Chicago & Northwestern Ry., 12 I. C. C. 446 290
Daniel Ball, The, 10 Wall. 557 38, 323, 326

PAGE

Dartmouth College *v.* Woodward, 4 Wheat. 518 367
Davidson *v.* Farrell, 8 Minn. 258 278
Davidson *v.* New Orleans, 96 U. S. 97 367, 370
Davis' Admr. *v.* C. & O. Ry., 116 Ky. 144 306, 307
Davis, Ohio *ex rel. v.* Hildebrant, 241 U. S. 565 13, 235
Davis *v.* New York, Ontario & W. Ry., 70 Minn. 37 586
Davis, State *ex rel. v.* Superior Court, 82 Wash. 31 255
Davis-Smith Co., State *ex rel. v.* Clausen, 65 Wash. 156 228, 237
Dealy *v.* United States, 152 U. S. 539 611
Debs, *In re*, 158 U. S. 564 387
DeCambra *v.* Rogers, 189 U. S. 119 632
Deibeikis *v.* Link-Belt Co., 261 Ill. 454 212
De la Montanya *v.* De la Montanya, 112 Cal. 101 92
Del., Lack. & W. R. R. *v.* Yurkonis, 238 U. S. 439 45
De Lima *v.* Bidwell, 182 U. S. 1 625
Deming *v.* Carlisle Packing Co., 226 U. S. 102 626, 627, 630, 631
Demolli *v.* United States, 144 Fed. Rep. 363 443
Demurrage Charges on Tank Cars, 13 I. C. C. 378 290
Demurrage Investigation, 19 I. C. C. 496 283
Den *v.* Lunsford, 20 N. Car. 407 409
Dickinson *v.* Grand Junction Canal Co., 7 Exch. 282 330
Dickson *v.* Luck Land Co., 242 U. S. 371 463
Dillon *v.* Barnard, 21 Wall. 430 289
Dooley *v.* United States, 182 U. S. 222 625
Douglas *v.* Forrest, 4 Bing. 686 91
Dow *v.* Beidelman, 125 U. S. 680 354

PAGE

Dun *v.* Lumbermen's Credit Assn., 209 U. S. 20 118
Dunlap *v.* Schofield, 152 U. S. 244 509
Dunlap *v.* United States, 173 U. S. 65 107
Dunn *v.* California, 30 L. D. 608 421
Easterling Lumber Co. *v.* Pierce, 235 U. S. 380 34
Eastern States Lumber Dealers' Assn. *v.* United States, 234 U. S. 600 85
East Hoquiam Boom Co. *v.* Neeson, 20 Wash. 142 322
Egan *v.* Chicago Great Western Ry., 163 Fed. Rep. 344 278
Eliza Lines, The, 199 U. S. 119 96
Ellis *v.* United States, 206 U. S. 246 357, 362
Elmendorf *v.* Taylor, 10 Wheat. 152 301
El Paso & Northeastern Ry. *v.* Gutierrez, 215 U. S. 87 200
Empire State Developing Co. *v.* Hanley, 136 Fed. Rep. 99 278, 280
Employers' Liability Cases, 207 U. S. 463 349
Erie R. R. *v.* Williams, 233 U. S. 685 238
Estrella, The, 4 Wheat. 298 155
Eustis *v.* Bolles, 150 U. S. 361 164, 628, 634
Excelsior Wooden Pipe Co. *v.* Pacific Bridge Co., 185 U. S. 282 305
Expanded Metal Co. *v.* Bradford, 177 Fed. Rep. 604 278
Express Co. *v.* Caldwell, 21 Wall. 264 604
Farmers Canal Co. *v.* Frank, 72 Neb. 136 161, 162
Farwell *v.* Boston & Worcester R. R., 4 Metc. 49 199
Ferris *v.* Frohman, 223 U. S. 424 599
Fidelity & Deposit Co. *v.* Expanded Metal Co., 183 Fed. Rep. 568 278
Filor *v.* United States, 9 Wall. 45 409

PAGE

Finney *v.* Guy, 183 U. S. 335 97
Flemister *v.* United States, 207 U. S. 372 628
Florida Central &c. R. R. *v.* Reynolds, 183 U. S. 471 633
Floyd County *v.* Rome Street R. R., 77 Ga. 614 259
Ford *v.* Chicago, R. I. & Pac. Ry., 123 Minn. 87 598
Fort Plain Bridge Co. *v.* Smith, 30 N. Y. 44 322
Fourteen Diamond Rings, 183 U. S. 176 625
Frank *v.* Mangum, 237 U. S. 309 208, 216, 249
Franklin *v.* United States, 216 U. S. 559 629
Freeman *v.* Alderson, 119 U. S. 185 271
Fritzlen *v.* Boatmen's Bank, 212 U. S. 364 13
Fruitland Irrigation Co. *v.* Smith, 54 Wash. 185 255
Fulton L. H. & P. Co. *v.* State, 200 N. Y. 400 322
Furness, Withy & Co. *v.* Yang-Tsze Ins. Assn., 242 U. S. 430 6
Gaar, Scott & Co. *v.* Shannon, 223 U. S. 468 164, 628
Galveston, Harrisburg & S. A. Ry. *v.* Texas, 210 U. S. 217 237
Gamble-Robinson Com. Co. *v.* Union Pacific Ry., 262 Ill. 400 597
Gardner *v.* Village of Newburgh, 2 Johns. Ch. 162 330
Gast Realty Co. *v.* Schneider Granite Co., 240 U. S. 55 633
Gavieres *v.* United States 220 U. S. 338 628
Georgia, Fla. & Ala. Ry. *v.* Blish Milling Co., 241 U. S. 190 596, 605
Gibbons *v.* Ogden, 9 Wheat. 1 365, 377
Gibson *v.* Chouteau, 13 Wall. 92 405
Gibson *v.* United States, 166 U. S. 269 320, 327
Gillis *v.* Stinchfield, 159 U. S. 658 164

PAGE

Gilman *v.* Philadelphia, 3 Wall. 713 324, 326
Gilson *v.* United States, 234 U. S. 380 118
Glass *v.* The Sloop Betsey, 3 Dall. 6 153
Goodin's Ex'rs *v.* Kentucky Lumber Co., 90 Ky. 625 320, 321
Goodwill *v.* Police Jury, 38 La. Ann. 752 322
Gordon *v.* Third Natl. Bank, 56 Fed. Rep. 790 278, 280
Grant *v.* Raymond, 6 Pet. 218 511, 520
Gray *v.* Seitz, 162 Ind. 1 487
Great Northern Ry. *v.* Knapp, 240 U. S. 464 574
Great Northern Ry. *v.* O'Connor, 232 U. S. 508 445
Great Northern Ry. *v.* Otos, 239 U. S. 349 314
Green *v.* Chicago, Burl. & Q. Ry., 205 U. S. 530 268
Greenameyer *v.* Coate, 212 U. S. 434 632
Green Bay & Miss. Canal Co. *v.* Patten Paper Co., 172 U. S. 58 599
Greene *v.* Caldwell, 170 Ky. 571 212
Greenleaf-Johnson Lumber Co. *v.* Garrison, 237 U. S. 251 321
Greer *v.* McCarter, 5 Kans. 17 278
Gregg *v.* Colorado, 15 L. D. 151 420
Grenada Lumber Co. *v.* Mississippi, 217 U. S. 433 354
Gritts *v.* Fisher, 224 U. S. 640 468, 469, 470
Gundling *v.* Chicago, 177 U. S. 183 237
Haddock *v.* Haddock, 201 U. S. 562 92
Haire, Montana, *ex rel. v.* Rice, 204 U. S. 291 627
Hale *v.* Lewis, 181 U. S. 473 164
Hall *v.* Smith, 2 Bing. 156 204
Hammond *v.* Johnston, 142 U. S. 73 164

PAGE

Hanscom *v.* Hanscom, 6 Colo. App. 97 272
Hardin *v.* Jordan, 140 U. S. 371 319
Harding *v.* Stamford Water Co., 41 Conn. 87 330
Hargrave *v.* Cook, 108 Cal. 72 330
Harris *v.* Balk, 198 U. S. 215 271
Hart *v.* United States, 95 U. S. 316 409
Hatch *v.* Reardon, 204 U. S. 152 214
Healy *v.* Backus, 241 U. S. 655 249
Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. Rep. 288 514, 515, 516, 520
Heckman *v.* United States, 224 U. S. 413 462
Heike *v.* United States, 217 U. S. 423 633
Henderson *v.* Mayor of New York, 92 U. S. 259 237
Henderson *v.* Staniford, 105 Mass. 504 93
Hendrick *v.* Maryland, 235 U. S. 610 214, 245
Henry *v.* Dick Co., 224 U. S. 1 515, 517, 518, 520
Herndon-Carter Co. *v.* Norris, Son & Co., 224 U. S. 496 265, 305
Hewit *v.* Berlin Machine Works, 194 U. S. 296 124
Heydenfeldt *v.* Daney Gold Mining Co., 93 U. S. 634 420
Hibberd *v.* Slack, 84 Fed. Rep. 571 420
Hinds *v.* Hinds, 80 Ala. 225 272
Hiriart *v.* Ballon, 9 Pet. 156 278
Holden *v.* Hardy, 169 U. S. 366 207, 357, 362
Holden Land Co. *v.* Interstate Trading Co., 233 U. S. 536 628
Holmes *v.* Steamer Belle Air, 5 La. Ann. 523 278
Holms *v.* Johnson, 59 Tenn. 155 289
Holsman *v.* Boiling Spring Bleaching Co., 14 N. J. Eq. 335 330
Holst *v.* Roe, 39 Ohio St. 340 245

PAGE

Horner *v.* Missouri Pacific Ry., 70 Mo. App. 285 586
Hotaling, Charles, 3 L. D. 17 611
Humphrey *v.* Queen, 2 Can. Exch. 386 409
Hunter *v.* Colfax Consolidated Coal Co., 154 N. W. Rep. 1037; 157 N. W. Rep. 145 212, 215, 219
Hurtado *v.* California, 110 U. S. 516 198, 366
Hutchinson *v.* York, Newcastle &c. Ry., 5 Exch. 343; 19 L. J. Exch. 296; 14 Jur. 837 199
Hy-yu-tse-mil-kin *v.* Smith, 194 U. S. 401, 412 118
Illinois Cent. Ry. *v.* Murphy's Admr., 123 Ky. 787 307
Illinois Cent. R. R. *v.* Sheegog, 215 U. S. 308 305, 310, 311
Illinois Cent. Ry. *v.* Sheegog's Admr., 126 Ky. 252 310
Illinois Cent. R. R. *v.* Williams, 242 U. S. 462 620
Improvement Co. *v.* Lumber Co., 69 Mich. 207 321
International Harvester Co. *v.* Missouri, 234 U. S. 199 85
Interstate Com. Comm. *v.* Brimson, 154 U. S. 447 346
Interstate Com. Comm. *v.* Chicago Great Western Ry., 209 U. S. 108 385
Interstate Com. Comm. *v.* Chicago, R. I. & Pac. Ry., 218 U. S. 88 349
Interstate Com. Comm. *v.* Del., Lack. & W. R. R., 220 U. S. 235 445
Interstate Com. Comm. *v.* Peavey & Co., 222 U. S. 42 446
Ireland *v.* Bowman & Cockrell, 130 Ky. 153 320
Irwin *v.* Brown, 3 Tenn. Cas. 309 322
Irwin *v.* Williar, 110 U. S. 499 22
Ives *v.* South Buffalo Ry., 201 N. Y. 271 195
Jackson *v.* United States, 230 U. S. 1 327

PAGE

Jeffrey Mfg. Co. *v.* Blagg, 235 U. S. 571 197, 212, 214, 234
Jensen *v.* Southern Pacific Co., 215 N. Y. 514 196, 197
Jewett *v.* Shoemaker, 124 Ia. 561 278, 280
Johannessen *v.* United States, 225 U. S. 227 474
Johnson *v.* Chicago & Pacific Elevator Co., 119 U. S. 388 278, 279
Johnson *v.* Jordan, 2 Metc. 234 330
Johnson *v.* New York Life Ins. Co., 187 U. S. 491 97
Johnson *v.* Southern Pacific Co., 196 U. S. 1 349, 379
Johnson *v.* Towsley, 13 Wall. 72 632
Johnson Grain Co. *v.* C., B. & Q. R. R., 177 Mo. App. 194 597
Johnston *v.* Trade Ins. Co., 132 Mass. 432 95
Jones Natl. Bank *v.* Yates, 240 U. S. 541 602
Joseph *v.* C., B. & Q. Ry., 157 S. W. Rep. 837 598
Jourdan *v.* Barrett, 4 How. 168 405
Kane *v.* New Jersey, 242 U. S. 160 245
Kansas City & Memphis Ry. *v.* Oakley, 115 Ark. 20 597
Kansas City Southern Ry. *v.* Albers Comm. Co., 223 U. S. 573 631
Kansas City Southern Ry. *v.* Henrie, 214 U. S. 491 625
Kansas City Southern Ry. *v.* Leslie, 238 U. S. 599 312
Keeler *v.* Standard Folding Bed Co., 157 U. S. 659 509
Kelly *v.* Griffin, 241 U. S. 6 249
Kendall *v.* Winsor, 21 How. 322 511
Keystone Bridge Co. *v.* Phoenix Iron Co., 95 U. S. 274 510
Kidd *v.* Pearson, 128 U. S. 1 238
Kielley *v.* Carson, 4 Moo. P. C. 63 538, 541, 544
Kiernan *v.* Portland, 223 U. S. 151 235

PAGE

Kilbourn *v.* Thompson, 103 U. S. 168 534, 537, 538
Knutter *v.* N. Y. & N. J. Tel. Co., 67 N. J. L. 646 199
Koopman *v.* Blodgett, 70 Mich. 610 321, 322
Kurtz *v.* Moffitt, 115 U. S. 487 249
La Amistad de Rues, 5 Wheat. 385 155
Lafayette Ins. Co. *v.* French, 18 How. 404 96
Lamar *v.* United States, 240 U. S. 60 629
Lau Ow Bew *v.* United States, 144 U. S. 47 249
Lawton *v.* Steele, 152 U. S. 133 238
Lea *v.* Deakin, 13 Fed. Rep. 514 279
Leathe *v.* Thomas, 207 U. S. 93 164, 165, 628, 634
Leavitt *v.* Maykel, 203 Mass. 506 186
Ledgerwood *v.* Pitts, 122 Tenn. 570 487
Lee *v.* Munroe, 7 Cranch, 366 409
Lehman *v.* M'Quown, 31 Fed. Rep. 138 279
Lennon, *In re*, 150 U. S. 393 250
Leovy *v.* United States, 177 U. S. 621 325
Le Sassier *v.* Kennedy, 123 U. S. 521 29
Leslie *v.* Brown, 90 Fed. Rep. 171 280
Levey *v.* Stockslager, 129 U. S. 470 470
Lewis Blue Point Oyster Co. *v.* Briggs, 229 U. S. 82 321
Leyson *v.* Davis, 170 U. S. 36 29
Light *v.* United States, 220 U. S. 523 405, 410
L'Invincible, 1 Wheat. 238 155
Little Rock, Miss. R. & Tex. R. R. *v.* Brooks, 39 Ark. 403 322
Livermore *v.* Boutelle, 11 Gray, 217 272
Lloyd *v.* Dollison, 194 U. S. 445 519
Lone Wolf *v.* Hitchcock, 187 U. S. 553 468
Longyear *v.* Buck, 83 Mich. 236 245

PAGE

Lott, *State ex rel. v.* Brewer, 64 Ala. 287 409
Lottery Case, 188 U. S. 321 346, 365
Louisiana *v.* Garfield, 211 U. S. 70 58
Louisiana R. R. Comm. *v.* Texas & Pacific Ry., 229 U. S. 336 39
Louisville Bridge Co. *v.* Sieber, 157 Ky. 151 310
Louis. & Nash. R. R. *v.* Melton, 218 U. S. 36 97, 200
Louis. & Nash. R. R. *v.* Parker, 242 U. S. 13 626
Louisville Trust Co. *v.* Knott, 191 U. S. 225 632
Lowry *v.* Silver City Gold Mining Co., 179 U. S. 196 164
Ludwig *v.* Western Union Tel. Co., 216 U. S. 146 237
Luther *v.* Borden, 7 How. 1 234
Lux *v.* Haggin, 69 Cal. 255 330
Luxton *v.* North River Bridge Co., 147 U. S. 337 256
Lyon *v.* Robert Garrett Lumber Co., 77 Kans. 823 289
McAllister *v.* Ches. & Ohio Ry., 157 Fed. Rep. 740 305
McCabe's Admx. *v.* Maysville & Big Sandy R. R., 112 Ky. 861 306, 310
McClain *v.* Ortmayer, 141 U. S. 419 510
McCluskey *v.* Marysville & Northern Ry., 243 U. S. 36 41, 42
McCray *v.* United States, 195 U. S. 27 355
McCulloch *v.* Maryland, 4 Wheat. 316 346, 537
McDonnell *v.* Jordan, 169 U. S. 734 633
McGlone *v.* Womack, 129 Ky. 274 245
McGovern *v.* Phila. & Reading Ry., 235 U. S. 389 573
McLish *v.* Roff, 141 U. S. 661 633
McMichael *v.* Murphy, 197 U. S. 304 421
Madisonville Traction Co. *v.* St. Bernard Mining Co., 196 U. S. 239 305

PAGE

Magruder *v.* Drury, 235 U. S. 106 118
Mallers *v.* Commercial L. & T. Co., 216 U. S. 613 627
Manhattan Life Ins. Co. *v.* Cohen, 234 U. S. 123 625
Marshall *v.* Dye, 231 U. S. 250 235, 450
Martin *v.* Pittsburg & Lake Erie R. R., 203 U. S. 284 198
Mathison *v.* Minneapolis Street Ry., 126 Minn. 286 212
Maubourquet *v.* Wyse, 1 Ir. Rep. C. L. 471 91
Mayor of Worcester *v.* Norwich &c. R. R., 109 Mass. 103 384
Mellon Co. *v.* McCafferty, 239 U. S. 134 628, 634
Meredith *v.* Santa Clara Mining Assn., 60 Cal. 617 278, 280
Messenger *v.* Anderson, 225 U. S. 436 257
Michigan Trust Co. *v.* Ferry, 228 U. S. 346 91, 96
Michoud *v.* Cirod, 4 How. 503 118
Middlesex Bank *v.* Butman, 29 Me. 19 93
Middleton *v.* Texas Power & Light Co., 185 S. W. Rep. 556 212
Miedreich *v.* Lauenstein, 232 U. S. 236 417
Miles Medical Co. *v.* Park & Sons Co., 220 U. S. 373 498
Milk Producers' Assn. *v.* Del., Lack. & W. R. R. Co., 7 I. C. C. 92 381
Miller *v.* Hepburn, 71 Ky. 326 320
Miller *v.* Wilson, 236 U. S. 373 357, 362
Milligan, *Ex parte*, 4 Wall. 2 348, 370, 377
Mills *v.* Green, 159 U. S. 651 289
Minneapolis Iron Co. *v.* Kline, 199 U. S. 593 200
Minneapolis & St. Louis R. R. *v.* Bombolis, 241 U. S. 211 235
Minneapolis & St. Louis Ry. *v.* Herrick, 127 U. S. 210 200

PAGE

Minneapolis & St. Louis R. R. *v.* Minnesota, 193 U. S. 53 568
Minneapolis & St. Louis R. R. *v.* Nash, 242 U. S. 619 45
Minnesota Rate Cases, 230 U. S. 352 349, 385
Missouri, Kans. & Tex. Ry. *v.* Cade, 233 U. S. 642 208
Missouri, Kans. & Tex. Ry. *v.* Hailey, 156 S. W. Rep. 1119 598
Missouri, Kans. & Tex. Ry. *v.* United States, 231 U. S. 112 346
Missouri, Kans. & Tex. Ry. *v.* Walston, 37 Okla. 517 598
Missouri, Kans. & Tex. Ry. *v.* Wulf, 226 U. S. 570 630
Missouri Pacific Ry. *v.* Castle, 224 U. S. 541 34, 200, 207
Missouri Pacific Ry. *v.* Kansas, 216 U. S. 262 350, 384
Missouri Pacific Ry. *v.* Mackey, 127 U. S. 205 34, 200
Mitchell *v.* Atlantic Coast Line R. R., 15 Ga. App. 797 597
Mitchell *v.* Williams, 27 Ind. 62 245
Mobile, Jackson & K. C. R. R. *v.* Turnipseed, 219 U. S. 35 34, 214
Monongahela Nav. Co. *v.* United States, 148 U. S. 312 320, 326, 365, 376, 383
Montana *ex rel.* Haire *v.* Rice, 204 U. S. 291 627
Montello, The, 20 Wall. 430 323
Montgomery *v.* Chelf, 118 Ky. 766 487
Moore *v.* Sanborne, 2 Mich. 519 321
Moran *v.* Horsky, 178 U. S. 205 164
Morey *v.* Brown, 42 N. H. 373 245
Morgan *v.* Devine, 237 U. S. 632 628
Morgan *v.* King, 18 Barb. 277; 35 N. Y. 454 322
Morrison *v.* Thurman, 56 Ky. 249 320
Mountain Timber Co. *v.* Washington, 243 U. S. 219 45

PAGE

Mount Vernon-Woodberry Cotton Duck Co. *v.* Alabama Interstate Power Co., 240 U. S. 30 570
Mullan *v.* United States, 212 U. S. 516 628
Mullen *v.* United States, 224 U. S. 448 111, 112
Muller *v.* Oregon, 208 U. S. 412 362
Munn *v.* Illinois, 94 U. S. 113 198, 384
Murdock *v.* Memphis, 20 Wall. 590 164
Murray's Lessee *v.* Hoboken Land & Imp. Co., 18 How. 272 367
Murray *v.* Murray, 115 Cal. 266 272
Murray *v.* Preston, 106 Ky. 561 320, 322
Murray *v.* South Carolina R. R., 1 McMull. (S. C.) 385 199
Nash *v.* United States, 229 U. S. 373 85
National Bank *v.* Matthews, 98 U. S. 621 119
National Bank *v.* Whitney, 103 U. S. 99 119
National Refg. Co. *v.* St. Louis, Iron Mt. & So. Ry., 226 Fed. Rep. 357; 237 Fed. Rep. 347 289
Needham *v.* Thayer, 147 Mass. 536 93
New Mexico, Territory of, 29 L. D. 364 421
New Mexico, Territory of, 34 L. D. 599 421
New Orleans *v.* Citizens' Bank, 167 U. S. 371 451
New York Cent. R. R. *v.* White, 243 U. S. 188 45, 213, 216, 234, 236, 239, 241, 243
New York, Lake Erie & W. R. R. *v.* Estill, 147 U. S. 591 95
New York, N. H. & H. R. R. *v.* Interstate Com. Comm., 200 U. S. 361 349
Noble State Bank *v.* Haskell, 219 U. S. 104 245

PAGE

Norfolk & Western Ry. *v.* West Virginia, 236 U. S. 605 631
North Carolina R. R. *v.* Zachary, 232 U. S. 248 417
Northern Pacific R. R. *v.* Herbert, 116 U. S. 642 199
Northern Pacific Ry. *v.* Wall, 241 U. S. 87 596, 604, 606
Ohio *ex rel.* Davis *v.* Hildebrant, 241 U. S. 565 13, 235
Ohio R. R. Comm. *v.* Worthington, 225 U. S. 101 39
Old Colony Trust Co. *v.* Omaha, 230 U. S. 100 166, 301
Old Wayne Mut. Life Assn. *v.* McDonough, 204 U. S. 8 95
Olive *v.* State, 86 Ala. 88 322
Omaha & C. B. St. Ry. *v.* Interstate Com. Comm., 230 U. S. 324 354
O'Neil *v.* Northern Colorado Irrig. Co., 242 U. S. 20 95
Opinion of Justices, 209 Mass. 607 212
Oregon & California R. R. *v.* United States, 238 U. S. 393 551
Overton *v.* Oklahoma, 235 U. S. 31 627
Owen *v.* Herzihoff, 2 Cal. App. 622 289
Owensboro *v.* Cumberland Tel. Co., 230 U. S. 58 186
Pacific States Tel. Co. *v.* Oregon, 223 U. S. 118 234
Packer *v.* Bird, 137 U. S. 661 319, 325
Pagett, State *ex rel. v.* Superior Court, 46 Wash. 35 256
Parker *v.* Griswold, 17 Conn. 288 330
Pearson *v.* Rolfe, 76 Me. 380 321
Pederson *v.* Del., Lack. & W. R. R., 229 U. S. 146 192
Pennock *v.* Dialogue, 2 Pet. 1 510
Pennoyer *v.* Neff, 95 U. S. 714 92, 271
Pennsylvania, The, 19 Wall. 125 298
Pennsylvania Co. *v.* Shearer, 75 Ohio St. 249 604, 606

PAGE

Pennsylvania Fire Ins. Co. *v.* Gold Issue Mining Co., 243 U. S. 93 91
People *v.* Boston & Albany R. R., 70 N. Y. 569 384
People *v.* Elk River M. & L. Co., 107 Cal. 221 322
People *v.* New York &c. R. R., 104 N. Y. 58 384
People *v.* St. Louis &c. R. R., 176 Ill. 512 384
Permoli *v.* First Municipality, 3 How. 589 217
Perry *v.* Tacoma Mill Co., 152 Fed. Rep. 115 278
Peterson *v.* Chicago, R. I. & Pac. Ry., 205 U. S. 364 268
Philadelphia Co. *v.* Stimson, 223 U. S. 605 321
Pierce *v.* Somerset Ry., 171 U. S. 641 164
Pine *v.* Mayor of New York, 103 Fed. Rep. 337; 112 Fed. Rep. 98 330
Pine River Logging Co. *v.* United States, 186 U. S. 279 409
Plymouth Coal Co. *v.* Pennsylvania, 232 U. S. 531 197, 214, 216, 234, 242, 246
Portland Trust Co. *v.* Havely, 36 Oreg. 234 280
Prescott *v.* Brooks, 94 N. W. Rep. 88 289
Preston *v.* Chicago, 226 U. S. 447 166
Procter & Gamble Co. *v.* Cincinnati, Hamilton &c. Ry., 19 I. C. C. 556 285
Procter & Gamble Co. *v.* United States, 225 U. S. 282 286, 414
Procter & Gamble Co. *v.* United States, 188 Fed. Rep. 221 286
Pullman Co. *v.* Croom, 231 U. S. 571 449
Pumpelly *v.* Green Bay Co., 13 Wall. 166 324, 328
Queen *v.* Black, 6 Can. Exch. 236 409
Queen of the Pacific, 180 U. S. 49 604

PAGE

Railroad Comm. of Mississippi *v.* Louis. & Nash. R. R., 225 U. S. 272 632
Railroad Co. *v.* Mellon, 104 U. S. 112 510
Randall *v.* Balt. & Ohio R. R., 109 U. S. 478 199
Rangely *v.* Webster, 11 N. H. 299 93
Rast *v.* Van Deman & Lewis Co., 240 U. S. 342 437
Raymond *v.* Chicago, Mil. & St. P. Ry., 243 U. S. 43 192
Reetz *v.* Michigan, 188 U. S. 505 591
Reynolds *v.* Crawfordsville First Natl. Bank, 112 U. S. 405 119
Rice *v.* California, 24 L. D. 14 421
Richards *v.* Harrison, 218 Fed. Rep. 134 278
Richardson *v.* McChesney, 218 U. S. 487 450
Rigney *v.* Tacoma Light & Water Co., 9 Wash. 576 330
Riverside & Dan River Cotton Mills *v.* Menefee, 237 U. S. 189 92
Robert W. Parsons, The, 191 U. S. 17 326
Robinson *v.* Wells, 142 Ky. 800 320
Rogers *v.* Brooks, 31 Ark. 194 280
Rogers *v.* Hennepin County, 240 U. S. 184 417
Rosenthal *v.* New York, 226 U. S. 260 214
Russell *v.* Farley, 105 U. S. 433 279
St. Anthony Falls Water Power Co. *v.* St. Paul Water Commrs, 168 U. S. 349 319
St. Joseph & Iowa R. R. *v.* Shambaugh, 106 Mo. 557 423
St. Louis &c. R. R. *v.* Keller, 90 Ark. 308 606
St. Louis, Iron Mt. & So. Ry. *v.* Arkansas, 240 U. S. 518 354
St. Louis, Iron Mt. & So. Ry. *v.* Faulkner, 111 Ark. 430 597
St. Louis, Iron Mt. & So. Ry. *v.* McWhirter, 229 U. S. 265 601

PAGE

St. Louis, Iron Mt. & So. Ry. *v.* Taylor, 210 U. S. 281 198, 314, 620
St. Louis & Kansas City Land Co. *v.* Kansas City, 241 U. S. 419 166
St. Louis & S. F. Ry. *v.* Bilby, 35 Okla. 589 598
St. Louis & San Francisco R. R. *v.* Conarty, 238 U. S. 243 620
St. Louis & San Francisco Ry. *v.* McBride, 141 U. S. 127 280
St. Louis & San Francisco Ry. *v.* Mathews, 165 U. S. 1 204, 425
St. Louis & San Francisco R. R. *v.* Zickafoose, 39 Okla. 302 598
St. Louis, S. F. & Tex. Ry. *v.* Seale, 229 U. S. 156 630
St. Louis Southwestern Ry. *v.* Alexander, 227 U. S. 218 265
St. Louis Southwestern Ry. *v.* Arkansas, 235 U. S. 350 237
San Francisco Lumber Co. *v.* Bibb, 139 Cal. 325 289
Santissima Trinidad, The, 7 Wheat. 283 154, 156
Sayles *v.* Foley, 96 Atl. Rep. 340 212
Sayward *v.* Denny, 158 U. S. 180 166
Schick *v.* United States, 195 U. S. 65 628
School Land Opinion, 30 L. D. 438 421
Schuyler Natl. Bank *v.* Gadsden, 191 U. S. 451 119
Scott *v.* Lattig, 227 U. S. 229 320
Scranton *v.* Wheeler, 179 U. S. 141 320, 327
Scriver *v.* Smith, 100 N. Y. 471 330
Seaboard Air Line Ry. *v.* Horton, 233 U. S. 492; 239 U. S. 595 199
Seaboard Air Line Ry. *v.* Koennecke, 239 U. S. 352 630
Seaboard Air Line Ry. *v.* Padgett, 236 U. S. 668 626, 627, 632

PAGE

Seaboard Air Line Ry. *v.* Renn, 241 U. S. 290 630
Seattle & Montana R. R. *v.* Bellingham Bay & E. R. R., 29 Wash. 491 255
Seattle, Port Angeles &c. Ry. *v.* Land, 81 Wash. 206 255, 256
Second Employers' Liability Cases, 223 U. S. 1 34, 35, 198, 200, 207, 349, 379, 597
Sexton *v.* Newark Dist. Tel. Co., 84 N. J. L. 85; 86 N. J. L. 701 212
Shade *v.* Cement Co., 92 Kans. 146; 93 Kans. 257 212
Shanks *v.* Del., Lack., & W. R. R., 239 U. S. 556 192
Shattuck *v.* Title Guaranty & Surety Co., 239 U. S. 637 124
Shea *v.* Minneapolis, St. Paul & Sault Ste. Marie Ry., 63 Minn. 228 586
Sheets *v.* Selden's Lessee, 2 Wall. 177 171
Shepley *v.* Cowan, 91 U. S. 330 632
Sherlock *v.* Alling, 93 U. S. 99 207
Sherman *v.* Buick, 93 U. S. 209 420
Sherman *v.* Grinnell, 144 U. S. 198 164
Shively *v.* Bowlby, 152 U. S. 1 319, 320
Siebold, *Ex parte*, 100 U. S. 371 482
Simon *v.* Southern Railway, 236 U. S. 115 95
Sioux Remedy Co. *v.* Cope, 235 U. S. 197 191
Sizemore *v.* Brady, 235 U. S. 441 468, 470
Slidell *v.* Grandjean, 111 U. S. 412 179
Smith *v.* Gaines, 93 U. S. 341 278
Smith *v.* City of Rochester, 92 N. Y. 463 322
Smith & Hambrick *v.* Fonda, 64 Miss. 551 322
Smolik *v.* Phila. & Reading Coal Co., 222 Fed. Rep. 148 95
Snyder *v.* Colorado Gold Dredging Co., 181 Fed. Rep. 62 411

PAGE

Society of American Florists *v.* U. S. Express Co., 121 I. C. C. 120 381
South Carolina *v.* Georgia, 93 U. S. 4 326
Southern Express Co. *v.* Byers, 240 U. S. 612 596
Southern Oregon Co. *v.* United States, (C. C. A., 9th Cir., Feb. 13, 1917) 557
Southern Pacific Co. *v.* Interstate Com. Comm., 219 U. S. 433 385
Southern Pacific Co. *v.* Pool, 160 U. S. 438 312
Southern Pacific Co. *v.* Schuyler, 227 U. S. 601 164, 631
Southern Pac. Terminal Co. *v.* Interstate Com. Comm., 219 U. S. 498 39
Southern Railway *v.* Lloyd, 239 U. S. 496 312
Southern Railway *v.* Maxwell, 113 Tenn. 464 301
Southern Railway *v.* Postal Telegraph-Cable Co., 179 U. S. 641 256
Southern Railway *v.* Prescott, 240 U. S. 632 596
Southern Railway *v.* Railroad Comm. of Indiana, 236 U. S. 439 620
Southern Railway *v.* United States, 222 U. S. 20 349, 379, 620
Southwestern Oil Co. *v.* Texas, 217 U. S. 114 354
Spada *v.* Pennsylvania R. R., 86 N. J. L. 187 597
Standard Oil Co. *v.* United States, 221 U. S. 1 84, 86
Standard Sanitary Mfg. Co. *v.* United States, 226 U. S. 20 85
State *v.* Barnett, 239 Mo. 193 97
State *ex rel.* Lott *v.* Brewer, 64 Ala. 287 409
State *v.* Brown, 67 Ill. 435 409
State *ex rel.* Circuit Attorney *v.* Cape Girardeau &c. R. R., 48 Mo. 468 423

PAGE

State *ex rel.* Davis-Smith Co. *v.* Clausen, 65 Wash. 156 228, 237
State *ex rel.* Yaple *v.* Creamer, 85 Ohio St. 349 212
State *v.* Erickson, 119 Minn. 152 487
State *v.* Grimm, 239 Mo. 135 97
State *v.* Nichols, 50 Wash. 508 487
State *ex rel.* Davis *v.* Superior Court, 82 Wash. 31 255
State *ex rel.* Pagett *v.* Superior Court, 46 Wash. 35 256
State *ex rel.* Von Stade *v.* Taylor, 220 Mo. 619 487
Stearns *v.* United States, 152 Fed. Rep. 900 611
Steele *v.* United States, 113 U. S. 128 409
Stephens *v.* Cherokee Nation, 174 U. S. 445 468
Stephens *v.* Ray, 5 L. D. 133 611
Stertz *v.* Industrial Ins. Comm., 91 Wash. 588 240
Stewart *v.* Kansas City, 239 U. S. 14 626, 627, 630, 631
Stockard *v.* Morgan, 185 U. S. 27 237
Stockdale *v.* Hansard, 9 Ad. & El. 1 534
Stokoe *v.* Singers, 8 El. & Bl. 31 330
Stone *v.* Farmers' Loan & Trust Co., 116 U. S. 307 349
Stone *v.* Mississippi, 101 U. S. 814 425
Straus *v.* Victor Talking Machine Co., 243 U. S. 490 520
Stuart *v.* Clark's Lessee, 32 Tenn. 9 322
Stuart *v.* Hayden, 169 U. S. 1 118
Swafford *v.* Templeton, 185 U. S. 487 13
Swice's Admx. *v.* Maysville & Big Sandy R. R., 116 Ky. 253 310
Tefft, Weller & Co. *v.* Munsuri, 222 U. S. 114 124
Ten Eyck *v.* Town of Warwick, 82 N. Y. 562 322
Tennessee *v.* Whitworth, 117 U. S. 129 183
Tenney *v.* Lenz, 16 Wis. 566 245

PAGE

Texas & New Orleans R. R. *v.* Miller, 221 U. S. 408 425
Texas & New Orleans R. R. *v.* Sabine Tram Co., 227 U. S. 111 39
Texas & Pacific Ry. *v.* Abilene Cotton Oil Co., 204 U. S. 426 88, 349
Texas & Pacific Ry. *v.* Langbehn, 158 S. W. Rep. 244 598
Texas & Pacific Ry. *v.* R. R. Comm. of Louisiana, 232 U. S. 338 118
Texas & Pacific Ry. *v.* Rigsby, 241 U. S. 33 198, 379, 620
Thomas *v.* Iowa, 209 U. S. 258 627
Thompson *v.* Saint Nicholas Natl. Bank, 146 U. S. 240 119
Thunder Bay River Booming Co. *v.* Speechly, 31 Mich. 336 321, 322
Thurman *v.* Morrison, 53 Ky. 367 320
Thurston *v.* Thurston, 58 Minn. 279 272
Tibbits & Son *v.* Rock Island & Peoria Ry., 49 Ill. App. 567 586
Tiger *v.* Western Inv. Co., 221 U. S. 286 462
Tillinghast, *Ex parte*, 4 Pet. 108 51
Topliff *v.* Topliff, 122 U. S. 121 179
Towson *v.* Moore, 173 U. S. 17 118
Treat *v.* Lord, 42 Me. 552 321
Truax *v.* Raich, 239 U. S. 33 206
Tullis *v.* Lake Erie & W. R. R., 175 U. S. 348 200
Twing *v.* O'Meara, 59 Ia. 326 272
Twining *v.* New Jersey, 211 U. S. 78 367
Tyler *v.* Judges of Court of Registration, 179 U. S. 405 289
Tyler *v.* Judges of Court of Registration, 175 Mass. 71 272
Tyler *v.* Wilkinson, 4 Mason, 397; 24 Fed. Cas. 472 330
Tyler Mining Co. *v.* Last Chance Mining Co., 90 Fed. Rep. 15 279
Umbria, The, 166 U. S. 404 296

PAGE

Union Natl. Bank *v.* Louisville, N. A. & Chic. Ry., 163 U. S. 325 29
Union Natl. Bank *v.* McBoyle, 243 U. S. 26 631
Union Pacific R. R. *v.* Updike Grain Co., 222 U. S. 215 446, 447
United States *v.* American Bell Tel. Co., 167 U. S. 224 510
United States *v.* American Tobacco Co., 221 U. S. 106 84, 86
United States *v.* Bailey, 9 Pet. 238 614, 617
United States *v.* Balt. & Ohio R. R., 231 U. S. 274 446
United States *v.* Beatty, 232 U. S. 463 256
United States *v.* Beebe, 127 U. S. 338 409
United States *v.* Boutwell, 17 Wall. 604 449, 451
United States *v.* Britton, 108 U. S. 199 472
United States *ex rel.* Bernardin *v.* Butterworth, 169 U. S. 600 450, 451
United States *v.* Chandler-Dunbar Co., 229 U. S. 53 321
United States *v.* Cress, 243 U. S. 316 376, 383
United States *v.* Dalles Military Road Co., 140 U. S. 599 409
United States *v.* Delaware & Hudson Co., 213 U. S. 366 346, 354
United States *v.* Denver & Rio Grande R. R., 191 U. S. 84 257
United States *v.* Des Moines Nav. & Ry. Co., 142 U. S. 510 469
United States *v.* Eaton, 144 U. S. 677 485
United States *v.* Erie R. R., 237 U. S. 402 573
United States *v.* First Natl. Bank, 234 U. S. 245 460, 462
United States *v.* Garbish, 222 U. S. 257 357
United States *v.* George, 228 U. S. 14 616

PAGE

United States *v.* Great Falls Mfg. Co., 112 U. S. 645 329
United States *v.* Grimaud, 220 U. S. 506 410
United States *v.* Grizzard, 219 U. S. 180 329
United States *v.* Hudson, 7 Cranch, 32 485
United States *v.* Insley, 130 U. S. 263 409
United States *v.* Joint Traffic Assn., 171 U. S. 505 85, 365
United States *v.* Kirkpatrick, 9 Wheat. 720 409
United States *v.* Lacher, 134 U. S. 624 485
United States *v.* Lynah, 188 U. S. 445 320, 325, 326, 328, 329, 376, 383
United States *v.* McBratney, 104 U. S. 621 404
United States *v.* Martin, 94 U. S. 100 357
United States *v.* Mason, 218 U. S. 517 571
United States *v.* Michigan, 190 U. S. 379 409
United States *v.* Morrison, 240 U. S. 192 420
United States *v.* Mosley, 238 U. S. 383 482, 486
United States *v.* Nice, 241 U. S. 591 460
United States *v.* Northern Pac. Ry., 204 Fed. Rep. 485 611
United States *v.* Old Settlers, 148 U. S. 427 469
United States *v.* Pacific & Arctic Ry. & Nav. Co., 228 U. S. 87 88
United States *v.* Rio Grande Dam & Irrig. Co., 174 U. S. 690 325
United States *v.* Smull, 236 U. S. 405 610, 614
United States *v.* Trans-Missouri Freight Assn., 166 U. S. 290 85
United States *v.* Welch, 217 U. S. 333 329
United Surety Co. *v.* American Fruit Product Co., 238 U. S. 140 279

PAGE

Van Brocklin *v.* Tennessee, 117 U. S. 151 404
Vandalia R. R. *v.* South Bend, 207 U. S. 359 164
Van Horn *v.* People, 46 Mich. 183 245
Victor Chemical Works *v.* Industrial Board, 274 Ill. 11 212
Von Stade, State *ex rel. v.* Taylor, 220 Mo. 619 487
Wabash R. R. *v.* Priddy, 179 Ind. 483 598
Wadsworth *v.* Smith, 11 Me. 278 321
Wadsworth *v.* Tillotson, 15 Conn. 366 330
Walker *v.* Sauvinet, 92 U. S. 90 208, 216
Walker & Fulton *v.* Board of Public Works, 16 Ohio, 540 322
Warner Valley Stock Co. *v.* Smith, 165 U. S. 28 450
Washington Securities Co. *v.* United States, 234 U. S. 76 118
Waters-Pierce Oil Co. *v.* Texas, 212 U. S. 112 164, 625
Watson's Admr. *v.* C. & O. Ry., 170 Ky. 254 309
Webster *v.* Harris, 111 Tenn. 668 322
Weise *v.* Smith, 3 Oreg. 445 322
Wells *v.* Covenant Mut. Benefit Assn., 126 Mo. 630 289
West End & Atlanta Street R. R. *v.* Atlanta Street R. R., 49 Ga. 151 264
Western American Co. *v.* St. Ann. Co., 22 Wash. 158 255
Western Life Indemnity Co. *v.* Rupp, 235 U. S. 261 97, 280
Western Union Tel. Co. *v.* Kansas, 216 U. S. 1 237
Western Union Tel. Co. *v.* Richmond, 224 U. S. 160 354
Wetmore *v.* Rymer, 169 U. S. 115 265
Whalen *v.* Manley, 68 W. Va. 328 186

PAGE

Wheeling & Belmont Bridge *v.* Wheeling Bridge Co., 138 U. S. 287 255
White *v.* Prigmore, 29 Ark. 208 278
Whiteside's Admr. *v.* Hickman, 2 Yerg. 358 278
Whitney *v.* Dick, 202 U. S. 132 249
Whittier *v.* Wendell, 7 N. H. 257 93
Wight *v.* United States, 167 U. S. 512 446
Wigmore *v.* Jay, 5 Exch. 354; 19 L. J. Exch. 300; 14 Jur. 838 199
Wilcox *v.* Jackson, 13 Pet. 498 405
Williamsburg Boom Co. *v.* Smith, 84 Ky. 372 320
Williamson *v.* United States, 207 U. S. 425 614
Willink *v.* United States, 240 U. S. 572 321
Willis' Admr. *v.* L. & N. R. R., 164 Ky. 124 309
Willson *v.* Black-Bird Creek Marsh Co., 2 Pet. 245 324
Wilmington Star Mining Co. *v.* Fulton, 205 U. S. 60 200
Wilson *v.* Watson, 141 Ky. 324 320
Winans *v.* Denmead, 15 How. 330 511
Wisconsin &c. R. R. *v.* Jacobson, 179 U. S. 287 384
Wisconsin Cent. R. R. *v.* Price Co., 133 U. S. 496 404
Witheral *v.* Muskegon Booming Co., 68 Mich. 48 321
Wood *v.* Price, 79 N. J. Eq. 1 272
Wood *v.* Waud, 3 Exch. 748 330
Woodworth *v.* N. W. Mut. Life Ins. Co., 185 U. S. 354 278
Yale Lock Mfg. Co. *v.* Greenleaf, 117 U. S. 554 510
Yaple, State *ex rel. v.* Creamer, 85 Ohio St. 349 212
Yarbrough, *Ex parte*, 110 U. S. 651 482
Young *v.* Duncan, 218 Mass. 346 212

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

	PAGE
1787, July 13, 1 Stat. 51 (Ordinance of 1787)	216
1789, Sept. 24, c. 20, 1 Stat. 73 (See Judiciary Act)	
1790, Apr. 10, c. 7, 1 Stat. 109	510
1794, June 5, c. 50, 1 Stat. 381 (Neutrality Act)	149
1802, Apr. 14, c. 28, 2 Stat. 153	473
1818, Apr. 20, c. 88, 3 Stat. 447 (Neutrality Act)	149
1831, Mar. 2, c. 99, 4 Stat. 487	543
1838, June 12, c. 96, 5 Stat. 235, § 12	217
1842, June 25, c. 47, 5 Stat. 491	482
1845, Mar. 3, c. 48, 5 Stat. 742	217
1845, Mar. 3, c. 76, 5 Stat. 789	217
1846, Aug. 4, c. 82, 9 Stat. 52	217
1846, Dec. 28, c. 1, 9 Stat. 117	217
1853, Mar. 3, c. 145, 10 Stat. 244	416
1866, July 3, c. 161, 14 Stat. 81	61
1866, July 23, c. 219, 14 Stat. 218	416
1866, July 25, c. 242, 14 Stat. 239	553
1866, July 25, c. 245, 14 Stat. 243	482
1867, Mar. 2, c. 169, 14 Stat. 471, § 30	481
1867, Mar. 2, c. 208, 14 Stat. 635	470
1867, Mar. 30, Joint Resolution, 15 Stat. 353	470
1868, June 25, c. 80, 15 Stat. 80	553
1869, Apr. 10, c. 27, 16 Stat. 47	553
1870, May 4, c. 69, 16 Stat. 94	553
1870, May 31, c. 114, 16 Stat. 140, §§ 19, 20, 21, 22	483
1870, July 14, c. 254, 16 Stat. 254, §§ 5, 6	483
1872, June 8, c. 338, 17 Stat. 333	609
1872, June 10, c. 415, 17 Stat. 347	483
1880, May 14, c. 89, 21 Stat. 140, § 3	615
1880, June 9, c. 164, 21 Stat. 169	616
1885, Mar. 3, c. 353, 23 Stat. 437	250
1887, Feb. 4, c. 104, 24 Stat. 379 (See Interstate Commerce Acts)	
1887, Feb. 8, c. 119, 24 Stat. 388	460
1887, Mar. 3, c. 359, 24 Stat. 505, §§ 2, 4, 5, 6, 7, 10, 15 (Tucker Act)	331
1889, Jan. 14, c. 24, 25 Stat. 642	461
1889, Mar. 2, c. 414, 25 Stat. 1008	61
1890, May 26, c. 355, 26 Stat. 121	616
1890, July 2, c. 647, 26 Stat. 209 (Sherman Act)	68, 531
§ 7	88
1890, Aug. 19, c. 802, 26 Stat. 320	295
1891, Feb. 28, c. 383, 26 Stat. 794	461
1891, Feb. 28, c. 384, 26 Stat. 796	417

PAGE

1891, Mar. 3, c. 517, 26 Stat. 826 (See Judiciary Act)
1891, Mar. 3, c. 561, 26 Stat. 1095 614
§§ 18–21 406
1893, Mar. 2, c. 196, 27 Stat. 531 (See Safety Appliance Acts)
1894, Feb. 8, c. 25, 28 Stat. 36 484
1896, May 14, c. 179, 29 Stat. 120 406
1896, Dec. 31, Proclamation, 29 Stat. 885 296
1898, May 11, c. 292, 30 Stat. 404 406
1898, June 21, c. 489, 30 Stat. 484, § 1 53
1898, July 1, c. 541, 30 Stat. 544 (See Bankruptcy Act)
1899, Feb. 8, c. 121, 30 Stat. 822 450
1900, June 6, c. 813, 31 Stat. 672, § 6 466
1901, Feb. 15, c. 372, 31 Stat. 790 407
1902, Mar. 11, c. 182, 32 Stat. 63 616
1902, July 1, c. 1362, 32 Stat. 641, §§ 11, 12, 15, 16 .. 110
§ 22 111
1903, Mar. 2, c. 976, 32 Stat. 943 (See Safety Appliance Acts)
1904, Mar. 4, c. 394, 33 Stat. 59 616
1904, Apr. 28, c. 1786, 33 Stat. 539 461
1905, Feb. 1, c. 288, 33 Stat. 628 .....407, 408
1906, Apr. 26, c. 1876, 34 Stat. 137 113
1906, May 8, c. 2348, 34 Stat. 182 463
1906, June 5, c. 2580, 34 Stat. 213, § 6 467
1906, June 21, c. 3504, 34 Stat. 325 459
1906, June 29, c. 3591, 34 Stat. 584 (See Interstate Commerce Acts)
1906, June 29, c. 3592, 34 Stat. 596, §§ 9, 15 473

PAGE

1907, Mar. 1, c. 2285, 34 Stat. 1015 459
1907, Mar. 2, c. 2564, 34 Stat. 1246 (See Criminal Appeals Act)
1907, Mar. 4, c. 2939, 34 Stat. 1415 (See Hours of Service Act)
1908, Mar. 27, c. 106, 35 Stat. 49 467
1908, Apr. 22, c. 149, 35 Stat. 65 (See Employers' Liability Act)
1908, May 29, c. 216, 35 Stat. 444, § 24 467
1908, May 30, c. 234, 35 Stat. 554 248
1909, Mar. 4, c. 321, 35 Stat. 1088 (See Criminal Code)
1910, Feb. 28, Proclamation, 36 Stat., Pt. 2, 2415, 2438.. 151
1910, Apr. 4, c. 140, 36 Stat. 269 465
1910, Apr. 14, c. 160, 36 Stat. 298 (See Safety Appliance Acts)
1910, June 17, c. 299, 36 Stat. 533, § 3 465
1910, June 20, c. 310, 36 Stat. 557, §§ 6, 10, 12 53
1910, June 25, c. 392, 36 Stat. 822 489
1910, Dec. 19, c. 3, 36 Stat. 887 466
1911, Mar. 3, c. 231, 36 Stat. 1087 (See Judicial Code)
1911, Aug. 19, c. 33, 37 Stat. 25 489
1912, Aug. 23, c. 349, 37 Stat. 360 489
1912, Aug. 24, c. 390, 37 Stat. 560, § 11 413
1913, Oct. 3, c. 16, 38 Stat. 114, 196, § IV, par. J, subsec. 7 105
1914, June 4, c. 103, 38 Stat. 384 489
1914, Oct. 15, c. 323, 38 Stat. 730 (Clayton Act)....517, 521
1915, Jan. 28, c. 22, 38 Stat. 803 123
1915, Mar. 4, c. 176, 38 Stat. 1196 (See Interstate Commerce Acts)

PAGE

1916, June 9, c. 137, 39 Stat. 218 557
1916, Sept. 3, 5, c. 436, 39 Stat. 721 .342, 360, 364, 373, 388
Constitution. See Index at end of volume.
Revised Statutes.
§ 102 538
§ 161 614
§ 441 613
§ 453 613
§ 709 .....594, 599
§ 763 249
§ 764 249
§ 914 278
§ 2246 616
§§ 2257–2288 614
§ 2262 615
§ 2264 615
§ 2275 417
§ 2276 417
§ 2290 .....611, 616
§ 2291 611
§ 2293 616
§ 2294 616
§ 2304 610
§§ 2304–2309 609
§ 2309 611
§ 2339 405
§ 2340 405
§ 2347 55
§ 2348 .....55, 616
§ 2349 616
§ 2478 614
§ 4228 106
§ 4884 509
§ 4886 511
§ 4900 509
§ 4901 509
§ 4952 600
§§ 5133 *et seq*. 27
§ 5440 481
§§ 5506–5532 483
Bankruptcy Act 122
§ 60b 122

PAGE

Criminal Appeals Act ...442, 609
Criminal Code.
§ 19 477
§§ 19–26 484
§ 37 .....477, 608
§ 97 571
§ 99 571
§ 126 608
§ 215 440
§§ 232–235 248
§ 339 481
Employers' Liability Act .. 37, 41, 45, 191, 312, 349, 379, 573
Hours of Service Act 349, 374
Interstate Commerce Acts 284, 446, 579, 585, 588, 606
§ 2 446
§ 5 414
§ 6 446
§ 8 583
§ 10 414
§ 15 446
§ 20 .....580, 583, 588, 595
Judicial Code 124
§ 24 (20) 318, 330
§ 152 331
§ 237 ..228, 254, 593, 596, 601
§ 238 ....212, 249, 266, 305
§ 239 472
§ 241 249
§ 289 250
§ 294 331
§ 295 331
§ 297 331
Judiciary Act, 1789 597
§ 25 594
Judiciary Act, 1891.
§§ 4, 5, 6, 14 250
National Bank Act 27
Safety Appliance Acts .. 314, 315, 349, 379, 573, 619
§ 2 620
§ 4 313

(B.) STATUTES OF THE STATES AND TERRITORIES.

Georgia.
Constitution, 1798, Art. I, § 13 536
1884–5, Laws, p. 191; *id*., p. 235 259
1887, Laws, p. 148 260
Georgia (*cont*.)
1889, Laws, p. 696 260
1914, Laws, p. 271 262
Code, 1910, § 6115 509
§ 6116 589
Code, 1911, § 2783 619

PAGE

Illinois.
Constitution, 1818, Art. II, § 13..... 536
Indiana.
Constitution, 1816, Art. III, § 14..... 536
Iowa.
1913, Acts, 35 G. A., c. 147..... 212
Code Supp., 1913, § 2477m..... 212
Kansas.
1903, Laws, c. 356, §§ 4, 5, 6..... 30
Gen. Stats., 1909, §§ 4676–4683..... 30
Kentucky.
Gen. Stats., 1883, c. 56, p. 548, § 7.....170, 176
Stats., 1903, §§ 540, 559, 574..... 170
Maine.
Constitution, 1820, Art. IV, pt. 3, § 6..... 536
Maryland.
Constitution, 1776, Art. XII..... 534
Massachusetts.
Constitution, 1780, pt. 2, c. 1, § 3, Arts. X, XI.. 535
Mississippi.
Constitution, 1817, Art. III, § 20..... 536
Missouri.
Constitution, 1820, Art. III, § 19..... 536
1859, Laws, p. 400..... 423
1868, Laws, p. 97..... 423
1870, Laws, p. 91, § 2... 424
1870, Laws, p. 93..... 423
Rev. Stats., 1855, p. 371, § 7..... 423
1909, § 3078..... 424
§ 7042..... 94
Nebraska.
1895, Laws, c. 69, §§ 16–27..... 159
New Hampshire.
Constitution, 1792, pt. 2, §§ 22, 23..... 536

PAGE

New York.
Constitution, Amendment, 1913..... 195
1910, Laws, c. 674..... 195
1913, Laws, c. 816...190, 234
1914, Laws, c. 41...190, 234
1914, Laws, c. 316...190, 234
1915, Laws, c. 674, §§ 2, 8 194
North Carolina.
1907, Laws, c. 302..... 569
1913, Laws, c. 94..... 569
Ohio.
Constitution, 1802, Art. I, § 14..... 536
Oregon.
1913, Laws, c. 102, p. 169
§ 1..... 435
§ 2..... 433
South Carolina.
Constitution, 1790, Art. I, § 13..... 536
Tennessee.
Constitution, 1796, Art. I, § 11..... 536
1903, Acts, c. 501, p. 1344 301
Texas.
1907, Laws (Bucket Shop Law)..... 20
Rev. Stats., 1911, Art. 1206..... 277
Rev. Civ. Stats., Art. 1627..... 278
Rev. Crim. Stats., 1911, c. 3, p. 141..... 20
Arts. 538, 539..... 23
Arts. 545, 546..... 24
Washington.
Constitution, Art. I, § 16 252
1911, Laws, c. 74....44, 227
1913, Laws, c. 133, p. 412 252
1915, Laws, c. 188, p. 674 231
Rem. & Ball. Ann. Code, § 789..... 121
§§ 921–931..... 253
§§ 5857–1 *et seq*..... 252
West Virginia.
1914, Act Feb. 20..... 489
1915, Acts, c. 26, pp. 222, 246..... 488

(C.) TREATIES.

	PAGE
Hague Convention.	
Art. 3	151
Art. 21	150
Art. 22	150
Art. 23	150
Art. 28	148
Indian.	
1867, Mar. 19, 16 Stat. 719 (Chippewa)	460
1867, Oct. 21, 15 Stat. 581 (Kiowa & Comanche)	466
1867, Oct. 21, 15 Stat. 589 (Kiowa, Comanche & Apache)	466
Prussia.	
1799, July 11, 8 Stat. 162	147
Art. 19	148, 152
1828, May 1, 8 Stat. 378	153

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1916.

TYRRELL, ADMINISTRATRIX OF TYRRELL, *v.* DISTRICT OF COLUMBIA.

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

No. 54. Argued November 1, 1916.—Decided March 6, 1917.

It is the duty of this court to dismiss a certiorari upon discovering that the question which induced the issuance of the writ does not arise on the record. *Furness, Withy & Co.* v. *Yang-Tsze Insurance Association*, 242 U. S. 430.

Petitioner's intestate was killed by an explosion of gas while making repairs in a school building of the District of Columbia. Damages were recovered in the Supreme Court of the District and the judgment was reversed by the Court of Appeals. This court issued a certiorari upon the assumption (induced by a misconception of counsel) that the decision, in possible conflict with decisions of this court, proceeded on the theory that the municipality could not be held for positive torts committed by its agents while discharging its public or governmental duties. Examination of the record proving that no exception was taken by plaintiff to the rulings of the trial court in this regard and that the decision of the appellate court

turned on its conclusion that the evidence was insufficient to establish a nuisance as the cause of the accident, *Held*, that the certiorari must be dismissed.

Writ of certiorari to review 41 App. D. C. 463, dismissed.

The case is stated in the opinion.

Mr. Levi H. David and *Mr. Alexander Wolf* for petitioner.

Mr. Percival H. Marshall and *Mr. Conrad H. Syme* for respondent.

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

We state only so much of the case as is essential to an understanding of the disposition which we are constrained to make of it.

The action was commenced in May, 1912, by the petitioner as administratrix of the estate of her husband to recover from the District of Columbia as a municipal corporation, damages suffered as the result of his wrongful death in September, 1911. Briefly, it was alleged that the District had contracted to make an addition to a school building to it belonging known as the McKinley Manual Training School and to put in order and adjust the boilers in the basement of the old building, and that while the deceased was engaged under a sub-contractor in doing the latter work, he was killed by an explosion of illuminating gas which had escaped from the gas pipes which were in the basement. It was alleged that the gas had been permitted to escape and remain in the basement through the neglect and wrongful conduct of the municipality or its agents. The averments as to the negligence of the municipality both in permitting the escape of the gas and as to allowing it to remain after notice of the dangerous condi-

tion, and as to the absence of neglect on the part of the plaintiff's intestate were ample. There was a subsequent amendment to the petition alleging facts which it was averred established that the conduct of the District as to the escape and failure to remove the gas was equivalent to the creation by it of a public nuisance. The defense was a general denial and a special plea setting up a release on the part of the plaintiff, which latter on demurrer was stricken out. There was a verdict and judgment in favor of the plaintiff and an appeal was taken by the defendant municipality. The Court of Appeals reversed the judgment and remanded with directions to grant a new trial, one member of the court dissenting. The appellee, alleging that the case in her favor could not be bettered at a new trial, asked that a final judgment be entered upon the theory that the case would be then susceptible of review in this court on error. On the refusal of this prayer a petition for certiorari was here presented.

The basis asserted for the application for certiorari was that the court below, disregarding a decisive line of decisions by this court holding that a municipality, the District of Columbia, was responsible for positive torts committed by its servants or agents in the course of their employment under the application of the rule *respondeat superior*, had mistakenly decided that such decisions were not controlling because that principle had no application when the servants or agents of a municipality represented it in the discharge of duties which were governmental or public in character as contradistinguished from mere municipal duties,—a ruling from which it was deduced that in the former situation a wrong suffered by an individual, however grievous, was not susceptible of redress because the wrongdoer, the municipality acting through its agents, was beyond the reach of courts of justice. Besides, it was declared that although the court proceeded upon the assumption that the doctrine which

it announced was not in conflict with the previous decisions of this court, that assumption was obviously a mistaken one, since the case principally relied upon by the court to sustain the doctrine which was applied had in express terms declared that the principle announced was in conflict with a previous decision of this court, which decision was wrong and would therefore not be applied. The existence of the ground thus stated in the petition for the writ was not challenged in the opposition filed by the respondent, although the correctness of the legal propositions relied upon and the significance of the previous decisions of this court were disputed.

As on the face of the opinion of the court below the reasoning apparently justified the inference that the situation was as stated in the petition for certiorari, the prayer for the writ was granted. When, however, we come to a close examination of the record on the submission of the case on its merits, we discover that the question upon which the certiorari was prayed under the circumstances previously stated does not arise on the record and is not open for consideration, and therefore (of course, we assume, through inadvertence of counsel) the petition for certiorari was rested upon a wholly unsubstantial and nonexisting ground,—a conclusion which will be at once demonstrated by the statement which follows:

At the trial the court in express terms charged the jury that "for a mere act of isolated negligence the municipality of the District of Columbia would not be responsible, no matter what the result of the isolated act of negligence was. The District in this action, if responsible at all, can only be responsible upon the theory that the death . . . resulted from the maintenance of a nuisance, in the first place, and secondly that the District of Columbia maintained the nuisance." And this was followed in the charge by a definition of what in the law would constitute a nuisance. To this charge as to non-liability of the city for any act

of negligence whatever under the circumstances, unless there was a public nuisance, no exception whatever was taken by the plaintiff, the only exception on the subject being that reserved by the defendant to the charge that there would be a liability even in case of a public nuisance. The case therefore on the appeal below (except as to subjects having no relation to the doctrine of municipal liability) involved only the question of liability in case of a public nuisance and raised no question concerning the correctness of the ruling that the municipality was not liable for an act of individual negligence because the work which was being done when the accident occurred involved the discharge of a governmental as distinguished from a municipal duty. It is true that in the reasoning of its opinion the court below stated what it deemed to be the correct theory concerning the division of the functions of a municipality, in one of which it had power to inflict a positive wrong without redress, and made reference to state cases deemed to establish this doctrine and a decision of this court which it said was argued at bar to establish to the contrary. But this was only reasoning deemed by the court to throw light upon its conclusion on the subject which was before it, that is, whether there was liability on the part of a municipality for a public nuisance as an exception to the general rule of its non-liability for a wrong done when in the exercise of a governmental function, and as a prelude to the ground upon which the judgment rendered was rested, that is, that there was no evidence tending to support the conclusion that the facts constituted a public nuisance.

In this view it is plain that if we differed from the conclusion of the court below on the subject of the tendencies of the proof as to the nuisance, we would not be at liberty as an original question to consider and dispose of the alleged contention concerning the governmental function and the resulting non-liability for a wrong done by a

municipality, since that question under the state of the record was not before the lower court and would not be open for our consideration, as no exception concerning the ruling of the trial court on that subject was taken so as to preserve a review concerning it. As it follows that the certiorari was improvidently granted as the result of a misconception of the parties as to the state of the record and the questions open, it follows that the case comes directly within the rule announced in *Furness, Withy & Company* v. *Yang-Tsze Insurance Association*, 242 U. S. 430, and our duty is to dismiss the certiorari, thus leaving the judgment of the court below unaffected by the previous order granting the writ.

Dismissed.

WELLSVILLE OIL COMPANY *v.* MILLER, *née* EVERETT, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 541. Argued December 6, 1916.—Decided March 6, 1917.

A controversy in a state court involving the power of the United States Court of the Indian Territory to authorize and approve a lease of an Indian allotment subject, however, to the condition that it be approved also by the Secretary of the Interior before becoming operative; and involving also the validity and effect of such a lease so judicially authorized and approved but disapproved by the Secretary, and the power of the Secretary to disapprove it, *Held*, reviewable in this court, as concerning matters inherently federal.

The United States Court for the Indian Territory in authorizing the guardian of a Cherokee minor to lease her allotment, conditioned the authority upon the approval of the lease by the Secretary of the Interior and ordered the guardian to report the lease when executed

to the court and furnish a new bond to secure moneys contemplated to be collected under it. So authorized, the guardian and ward executed a form of lease containing provisions which conferred upon the Secretary broad power to control its performance, with a discretion to cancel it without legal proceedings, and stipulating that, after approval by him, the lease should be void if an additional bond subject to his approval were not furnished. This instrument was reported to and approved by the court, but some months later was expressly disapproved by the Secretary.

Held, (1) That the approval by the court was not absolute but was merely a prerequisite and preliminary to the submission of the lease to the Secretary as required by the original order.

(2) That this conclusion was corroborated by the terms of the lease itself and by an allegation made by the plaintiff in error (the lessee) in its petition in this case to the effect that the court in granting authority to make the lease acquiesced in the Secretary's claim that approval by him was prerequisite.

(3) That failure to give effect to the lease did not deny full faith and credit to the order of the court authorizing the guardian to make it.

(4) That if the Secretary had no power of approval no authority to lease was conferred by the order.

44 Oklahoma, 493; 150 Pac. Rep. 186, affirmed.

THE case is stated in the opinion.

Mr. Charles H. Merillat, with whom *Mr. James A. Veasey* was on the brief, for plaintiff in error.

Mr. Robert J. Boone for defendants in error.

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

The Wellsville Oil Company sued to protect its alleged rights as lessee under an oil and gas lease and to set aside a conflicting lease held by the Alpha Oil Company. Upon demurrer the petition was dismissed for want of cause of action and the judgment to that effect was affirmed by the court below.

To state the undisputed facts which led to the bringing of the suit and upon which its determination depends, will make clear the issues. Martha Miller, born Everett, owned land which had been allotted to her as a Cherokee of the full blood, and which, through her guardian, under authority of court approved by the Secretary of the Interior, had been leased in 1905 for the term of her minority for oil and gas purposes, the lease having by assignment passed to the Wellsville Oil Company, also with the approval of the Secretary of the Interior. In 1907 the guardian filed in the United States Court, Northern Judicial District of the Indian Territory, a request for authority to make a new lease to the Wellsville Oil Company for fifteen years. It was stated that the minor was then within one year of majority, that the existing lease would expire at that time and that the Oil Company, in view of the short time which the lease had yet to run, was engaged in pumping oil night and day and would probably extract all of the oil before the expiration of the lease, to the great detriment and injury of the minor and her property, as the price of oil was very low and the royalties would amount to very little. It was averred that the Oil Company had agreed that it would abandon the "excessive and damaging pumping" in which it was engaged if it could get a new lease for fifteen years and proposed to pay a bonus and an additional royalty. The court after a reference entered an order authorizing the lease, expressly, however, causing the authority to make it to depend upon the approval of the Secretary of the Interior and providing that only when the lease was so approved should it take the place of the old and existing lease which had yet a year to run. The order directed the guardian to report the lease by him made and to furnish a new bond to secure the bonus and the additional sums to be paid. Acting under this authority on the form of lease prepared and exacted by the Interior Department,

the parties executed the fifteen-year lease. This lease in the fullest way gave the Secretary of the Interior control over the parties in performing the obligations of the lease, delegated to the Secretary authority to cancel the lease without resort to legal proceedings if he deemed the situation required it and expressly exacted that after approval by the Secretary the lease should be void unless an additional bond subject to his approval was given. The lease thus drawn was reported to the court and was by it approved on July 24, 1907. It was forwarded by the Indian agent in October of that year to the Commissioner of Indian Affairs for submission to the Secretary of the Interior and was by the Secretary in the same month expressly disapproved.

A little more than three years later, the petition to which we have at the outset referred was filed, and some months thereafter, in September, 1911, there was an amended petition. This petition was divided into two counts. The first, after reciting the facts which we have stated as to the making of the new lease and the disapproval of the same by the Secretary, charged that the plaintiff had remained in possession of the property under the new lease; that it worked and developed the same, producing oil therefrom, but that it was unable to dispose of the oil, as the only means for its outlet was through the pipe line of the Prairie Oil Company and that company, under the influence of the Secretary of the Interior, had refused to pay for the oil on the ground of the non-existence of the lease. It was further charged that some time after Martha Miller, the lessor, had become of age, she had leased the property to the Alpha Oil Company for gas and oil purposes, that that company had fraudulently interfered with the exercise of the rights of plaintiff under its lease and had ousted the plaintiff of possession and had wrongfully held possession until 1910, in which year it had abandoned the property. It was alleged that following this

abandonment the plaintiff had retaken possession and continued to produce oil and transmit it through the pipes of the Prairie Oil Company without pay as in the previous period. It was charged that the fifteen-year lease was valid, that the Secretary of the Interior was wholly without authority of law to disapprove the same, that while the court in sanctioning the lease had acquiesced in his claim of authority to do so, that acquiescence was nothing worth and the lease as made was valid notwithstanding the disapproval of the Secretary. There was an inconsistent claim in the petition that the court by approving the lease as presented by the guardian prior to its transmission to the Secretary of the Interior for his action had virtually sanctioned the lease upon the theory that the approval of the Secretary was not necessary. The second count asserted, under the theory of the validity of the lease, the right to the proceeds of the oil in the hands of the Prairie Oil Company, and even upon the hypothesis that the lease was invalid, the right to be reimbursed a very large amount of expenses and costs of improvements which it was alleged had been made in working and developing the property.

The prayer was for a judgment upholding the validity of the fifteen-year lease and annulling the lease to the Alpha Oil Company and awarding the proceeds of oil in the hands of the Prairie Oil Company to the plaintiff. It was further prayed, under the hypothesis that the fifteen-year lease should not be upheld, that there be a judgment for the costs and expenses as averred in the second count.

The petition was demurred to on the ground that it stated no cause of action. The demurrer was sustained and, as the plaintiff elected to stand upon its pleading, a judgment was entered dismissing the petition on the merits. By order of court and consent of parties it came to pass that the proceeds of the oil which had been hitherto

received by the Prairie Oil Company were subjected to the order of the court for ultimate distribution and an agreement was had concerning the right of the Prairie Oil Company to retain the proceeds of the oil produced by the operations under the lease until it became possible to distribute the same by a final disposition of the cause. The case was then taken to the court below. It was there decided: (a) That the plaintiff was not in a position to invoke the equitable powers of the court for the purpose of enforcing the fifteen-year lease because it appeared that the lease had been procured by the wrongdoing of the petitioner in excessively exercising its right to pump as a means of forcing the making to it of a new lease for a long period; and (b) that in any event, as the new lease had by the order of the court been in express terms subjected as a condition precedent to the approval of the Secretary of the Interior, the failure of that officer to so approve, indeed his express disapproval, had prevented the power to make the lease from taking being and therefore there was no foundation whatever upon which to base the claim that the lease had been lawfully executed, and it was held that there was hence no necessity for passing upon the question of legal power in the Secretary to approve or disapprove. In other words, it was decided that if the Secretary had power, the failure to approve was an end of the controversy; if he had not the power, the same result followed, since the court which granted the right had in express terms permitted it to be exercised only upon the precedent condition that its exertion was approved by the Secretary. In addition the court held that the contention that because the form of lease as drawn was reported to the court which had given the authority to make it subject to the approval of the Secretary of the Interior and received its approval before action by the Secretary, therefore the condition of precedent action of the Secretary was waived or withdrawn, was without

foundation. The court did not pass upon the question raised under the second count concerning the right to recover costs and expenses if the lease were held not to exist, upon the ground that as the petitioner was in possession that question might be reserved for ulterior consideration. 44 Oklahoma, 493.

Following this judgment the trial court distributed the money which had accumulated in its custody by virtue of the agreement previously made as well as a further sum derived from the delivery of oil from the leased property which was in the hands of the Prairie Oil Company. This distribution was made upon the basis of the nonexistence of the fifteen-year lease, of the right of Martha Miller to possession subject to the lease by her made to the Alpha Oil Company, on a ratio which was agreed upon between the two interested parties, and there was a judgment against the Wellsville Oil Company for costs. The appeal of that company taken from this order was dismissed by the court below on the ground that the order substantially embraced only a distribution of funds which had been virtually directed to be distributed by the previous judgment. In thus disposing of the case it was held that the assignment of error made by the Wellsville Oil Company concerning the failure to allow it costs and expenses as urged in the second count of its petition was not foreclosed because, being in possession, as previously held that subject might be litigated when an attempt to oust the possession was made. In this connection the court observed that while it was true a recital was contained in the order of distribution that Martha Miller was entitled to possession as owner, as no process was directed to issue giving effect to this decree, it was a mere surplusage which left the question open. 150 Pac. Rep. 186.

All consideration of error committed in refusing in either judgment to allow the costs and expenses asserted in the

second count of the petition may be at once put aside, as it is declared in the argument for the plaintiff in error that this particular phase of the case is not urged. Moreover, before coming to consider the merits of the errors relied upon, we observe that because of the federal nature of the court which authorized the lease, whose validity was involved, the subject-matter with which the case dealt (Indian land), and the asserted want of power in the Secretary of the Interior to disapprove the lease, and the further assertion that the court had no authority in any event to subject the lease to the approval of the Secretary, we think the issues involved so concern matters of inherently federal nature as to afford jurisdiction. *Swafford* v. *Templeton*, 185 U. S. 487; *Fritzlen* v. *Boatmen's Bank*, 212 U. S. 364; *Ohio ex rel. Davis* v. *Hildebrant*, 241 U. S. 565. We therefore overrule the motion to dismiss.

Without following the elaborate argument of the plaintiff in error and the various propositions which that argument advances, we content ourselves with saying that every proposition relied upon will be embraced and disposed of by these considerations:

First. The contention that the court which authorized the lease retracted the condition precedent of approval by the Secretary of the Interior which it had previously imposed because it approved the executed lease before it had been presented to the Secretary when it was reported to the court by the guardian in conformity with previous directions to that effect, is plainly without merit, (a) because, as pointed out by the court below, the report of the lease and its approval were mere prerequisite and preliminary steps to the submission of the lease to the Secretary for his action in order that the condition precedent which the court had established might be brought into play, (b) because the contention is directly in conflict with the express terms of the lease which was submitted and approved, every condition of which made it manifest

that it was drawn with reference to the power of the Secretary to approve or disapprove the same, and that its execution was subject to all the conditions, limitations and restrictions resulting from that situation, (c) because the contention is directly in conflict with the petition which, as we have already pointed out, in express terms alleged that the Secretary asserted the power to approve and that the court in giving the authority acquiesced in such assertion of authority as a prerequisite.

Second. The contention that the failure to give effect to the lease was a denial of full faith and credit to the order of the court authorizing the guardian to make the lease involves on its face a misconception and comes to saying that because the condition precedent which was imposed by the order of authorization, that is, the approval of the Secretary, was enforced, thereby there resulted a failure to give effect to the order. In other words the argument is, that because the court gave full effect to the judgment, it failed to carry it out. In fact, on the very face of the petition, of the assignments of error and of all the arguments, it is apparent that they rest upon the plainly erroneous assumption which we thus point out, since they all but assert that the power to execute the lease which was given only upon the precedent condition of approval by the Secretary should have been upheld despite the fact that such approval was never obtained. As the petition averred that, acquiescing in the possession by the Secretary of legal authority to approve the lease, the court gave the right to make it only conditioned upon such approval, it follows that the averment that there was no legal power in the Secretary to approve was negligible, since it but asserted that the power to make the lease never arose.

Affirmed.

BOND ET AL., PARTNERS AS BOND & BUTTFIELD, *v.* HUME.

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

No. 119. Argued February 2, 1917.—Decided March 6, 1917.

An independent sovereignty will not lend the aid of its courts to enforce a foreign contract where such action would be repugnant to good morals, lead to disturbance or disorganization of its municipal laws, or otherwise violate its public policy.

The courts of one sovereignty, however, will not refuse effect to the principle of comity by declining to enforce contracts which are valid under the laws of another sovereignty unless constrained thereto by clear conviction of the existence of the conditions justifying that course.

Since the definition of public policy lies peculiarly with the law-making power, the policy indicated by its enactments must control comity in the enforcement of foreign contracts.

The foregoing principles apply to the several States, under the common obligations of the Constitution, more strongly than to sovereignties which are independent of one another.

Contracts between citizens of New York and a citizen of Texas, executed in New York, for the purchase and sale of cotton for future delivery upon the New York Cotton Exchange, pursuant to its rules, etc., *Held* valid under the New York law and under the common law.

Contracts with brokers for the purchase and sale of cotton for future delivery, under and subject to the rules of a cotton exchange, which rules permit the substitution in delivery of grades other than that upon which the contract price is based and provide that in such case the price shall be readjusted according to the rates of the exchange "existing on the day previous to the date of the transferable notice of delivery," are not necessarily to be regarded as violating the policy evinced by the Texas "Bucket Shop Law," Rev. Crim. Stats. 1911, c. 3, Arts. 538, 539, when it is alleged and admitted that actual delivery of the goods was *bona fide* intended by the parties;

Nor are they repugnant to the public policy of Texas as manifested by other statutes of the State or by decisions of its courts.

The general provisions contained in Arts. 545 and 546 of the Texas statute, *supra*, and which shift the burden of proof in particular criminal prosecutions under it, afford no ground, in a civil case brought to enforce a contract, for holding that the averments of the petition must be taken to be untrue.

Whether the mere existence of a state statute punishing those who contract for the sale or purchase of goods or securities to be delivered in the future, not intending in good faith that delivery shall be made, could constitutionally justify the courts of that State, or in any event the courts of the United States exercising jurisdiction therein, in declining to enforce like contracts when made under like circumstances in another State and valid where made,—are questions upon which the court expresses no opinion.

"THIS action was instituted in the United States Circuit Court for the Western District of Texas, at Austin, on the 23rd day of February, 1910, by Allen Bond and William J. Buttfield, plaintiffs, against J. L. Hume, defendant, to recover the balance due upon an open account for money advanced to defendant, and paid, laid out and expended for his account, and for services rendered and performed for defendant at his special instance and request at divers times between the first day of July, 1907, and the first day of June, 1908, at the City, County and State of New York, in connection with the purchase and sale for defendant's account of cotton for future delivery upon the New York Cotton Exchange, pursuant to the rules, regulations, customs and usages of said Exchange, and for the amount due upon a certain promissory note executed by defendant payable to the order of J. W. Buttfield, and by the latter assigned to the firm of Bond and Buttfield.

"The plaintiff's first amended original petition contains the following allegations:

'The plaintiffs at the special instance and request of the defendant at the City, County, and State of New York, advanced to the defendant and paid, laid out and expended for his account divers sums of money, and did and performed for said defendant at the City, County and

State of New York, divers services in and about the purchase and sale of (*sic*) the defendant (*sic*) account cotton upon the New York Cotton Exchange, and in pursuance of the rules, regulations, customs and usage of the said New York Cotton Exchange, a copy of the rules and by laws and regulations being hereto attached and marked Exhibit A, and asked to be made, etc.

'That the said services were rendered and said money paid out by them to said defendant for and at his request in buying and selling for his said account as his agent cotton for future delivery according to the rules and regulations of the New York Cotton Exchange in the City of New York, a copy of said rules and regulations being hereto attached and marked Exhibit, etc.

'Said orders for the purchase and sale of cotton for future delivery were received by plaintiffs and executed with the understanding and agreement between the parties that actual delivery for this account was contemplated, subject to the rules and by laws of the said New York Cotton Exchange, as hereto attached and marked said Exhibit A.

'Plaintiffs allege further that they made said purchase and sales of the cotton for and at the request of the said defendant at the prices respectively authorized by him, and at his instance and request entered into binding contracts of purchase and sale for future delivery in accordance with the said rules and by laws of the said New York Cotton Exchange, a copy of said rules and by laws being hereto attached and marked Exhibit A, and made a part of this petition.

'Plaintiffs further allege that at the several times they made said purchases and sales for the defendant he well knew that actual delivery was contemplated, and well knew that plaintiffs were to make and did make said purchases and sales under and subject to the rules and by laws of the New York Cotton Exchange, and were held

personally bound for carrying out said contract, as will more fully appear by reference to said rules and by laws hereto attached and marked Exhibit A, and plaintiffs allege that they promptly advised the defendant of the said several purchases and sales and that said purchases and sales were made in accordance and with his instruction, subject to the rules and by laws of the New York Cotton Exchange and that said orders for the purchase and sale of cotton for future delivery were received and executed with the distinct understanding that actual delivery was contemplated as provided by the by laws and rules of said Exchange, as will more fully appear by reference to said exhibit A.'

"The by laws of the New York Cotton Exchange pleaded by the plaintiffs contain the following provision:

'The cotton to be of any grade from Good Ordinary to Fair inclusive, and if tinged or stained not below Low Middling Stained (New York Cotton Exchange Inspection and Classification) at the price of —— cents per pound for middling, with additions or deductions for other grades according to the rates of the New York Cotton Exchange existing on the day previous to the date of the transferable notice of delivery.'

"To this pleading the defendant, in the lower court, interposed the following exceptions:

'I. Now comes the defendant in the above entitled cause by his attorney, and excepts to plaintiffs' petition herein and says that the same is not sufficient in law to require him to answer and should be dismissed.

'II. And for special cause of exception defendant shows the following:

'1. It is apparent from the face of plaintiffs' petition that the balance due upon the alleged account sued on, arose out of a gaming transaction in cotton futures on the New York Cotton Exchange, that none of the cotton

alleged to have been bought and sold was delivered, but the account sued on simply represents the difference in the rise and fall of the market on said Cotton Exchange, and were alleged to have been settled by plaintiffs by paying or receiving a margin or profit on each contract, as shown in said account, and that the alleged balance claimed by plaintiff (*sic*) to be due from defendant consists of said alleged margin or profit.

'2. It appears from plaintiffs' petition that said alleged account sued on arose out of transactions on the New York Cotton Exchange, and pursuant to the rules, regulations, customs and usages of said Exchange, and does not show or set forth that in the settlement or closing out of said transaction sued on by delivery or tender of any grade or grades of cotton other than the grade upon which the prices were based in the transaction sued on, that the same were settled or closed out at the actual price for spot delivery of such other grade or grades at the time and place of delivery or tender.'

"Upon this record the Court below entered the following order:

'Thereupon came on to be heard the demurrers and exceptions of defendant to plaintiffs' amended petition and the same having been heard and duly considered, it is the opinion of the Court that said demurrers and exceptions should be sustained, and it is accordingly so ordered, and the plaintiffs declining to amend, it is further ordered that said cause be and the same is hereby dismissed at the cost of plaintiffs, to which order of the court sustaining said demurrers and exceptions, and dismissing said cause, the plaintiffs in open court excepted.'"

Mr. Charles Pope Caldwell, with whom *Mr. W. D. Caldwell* was on the brief, for Bond *et al.*

No appearance for Hume.

MR. CHIEF JUSTICE WHITE, after stating the contents of the certificate of the court below as above reproduced, delivered the opinion of the court.

The question as to which the court below desires to be instructed upon the case as stated in the foregoing certificate is this:

"Where a contract between a citizen of the State of New York and a citizen of the State of Texas is entered into, made and executed in the State of New York, for the sale of cotton for future delivery upon the New York Cotton Exchange, pursuant to the rules, regulations, customs and usages of said Exchange, and the same is a valid exigible contract in the State of New York, does the statute of the State of Texas (known as the 'Bucket Shop Law') passed by the 30th Legislature of the State of Texas, in 1907, the same being incorporated in the Revised Criminal Statutes of Texas (1911) as Chapter 3, pages 141, 142, or any public policy therein declared, prevent a district court of the United States, sitting in Texas, wherein a suit is brought to recover for breach of said contract from granting such relief as otherwise but for such statute the parties would be entitled to have and receive?"

We construe the question as simply asking whether under the pleadings as stated in the certificate a cause of action was disclosed which there was jurisdiction to hear, taking into consideration the local law including the provisions of the Texas statute referred to in the question.

It is obvious on the face of the pleadings as stated in the certificate that the contract the enforcement of which was sought was valid under the laws of the State of New York, the place where it was entered into and where it was executed, and this validity was not and could not be affected by the laws of the State of Texas, as in the nature of things such laws could have no extraterritorial opera-

tion. This conclusion is, however, negligible, as the question is not whether the contract was valid, but whether being valid under the law of New York, it was susceptible, consistently with the laws of Texas, of enforcement in the courts of the United States sitting in that State. And this question involves the inquiry: Was there any local public policy in the State of Texas which, consistently with the duty of the courts of that State under the Constitution to give effect to a contract validly made in another State, was sufficient to warrant a refusal by the courts of that State to discharge such duty?

A statement of a few elementary doctrines is essential to a consideration of this issue. Treating the two States as sovereign and foreign to each other—New York, under whose laws the contract was made and where it was valid, and Texas, in whose courts we are assuming it was sought to be enforced—it is elementary that the right to enforce a foreign contract in another foreign country could alone rest upon the general principles of comity. But elementary as is the rule of comity, it is equally rudimentary that an independent State under that principle will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or in other words, violate the public policy of the State where the enforcement of the foreign contract is sought. It is moreover axiomatic that the existence of the described conditions preventing the enforcement in a given case does not exclusively depend upon legislation but may result from a judicial consideration of the subject, although it is also true that courts of one sovereignty will not refuse to give effect to the principle of comity by declining to enforce contracts which are valid under the laws of another sovereignty unless constrained to do so by clear convictions of the existence of the conditions justifying that course. And

finally it is certain that as it is peculiarly within the province of the law-making power to define the public policy of the State, where that power has been exerted in such a way as to manifest that a violation of public policy would result from the enforcement of a foreign contract validly entered into under a foreign law, comity will yield to the manifestation of the legislative will and enforcement will not be permitted. It is certain that these principles which govern as between countries foreign to each other apply with greater force to the relation of the several States to each other, since the obligations of the Constitution which bind them all in a common orbit of national unity impose of necessity restrictions which otherwise would not obtain and exact a greater degree of respect for each other than otherwise by the principles of comity would be expected. It is unnecessary to cite authority for these several doctrines since, as we have said, they are indisputable, but they nowhere find a more lucid exposition than that long ago made by Mr. Chief Justice Taney in *Bank of Augusta* v. *Earle*, 13 Pet. 519, 589, 590.

Coming to apply these principles from general considerations, as it is undoubted that the New York contract as declared on was not only valid under the law of New York, but was not repugnant to the common or general law, as long since settled by this court (*Irwin* v. *Williar*, 110 U. S. 499; *Bibb* v. *Allen*, 149 U. S. 481; *Clews* v. *Jamieson*, 182 U. S. 461), and as we have been referred to and have been able to discover no decision of the courts of Texas or statute of that State causing its enforcement to be repugnant to the public policy of Texas, it must result that the question would have to be answered in the negative unless a different conclusion is required by the provisions of the particular state statute referred to in the question.

The statute is criminal and provides a punishment for the offences which it defines and the argument is that,

this being true, it necessarily forbids as a matter of public policy the enforcement in Texas of contracts, although lawful by the laws of another State, which, if entered into in Texas, would be criminal, since it must be that the public policy of Texas exacts that the results of a contract which if made in Texas would be punished as a crime shall not be susceptible of enforcement in its civil courts because made in another State. But without stopping to analyze the authorities relied upon to sustain the proposition in order to determine whether they support the doctrine as broadly stated, we observe that although the proposition were to be conceded for the sake of the argument only, that concession is immaterial for this reason: The statute relied upon (the pertinent sections are in the margin [1]) does not make criminal all sales for future delivery

---

[1] Texas Revised Criminal Statutes, 1911, Title 11, c. 3, p. 141.

Art. 538. A bucket shop defined.—A bucket shop, within the meaning of this law, is any place wherein dealing in futures is carried on contrary to any of the provisions hereof.

Art. 539. Futures or dealing in futures defined.—By each of the expressions, "futures," "dealing in futures," and "future contracts," as these terms are used in this law is meant: 1. A sale or purchase, or contract to sell, or any offer to sell or purchase, any cotton, grain, meat, lard, or any stocks or bonds of any corporation, to be delivered in the future, when it was not the bona fide intention of the party being prosecuted under this chapter, at the time that such sale, contract, purchase, or offer to sell or purchase, was made, that the thing mentioned in such transaction should be delivered and paid for as specified in such transaction. 2. Any such sale, purchase, offer or contract, where it was the intention of the party being prosecuted hereunder at the time of making such contract or offer, that the same should, or, at the option of either party, might be settled by paying or receiving a margin or profit on such contract. 3. Any purchase, sale or offer of sale or purchase, or contract for future delivery of any of the things mentioned in this article on, by or through any exchange or board of trade, the rules, by-laws, customs or regulations of which permit such contract or transaction to be settled or closed by delivery or tender of any grade or grades of the thing mentioned in such contract or transaction, other

of the property described, but only forbids and punishes the making of contracts of that nature where certain prescribed conditions are not exacted or do not exist. It looks, therefore, not to prohibit all such contracts but to secure in all when made in Texas the presence of conditions deemed to be essential. Indeed, it goes further, since even although the contract on the subject may have been made with the express stipulation as to delivery exacted by the statute, nevertheless crime and punishment may result as against a particular party to the contract who in bad faith has assented to the express stipulation, which otherwise would be valid. These conclusions we think plainly result from the definitions which the statute makes in the first class as to delivery, in the second class as to option, and in the third as to ultimate performance, none of which conditions we think can be said to necessarily embrace the contract sued upon taking the facts alleged in the petition to be established. It is true the statute contains general provisions in articles 545 and 546 (which we do not reproduce) that wherever a criminal prosecution is commenced against a person who may have made a particular future contract containing provisions in violation of the statute, the presumption shall be *prima facie* that the illegal conditions existed and therefore that there was guilt until the contrary was shown. But we are of opinion that this affords no ground in a civil case brought to enforce a contract, for holding that the averments of the petition must be taken to be untrue in order to defeat a right to be heard simply because under a criminal statute as to particular offences the burden of proof is shifted.

Concluding as we do that, accepting the averments of the petition as true, the cause of action was susceptible

than the grade upon which the price is based in said transaction, at any price other than the actual price for spot delivery of such other grade or grades, at the time and place of delivery or tender.

of being heard in the courts of Texas and therefore was also susceptible of being brought in the courts of the United States in that State, we are of opinion that the question asked should be replied to in the negative. And of course we must not be understood as deciding whether the mere existence of a state statute punishing one who in bad faith, and because of such bad faith, had made an agreement to deliver in a contract of sale which would be otherwise valid, could become the basis of a public policy preventing the enforcement in Texas of contracts for sale and delivery made in another State which were there valid although one of the parties might have made the agreement to deliver in bad faith. In other words, we must not be understood as expressing any opinion on the subject of whether, consistently with the very nature of the relations between the several States resulting from the constitutional obligations resting upon them, the courts of Texas under the guise of a public policy resting merely on the conditions stated could rightfully refuse to enforce a contract validly made in another State, or at all events whether under such circumstances such a contract would not in the nature of things be enforceable in the appropriate courts of the United States.

A negative answer is therefore made to the question asked and it is ordered that it be so certified.

UNION NATIONAL BANK ET AL. *v.* McBOYLE ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 164. Argued January 24, 25, 1917.—Decided March 6, 1917.

The board of directors of a national bank have power under the National Bank Act to clothe the cashier with authority to sell corporate shares which have been acquired by the bank as the result of a loan made upon the shares as security.

Whether the rules adopted by the board of directors of a national bank to govern its business do or do not empower the cashier to sell corporate shares which the bank has acquired as the result of loans upon them as collateral is a question involving the interpretation of the rules as applied to the circumstances of the transaction, and not a question concerning the meaning of the National Bank Act upon which this court may assume jurisdiction to review a state court's judgment.

Writ of error to review 168 California, 263, dismissed.

THE case is stated in the opinion.

Mr. Charles A. Beardsley, with whom *Mr. R. M. Fitzgerald* and *Mr. Carl H. Abbott* were on the briefs, for plaintiffs in error.

Mr. W. H. Orrick, with whom *Mr. Julius Kahn*, *Mr. T. C. Coogan* and *Mr. H. A. Powell* were on the brief, for defendants in error.

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

McBoyle and his wife sued the bank to recover 599 shares of the stock of the Burnham-Standeford Company,

which it was alleged they had purchased from the bank and which after payment of the cash part of the price had been placed with it as collateral to secure a note evidencing the credit price. It was alleged that, despite a tender of the purchase money due, the bank had refused to deliver the stock. The answer of the bank, while not denying the sale of the stock to McBoyle, charged that the sale had been fraudulently procured by him and besides that the sale was void because it was made by the cashier who was without authority to do so. It was moreover alleged that the sale had been repudiated by the board of directors and that there had been a tender of the cash price paid and of the note given for the balance.

The Supreme Court of the State, in reviewing and reversing a judgment of the trial court in favor of the bank, held that there was no proof of fraud in the sale from the bank to McBoyle and that from a consideration of the authority of the cashier in the light of the power conferred upon that officer by the board of directors and the nature and character of the transaction, the cashier had authority to make the sale and it was therefore valid. The case was remanded for a new trial. 162 California, 277. Before that trial the bank amended its answer by asserting that authority in the cashier to sell shares of stock belonging to the bank could not be sustained without a violation of the National Bank Law. The Supreme Court, to which the case was again taken, in affirming a judgment of the trial court awarding the stock to McBoyle, pointed out that, while the National Bank Law conferred no authority on national banks to buy stock for speculation or investment, yet such law did not prevent them from taking stock as security for loans made in the due course of business, from realizing on the security in default of payment of the loan and consequently when needs be from buying in the security to protect the bank and from selling the security after it had been bought in for the purpose of

realizing on the same. Thus recognizing the right of the bank consistently with the National Bank Act to acquire the stock, and treating the power to sell it as being indisputably vested at least in the board of directors, the court adhered to the opinion which it had previously expressed that the power in the cashier to make the sale in question was susceptible of being deduced by fair implication from the rules adopted by the board of directors for the government of the business of the bank and from the circumstances of the case. 168 California, 263.

The case is here in reliance upon the federal question supposed to have been raised by the amended answer and the ruling just stated, that is, the asserted violation of the National Bank Act which arose from implying from the rules adopted by the board of directors, authority in the cashier to make the sale. We say this because there is no pretense that the case as presented below or as here made raised any question concerning the power of a national bank in good faith in the due course of business under the law to loan on capital stock as collateral and realize on the same. But when the issue is thus accurately fixed, it is apparent that while in mere form of expression it may seemingly raise a question under the National Bank Act, in substance it presents no question of that character whatever, since it simply concerns an interpretation, not of the statute, but of the rules adopted by the board for the government of the bank, involving, in whatever view be taken, no exercise of power beyond that which it is conceded the National Bank Act conferred. To illustrate, if in express terms the board of directors had clothed the cashier with power to make the sale, there can be no question that they would have had authority to do so under the statute,—a conclusion which makes it clear that the determination of whether by a correct interpretation of the rules adopted by the board, power did or did not exist in the cashier, involves not the statute,

but the mere significance of the rules. That, coming to this, the contention involves no question under the National Bank Law upon which to base jurisdiction to review is so conclusively settled as not to be open. *Le Sassier* v. *Kennedy*, 123 U. S. 521; *Chemical Bank* v. *City Bank of Portage*, 160 U. S. 646; *Union National Bank* v. *Louisville, New Albany & Chicago Ry. Co.*, 163 U. S. 325; *Leyson* v. *Davis*, 170 U. S. 36; *Capital National Bank* v. *First National Bank of Cadiz*, 172 U. S. 425. It follows, therefore, that as there is nothing within our competency to review, the writ of error must be and it is

Dismissed for want of jurisdiction.

BOWERSOCK *v.* SMITH, ADMINISTRATRIX OF SMITH.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 172. Submitted February 1, 1917.—Decided March 6, 1917.

A State may by law provide for the protection of employees engaged in hazardous occupations by requiring that dangerous machinery be safeguarded, and by making the failure to do so an act of negligence upon which a cause of action may be based in case of injury or death resulting therefrom.

Consistently with due process, the State may also provide that in actions brought under such a statute the doctrines of contributory negligence, assumption of risk and fellow servant shall not bar recovery and that the burden shall be upon the defendant to show compliance with the act.

Chapter 356 of the Laws of Kansas of 1903, Gen. Stats., 1909, §§ 4676–4683, as construed by the Supreme Court of the State, lays upon the owners of manufacturing establishments an absolute duty to safeguard their machinery, makes them liable in damages for injuries

or death of employees resulting from breach of the duty, and abolishes the defenses of contributory negligence and assumption of risk. *Held*, that the statute was not rendered violative of due process under the Fourteenth Amendment by application to the case of an employee who had contracted with the owner to provide the safeguards the absence of which resulted later in his injury and death.

The statute makes the duty to provide safeguards absolute in the case of corporate as well as individual owners, and hence affords no basis for a contention that it denies the equal protection of the laws in permitting the former, while forbidding the latter, to escape liability by contract.

95 Kansas, 96, affirmed.

THE case is stated in the opinion.

Mr. Charles F. Hutchings and *Mr. McCabe Moore* for plaintiff in error.

Mr. Joseph Taggart, Ada Burhans Smith, Administratrix, *pro se*, *Mr. J. H. Mitchell* and *Mr. S. D. Bishop* for defendant in error.

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

Chapter 356 of the Laws of Kansas of 1903, General Statutes of 1909, §§ 4676 to 4683, is entitled and provides in part as follows:

"An Act requiring safeguards for the protection of all persons employed or laboring in manufacturing establishments, and providing civil remedies for all persons so engaged, or their personal representatives, in cases where any such person may be killed or injured while employed or laboring in any manufacturing establishment which is not properly provided with the safeguards required by this act.

* * * * * * * *

"Sec. 4. All . . . machinery of every description used in a manufacturing establishment shall, where prac-

ticable, be properly and safely guarded, for the purpose of preventing or avoiding the death of or injury to the persons employed or laboring in any such establishment; and it is hereby made the duty of all persons owning or operating manufacturing establishments to provide and keep the same furnished with safeguards as herein specified.

"Sec. 5. If any person employed or laboring in any manufacturing establishment shall be killed or injured in any case wherein the absence of any of the safeguards or precautions required by the act shall directly contribute to such death or injury, the personal representatives of the person so killed, or the person himself, in case of injury only, may maintain an action against the person owning or operating such manufacturing establishment for the recovery of all proper damages. . . .

"Sec. 6. In all actions brought under and by virtue of the provisions of this act, it shall be sufficient for the plaintiff to prove in the first instance, in order to establish the liability of the defendant, that the death or injury complained of resulted in consequence of the failure of the person owning or operating the manufacturing establishment where such death or injury occurred to provide said establishment with safeguards as required by this act, or that the failure to provide such safeguard directly contributed to such death or injury."

This act being in force, Smith, the superintendent of the Lawrence Paper Manufacturing Company, while engaged in adjusting some unguarded dryer rolls, was caught between them, crushed and killed. Relying upon the law above quoted, his personal representative sued Bowersock, the owner of the factory, to recover the damages suffered. The petition alleged the dangerous character of the dryer rolls and the fact that, although it was practicable to guard them, the requirements of the act in that respect had not been complied with, and

charged that the failure to do so directly caused the death of Smith. It was further alleged that at the time of the accident Smith was engaged in adjusting the machinery under the direction of a superior officer, the assistant manager of the factory. The answer, while denying generally the allegations of the petition, alleged that it was not practicable to guard the dryer rolls and averred that Smith was guilty of contributory negligence. It was also averred that as superintendent Smith by his contract of employment was under the duty of safeguarding the machinery and was charged generally with authority to direct the use of the same and hence he had assumed the risk of injury from failure to guard the dryer rolls and hence his injury and death resulted solely from his own neglect and through no fault on the part of the owner.

At the trial the plaintiff's evidence tended to support all of the allegations of the petition. The defendant offered evidence tending to show that the guarding of the dryer rolls was not practicable and that Smith had been guilty of contributory negligence. Further evidence was introduced tending to show that when Smith was employed as superintendent it was stipulated by him as a condition to his accepting the position, that he should have full and complete charge and management of the factory, including grounds, building, machinery and men, and that he should place guards on the machinery where needed for the protection of the employees. In addition the defendant, in support of the allegation that he had fully performed his duty under the statute, introduced in evidence the following notice which he had posted in the factory in question and three others which he carried on:

"CAUTION. Every Employe is Urged to be Careful in Order to Avoid Accidents.

"If there is any machinery, dangerous place or tool that you think should be safeguarded, repaired or improved, we will regard it a favor if you will report same at once to

the office. It is desired that all employes assist in reducing accidents to lowest possible point. November, 1911."

The court instructed the jury over the objection of the defendant that under the statute contributory negligence was no defence and that the fact that Smith was employed as superintendent of the factory with authority to safeguard the machinery would not bar a recovery and charged with reference to the burden of proof in accordance with the provision of the statute relating to that subject. There was a verdict for the plaintiff and the judgment entered thereon was affirmed by the court below. It was held, following previous decisions, that the common-law defences of contributory negligence, fellow servant and assumption of the risk were not applicable to suits under the statute. The court further construing the statute, held that it embraced all employees of every class or rank in the factories to which it applied and that merely because the deceased was employed as superintendent did not exclude him from the benefits of the act nor relieve the owner from responsibility under it. And it was held that a different result was not required because the deceased had contracted with the owner to safeguard the machinery under the circumstances of his employment. In so ruling the court referred to the evidence and pointed out that although there was testimony as to the authority of the deceased under his contract to safeguard the machinery, at the same time the evidence showed that in the exercise of such authority he was under the control of three superiors, all of whom had testified that they did not consider it practicable to safeguard the dryer rolls. Attention was also directed to the notice above reproduced which the defendant posted with reference to guards on machinery as showing a control over that subject by the owner. 95 Kansas, 96.

The case is here because of the asserted denial of rights guaranteed by the Fourteenth Amendment.

That government may, in the exercise of its police power, provide for the protection of employees engaged in hazardous occupations by requiring that dangerous machinery be safeguarded and by making the failure to do so an act of negligence upon which a cause of action may be based in case of injury resulting therefrom, is undoubted. And it is also not disputable that, consistently with due process, it may be provided that in actions brought under such statute the doctrines of contributory negligence, assumption of risk and fellow servant shall not bar a recovery, and that the burden of proof shall be upon the defendant to show a compliance with the act. *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205; *Second Employers' Liability Cases*, 223 U. S. 1; *Missouri Pacific Ry. Co.* v. *Castle*, 224 U. S. 541; *Chicago, Burlington & Quincy Ry. Co.* v. *United States*, 220 U. S. 559; *Mobile, Jackson & Kansas City R. R. Co.* v. *Turnipseed*, 219 U. S. 35; *Easterling Lumber Co.* v. *Pierce*, 235 U. S. 380.

While not directly disputing these propositions and conceding that the Kansas statute contains them and that it is not invalid for that reason, nevertheless it is insisted that the construction placed upon the statute by the court below causes it to be repugnant to the due process clause of the Fourteenth Amendment. This contention is based alone upon the ruling made by the court below that under the statute the deceased had a right to recover although he had contracted with the owner to provide the safeguards the failure to furnish which caused his death, a result which, it is urged, makes the owner liable and allows a recovery by the employee because of his neglect of duty. We think the contention is without merit. It is clear that the statute as interpreted by the court below —a construction which is not challenged— imposed a duty as to safeguards upon the owner which was absolute and as to which he could not relieve himself by contract. This being true, the contention has nothing to rest upon since

in the nature of things the want of power to avoid the duty and liability which the statute imposed embraced all forms of contract, whether of employment or otherwise, by which the positive commands of the statute would be frustrated or rendered inefficacious. *Second Employers' Liability Cases*, 223 U. S. 1, 52.

Again it is contended that the statute denies to the plaintiff in error the equal protection of the laws, since it discriminates against factories owned and operated by individuals in favor of those carried on by corporations. This is the case, it is said, because a corporation in the nature of things can only comply with the requirements of the statute by contracting with agents or employees to safeguard the machinery, to whom in case of injury the corporation would not be liable, while an individual owner under the ruling of the court must perform that duty himself. The reasoning is obscure but we think it suffices to say that it rests upon an entire misconception since the statute imposes the positive duty to have the machinery duly safeguarded whether the owner be an individual or a corporation, and the want of power by contract to escape the liability which the statute imposes also equally applied to corporations as well as individuals. It follows, therefore, that the statute affords no semblance of ground upon which to rest the argument of inequality which is urged.

Affirmed.

McCLUSKEY, ADMINISTRATOR OF NORDGARD, *v.* MARYSVILLE & NORTHERN RAILWAY COMPANY ET AL.

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

No. 166. Argued January 30, 31, 1917.—Decided March 6, 1917.

The course of business of a company engaged in logging and milling timber consisted in carrying its logs from its own timber-land within a State over its own logging railroad to tidewater, in the same State, in selling there a part to others who towed them away and re-sold them to purchasers within and without the State, and in towing the rest to its mills in the same State, milling them at the latter place and then disposing by sale of their products partly in local markets and partly in other States and countries. *Held*, that the transportation of the logs by the railroad was not interstate or foreign commerce, and that an employee of the railroad, injured while engaged in unloading some of them at the tidewater terminus, was not employed in such commerce, within the Federal Employers' Liability Act.

A plaintiff in an action for personal injuries based on the Federal Employers' Liability Act died while the case was pending in the Circuit Court of Appeals. Writ of error to review an adverse judgment of that court having been subsequently sued out in his name and citation issued and served, attorneys for both sides stipulated that his administrator might be substituted. Substitution, however, was refused by the Court of Appeals upon the ground that the writ had deprived it of jurisdiction. Upon a motion to dismiss upon the ground that the writ was wrongfully allowed and the administrator not properly a party, *Held*, that the defect of the proceedings was at most an irregularity which, in view of the stipulation, was waived.

218 Fed. Rep. 737, affirmed.

AFTER judgment against plaintiff in the court below, the writ of error from this court was allowed by a judge of that court March 15, 1915, upon a petition therefor made by plaintiff's attorney in plaintiff's name. Citation was

issued conformably, March 22, 1915, of which service was admitted by defendants' attorneys March 23d. In April following attorneys for both sides stipulated that the plaintiff died February 28, 1915, while the cause was pending in the court below, that his administrator was duly appointed March 23, 1915, and that the administrator might be substituted, and application for an order of substitution was made accordingly by plaintiff's attorney, but was refused by the court below upon the ground that issuance of the writ of error had deprived it of jurisdiction over the cause. The facts are stated in the opinion.

Mr. John T. Casey, with whom *Mr. George F. Hannan* and *Mr. Chas. R. Pierce* were on the briefs, for plaintiff in error.

Mr. E. C. Hughes, with whom *Mr. Maurice McMicken*, *Mr. Otto B. Rupp* and *Mr. H. J. Ramsey* were on the brief, for defendants in error.

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

This suit was brought under the Employers' Liability Act to recover damages resulting from injuries suffered by Nordgard while in the employ of the defendant railway company. The trial court directed a verdict for the defendants on the ground that there was no evidence tending to show that the defendants and Nordgard were engaged at the time of the accident in interstate or foreign commerce, and the case is here on writ of error to secure a reversal of the action of the court below affirming the judgment entered by the trial court dismissing the suit. 218 Fed. Rep. 737.

These are the facts: The defendant Stimson Mill Com-

pany was engaged in the logging and lumber business and carried its logs on its own logging railroad, the Marysville & Northern Railway, from timber land owned by it in Washington to a point near Marysville in that State where they were dumped into the waters of Puget Sound. Part of the logs were thereafter sold to mills located on the sound and the balance were rafted and taken by tugs to the Stimson Company's mills at Ballard, Washington, where they were manufactured into timber, which was thereafter sold, about twenty per cent. in local markets and the remainder in other States and countries. The logs which were sold after they had been carried to tidewater by the railroad were towed away by the purchasers to their mills or places for storage and part of them were subsequently re-sold for piling or poles to purchasers both within and without the State. Nordgard was a brakeman on the logging railroad and suffered the injuries for which he sued while engaged in unloading logs from the cars at tidewater.

The conclusion of the court below that under these facts the defendants were not engaged in interstate or foreign commerce when the injuries were suffered was based upon the decisions in *Coe* v. *Errol*, 116 U. S. 517, and *The Daniel Ball*, 10 Wall. 557, from the former of which the following quotations were made:

"When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State." 116 U. S. 517, 525.

"But this movement [that is, interstate commerce movement] does not begin until the articles have been

shipped or started for transportation from one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. . . . Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State." 116 U. S. 517, 528.

After pointing out that these rulings had not been modified, but on the contrary had been re-affirmed by the subsequent cases relied upon by the plaintiff in error (*Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111; *Louisiana Railroad Commission* v. *Texas & Pacific Ry. Co.*, 229 U. S. 336; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498; *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101) the court said:

"In the case at bar there was no initial shipment of the goods. The transportation of the poles from the forest in which they were cut to tidewater, where they were sold, was not a shipment. There was no contract of carriage; there was no bill of lading; there was no consignor or consignee. The goods were not committed to a carrier. The defendant Mill Company simply carried over its own road, on its own cars, its own goods to a market where it sold and delivered them. It had no concern with the subsequent disposition of them. It was under no obligation to deliver them to another carrier, and no other carrier was under obligation to receive them or carry them further. The selling of the poles after the first sale by the Mill Company, or whether they were going outside of the State, depended upon chance or the exigencies of trade. The movement of the poles did not become interstate commerce until by the act of the purchasers thereof the

poles were started on their way to their destination in another State or country. The beginning of the transit which constitutes interstate commerce 'is defined in *Coe* v. *Errol*, to be the point of time that an article is committed to a carrier for transportation to the State of its destination, or started on its ultimate passage.' *General Oil Co.* v. *Crain*, 209 U. S. 211, 229."

The conclusion of the court below that the defendants were not engaged in interstate or foreign commerce when the accident occurred is, we think, clearly demonstrated by the reasoning by which it sustained its conclusion and the authorities upon which it relied as above stated, and its judgment should be affirmed.

Before concluding we observe that in view of the stipulation of the parties in the court below agreeing to the substitution as plaintiff in error of the administrator of Nordgard who died while the cause was there pending, the motion to dismiss on the ground that the writ of error was wrongfully allowed and that the administrator is not a proper party is based upon a mere irregularity which was waived.

Affirmed.

BAY *v.* MERRILL & RING LOGGING COMPANY.

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

No. 165. Argued January 30, 31, 1917.—Decided March 6, 1917.

Upon a state of facts not substantially different from those presented in *McCluskey* v. *Marysville & Northern Railway Co.*, *ante*, 36, *Held*, that the defendant in error in hauling its logs from its own timberlands over its own railroad to tidewater (origin, destination and transit all being in the same State) for sale to others who subse-

quently disposed of them or their manufactured products partly in other States, was not engaged in interstate or foreign commerce, and that the injuries suffered by the plaintiff while loading logs upon one of defendant's cars were therefore not remediable under the Federal Employers' Liability Act.

220 Fed. Rep. 295, affirmed.

THE case is stated in the opinion.

Mr. John T. Casey, with whom *Mr. George F. Hannan* and *Mr. Chas. R. Pierce* were on the briefs, for plaintiff in error.

Mr. E. C. Hughes, with whom *Mr. Maurice McMicken, Mr. Otto B. Rupp* and *Mr. H. J. Ramsey* were on the brief, for defendant in error.

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

This case is controlled by the decision in *McCluskey* v. *Marysville & Northern Railway Company,* just decided, *ante,* 36. As in that case, the suit was brought under the Federal Employers' Liability Act to recover damages for injuries suffered while Bay, the plaintiff in error, was employed by the defendant on its logging railroad. The accident which gave rise to his injuries occurred while he was engaged in loading on a flat car on defendant's timber land, logs which had been cut for carriage on the railroad to tidewater at Puget Sound. The case was tried by the same court which heard the *McCluskey Case,* there was a directed verdict for the defendant on the ground that the company was not engaged in interstate or foreign commerce when the accident occurred and the judgment thereupon entered dismissing the suit was affirmed by the court below on the authority of the *McCluskey Case.* 220 Fed. Rep. 295.

The facts were thus stated by the court below:

"The Logging Company owned extensive tracts of timber in Snohomish County, Washington, and was engaged solely in cutting logs on its own lands and hauling them over its own road to the waters of Puget Sound, where it dumped them from the cars into a boom. At that point it sold the logs to purchasers who paid for them there, and there took possession of them and towed them away by tugs. The most of the logs were sold to near-by mills on the Sound, which were engaged in the manufacture of lumber, and this lumber, when manufactured, was for the most part ultimately disposed of and shipped to points outside of the State of Washington. In addition to these transactions in logs, the Logging Company had at times taken out some poles, which also it sold and delivered at its boom to the National Pole Company, a purchaser which did business at Everett, and which bought and paid for the poles after they were delivered in the water, and thereafter sold them for shipment to California. The road is a standard gauge logging railroad, and is operated as a part of the logging business of the defendant in error, and is connected by switches with the Great Northern and the Interurban roads; but those connections are used only for the purpose of bringing supplies to the company's logging camps. No logs or timber of any kind were at any time transferred to these other roads. One shipment of steel rails had gone over the logging road for the Interurban at the time when the latter was constructing its road. For that service the actual expense of operating the locomotive was the only charge made, and the Interurban assumed all liability on account of accidents occurring in the transportation."

As these facts are not substantially different from those presented in the *McCluskey Case*, it follows that the reasoning and authorities by which the court below sustained its ruling in that case also demonstrate the correctness of its

conclusion that in this case at the time the injuries were suffered the defendant was not engaged in interstate or foreign commerce.

Affirmed.

RAYMOND *v.* CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

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

No. 636. Argued January 31, 1917.—Decided March 6, 1917.

Plaintiff, employed by the defendant, an interstate carrier, was injured while laboring in a tunnel which was then being constructed by the defendant in the State of Washington for the purpose of shortening its main line between Chicago and Seattle and thus improving its freight and passenger service. The tunnel was incomplete and had never been used in interstate commerce.

Held, (1) That neither party was engaged in interstate commerce, *quoad* the injury, and that no cause of action existed under the Federal Employers' Liability Act.

(2) That plaintiff's cause of action, viewed as arising under the state law, was remediable only as provided by the Washington Workmen's Compensation Act, Laws 1911, c. 74. *Mountain Timber Co.* v. *Washington*, *post*, 219; *New York Central R. R. Co.* v. *White*, *post*, 188.

233 Fed. Rep. 239, affirmed.

THIS was an action for personal injuries begun in the District Court of the United States for the Western District of Washington, the petition averring that the plaintiff was a citizen of that State and the defendant a foreign corporation. The facts are stated in the opinion.

Mr. John T. Casey, with whom *Mr. Thomas J. Walsh* was on the briefs, for plaintiff in error.

Mr. Heman H. Field and *Mr. George W. Korte* for defendant in error, submitted.

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

Raymond, the plaintiff in error, sued the Railway Company, a foreign corporation doing business in Washington, to recover damages resulting from injuries sustained by him while in its employ. The petition alleged that the defendant operated an interstate commerce railroad between Chicago and Seattle and that for the purpose of shortening its main line and making more efficient and expeditious its freight and passenger service, was engaged in cutting a tunnel through the mountain between Horrick's Spur and Rockdale in Washington. It was averred that plaintiff was employed by the defendant in the tunnel as a laborer and that while he was at work his pick struck a charge of dynamite which through the defendant's negligence had not been removed and that from the explosion which followed he has sustained serious injuries.

The defendant's answer contained a general denial and alleged that at the time and place of the accident the railroad and Raymond were not engaged in interstate commerce, since the tunnel was only partially bored and hence not in use as an instrumentality of interstate commerce. It was further alleged that the court was without jurisdiction to hear the cause because of the provisions of the Washington Workmen's Compensation Act (Chapter 74, Laws of 1911) with whose requirements the defendant had fully complied. The reply of the plaintiff admitted the facts alleged in the answer but denied that they constituted defenses to the action.

The trial court entered a judgment for the defendant on the pleadings, and this writ of error is prosecuted to a

judgment of the court below affirming such action. 233 Fed. Rep. 239.

Considering the suit as based upon the Federal Employers' Liability Act, it is certain under recent decisions of this court, whatever doubt may have existed in the minds of some at the time the judgment below was rendered, that under the facts as alleged Raymond and the Railway Company were not engaged in interstate commerce at the time the injuries were suffered, and consequently no cause of action was alleged under the act. *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439; *Chicago, Burlington & Quincy R. R. Co.* v. *Harrington*, 241 U. S. 177; *Minneapolis & St. Louis R. R. Co.* v. *Nash*, 242 U. S. 619.

It is also certain that if the petition be treated as alleging a cause of action under the common law, the court below was without authority to afford relief, as that result could only be attained under the local law in accordance with the provisions of the Washington Workmen's Compensation Act, which has this day been decided to be not repugnant to the Constitution of the United States. *Mountain Timber Company* v. *Washington*, *post*, 219. And this result is controlling even although it be conceded that the railroad company was in a general sense engaged in interstate commerce, since it has been also this day decided that that fact does not prevent the operation of a state workmen's compensation act. *New York Central R. R. Co.* v. *White*, *post*, 188.

Affirmed.

IN THE MATTER OF THE PETITION OF SELLING ET AL., A SPECIAL COMMITTEE APPOINTED BY THE ASSOCIATION OF THE BAR OF THE CITY OF DETROIT, *v.* RADFORD.

PETITION TO DISBAR.

No. 21, Original. Submitted November 20, 1916.—Order made March 6, 1917.

Only by the action of this court may one who has secured admission to its bar be disbarred from practicing before it.

The character and scope of the investigation to be made on a prayer for disbarment, before sanction is given to it, must depend upon the character of the acts of misconduct charged, the place of their commission and the nature of the proof relied upon to establish them.

While membership of the bar of a state court of last resort and fair private and professional character are both prerequisite to admission to the bar of this court, loss of the first, after admission here, cannot, without more, affect the standing of the member.

Fair private and professional character, however, are continuing essentials, and their loss by wrongful personal and professional conduct, wherever committed, is adequate reason for disbarment.

An order of the highest court of a State disbarring a member of its bar upon charges of personal and professional misconduct, this court has no authority to reëxamine and reverse in the capacity of a court of review.

Such an order of the state court, although not binding on this court as a thing adjudged, so operates, while unreversed, against the private and professional character of the member as to constrain this court to exclude him from its bar also, unless, upon intrinsic consideration of the state record, this court shall (1) find that the state procedure was wanting in due process, (2) come to a clear conviction that the proof of facts relied on by the state court to establish want of fair character was so infirm that acceptance of the state court's conclusion thereon as a finality would be inconsistent with this court's duty, or (3) discover some other grave and sufficient reason why this court could not disbar consistently with its duty not to take that action unless constrained under the principles of right and justice to do so. *Ex parte Tillinghast*, 4 Pet. 108, distinguished.

THE facts are stated in the opinion.

The Solicitor General on behalf of the petitioners.

Mr. Thomas A. E. Weadock and *Mr. Harrison Geer* for respondent.

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

George W. Radford was admitted to practice in the Supreme Court of the State of Michigan on the fifteenth day of June, 1876. About ten years thereafter, on March 18, 1886, upon the representation that he had been for the three years preceding a member of the Bar of the highest court of the State of Michigan and upon the further assurance, both conformably with Rule 2 of this court, that his private and professional character appeared to be fair, he was permitted to become a member of the Bar of this court.

Represented by the Solicitor General of the United States, the petitioners as a committee of the Association of the Bar of the City of Detroit, specially appointed for that purpose, seek to procure an order striking Radford from the roll of the members of the Bar of this court on the ground of his personal unworthiness to continue as a member of such Bar. And in coming to consider their request, we understand their sense of pain at being called on to discharge the duty which they unselfishly perform. The original petition filed for that purpose alleged that in a suit brought in a designated court of original jurisdiction in Michigan for the purpose of disbarring Radford for professional misconduct amounting to moral wrong, he had, after notice and full hearing, been found to have committed the wrongful acts complained of and had been disbarred and that such judgment had been approved by

the Supreme Court of Michigan in a proceeding by certiorari taken to consider the same. Annexed to the petition was a copy of the opinion and order of disbarment entered by the court of original jurisdiction, as well as a copy of the opinion and order of the Supreme Court of the State in the certiorari proceeding, the same being reported in 168 Michigan, 474.

It was alleged in the petition that notwithstanding the fact that Radford had by the final action of the Supreme Court of the State of Michigan been stricken from the rolls of the courts in that State for the reasons previously stated, he had continued in the City of Detroit to hold himself out as a practicing lawyer entitled to respect and confidence as such because of the fact that he continued to be a member of the Bar of this court, unaffected by the order of disbarment by the courts of the State. After reciting the unseemly condition produced by these circumstances and the disrespect for the state courts which was naturally implied, the prayer was for a rule to show cause and for the awarding, on the return to such rule, of the order of disbarment which was sought.

An answer was made to the rule to show cause and a brief filed in support of the same, as to which we think it suffices to say for our present purposes that both the answer and the brief take a much wider range than is permissible and rely upon much that is here irrelevant, not to say in some respects improper to be considered, as the prayer for the enforcement of the judgment of the court of last resort of Michigan is not to be converted into a trial of the courts of that State or of the members of the Detroit Bar Association on behalf of which the petition was filed.

Beyond all question, when admission to the Bar of this court is secured, that right may not be taken away except by the action of this court. While this is true, it is also true that the character and scope of the investigation to

be made on a prayer for disbarment, before sanction is given to it, must depend upon the character of the acts of misconduct and wrong relied upon, of the place of their commission and the nature of the proof relied upon to establish their existence.

While, moreover, it is true that the two conditions, membership of the Bar of the court of last resort of a State and fair private and professional character, are prerequisites to admission here, there is a wide difference in the nature and effect of the two requirements. This follows, because the first, although a prerequisite to admission here, is ephemeral in its operation since its effect is exhausted upon admission to this Bar which it has served to secure,—a result which becomes manifest by the consideration that although the membership of the Bar of the court of last resort of a State after admission here might be lost by change of domicil from one State to another, if so provided by the state law or rule of court, or by any other cause not involving unworthiness, such loss would be wholly negligible upon the right to continue to be a member of the Bar of this court. The second exaction, on the contrary, is not ephemeral and its influence is not exhausted when the admission based upon it is secured since the continued possession of a fair private and professional character is essential to the right to be a member of this Bar. It follows, therefore, that the personality of the member and these inherent and prerequisite qualifications for membership of this Bar are indivisible, that is, inseparable. They must, if they exist, follow the personality of one who is a member of the Bar and hence their loss by wrongful personal and professional conduct, wherever committed, operates everywhere and must in the nature of things furnish adequate reason in every jurisdiction for taking away the right to continue to be a member of the Bar in good standing.

In the light of these conclusions, the question is: What,

consistently with the duty which rests upon us, is exacted in dealing with the situation now presented?

In coming to solve that question three things are patent: (a) That we have no authority to re-examine or reverse as a reviewing court the action of the Supreme Court of Michigan in disbarring a member of the Bar of the courts of that State for personal and professional misconduct; (b) that the order of disbarment is not binding upon us as the thing adjudged in a technical sense; and (c) that, albeit this is the case, yet as we have previously shown, the necessary effect of the action of the Supreme Court of Michigan as long as it stands unreversed, unless for some reason it is found that it ought not to be accepted or given effect to, has been to absolutely destroy the condition of fair private and professional character, without the possession of which there could be no possible right to continue to be a member of this Bar.

Meeting this situation, we are of opinion that on the case presented our duty is not to review the action of the state court of last resort—a power which we do not possess—,not wholly to abdicate our own functions by treating its judgment as the thing adjudged excluding all inquiry on our part, and yet not, in considering the right of one to continue to be a member of the Bar of this court, to shut our eyes to the status, as it were, of unworthiness to be such a member which the judgment must be treated as having established, unless for some reason we deem that consequence should not now be accepted. In other words, in passing upon the question of the right to continue to be a member of the Bar of this court, we think we should recognize the absence of fair private and professional character inherently arising as the result of the action of the Supreme Court of Michigan so far as we are at liberty to do so consistently with the duty resting upon us to determine for ourselves the right to continue to be a member of this Bar. That is to say, we are of opinion

that we should recognize the condition created by the judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do.

In concluding that our duty is to give effect to the finding of the state court establishing the want of fair private and professional character subject to the limitations stated, we confine ourselves to the case before us and therefore do not in the slightest degree call in question the ruling in *Ex parte Tillinghast*, 4 Pet. 108, that a mere punishment for contempt by an inferior federal court was not a sufficient ground for preventing admission to the Bar of this court, there being nothing to indicate that the action of the inferior court was based upon the doing of acts which inherently and necessarily deprived the applicant of the fair private and professional character essential to admission.

Thus defining what is open to our consideration, we think we ought not to foreclose the subject on the answer made to the rule to show cause in the proceeding which is now before us, but that an opportunity should be afforded the respondent, confining himself to the propositions stated, if he is so advised, to file the record or records of the state court within thirty days from this date with

permission by printed brief, considering the record intrinsically, to point out any ground within the limitations stated which should prevent us from giving effect to the conclusions established by the action of the Supreme Court of Michigan which is now before us, as we have seen, as part of the petition we are now considering.

It is so ordered.

STATE OF NEW MEXICO *v.* LANE, SECRETARY OF THE INTERIOR, AND TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE.

IN EQUITY.

No. 20, Original. Motion to dismiss. Submitted January 8, 1917.—Decided March 6, 1917.

The State of New Mexico filed its bill in this court naming the Secretary of the Interior and the Commissioner of the General Land Office as the parties defendant and praying that a tract of land, which the Interior Department had awarded and sold as coal land to an entryman under the coal land law, be decreed the property of the State by virtue of the school-land grant to the Territory of New Mexico, and the State's succession thereto; that the entry proceedings be decreed unlawful and that issuance of patent thereon be enjoined. Questions concerning the construction of the laws mentioned, and questions of fact concerning the character of the land and the knowledge of it, were involved.

Held, that the suit must be dismissed as, in substance, a suit against the United States. *Louisiana* v. *Garfield*, 211 U. S. 70.

Semble, that the presence of the entryman as a party, he having purchased the land and paid the price, would be indispensable to the granting of the relief prayed.

This court has no original jurisdiction of a suit by a State against citizens of other States [1] and citizens of the State complaining. Constitution, Art. III, § 2; *California* v. *Southern Pacific Co.*, 157 U. S. 229.

---

[1] The bill avers that Mr. Lane is a citizen of California and Mr. Tallman a citizen of Nevada, and the entryman, presumably, is a citizen of New Mexico. See p. 58.

THE case is stated in the opinion.

The Attorney General, The Solicitor General and *Mr. S. W. Williams* for defendants, in support of the motion.

Mr. Harvey M. Friend for complainant, in opposition to the motion.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Bill for injunction, in which the State of New Mexico asserts title in fee simple to the S. W. ¼ of the N. E. ¼ of section 16, township 15 N., R. 18 W., New Mexico principal meridian, under the school-land grant of June 21, 1898, and prays to restrain the Interior Department from issuing a patent therefor to one Keepers.

The bill exhibits the grounds of suit as follows:

By § 1 of an act approved June 21, 1898, 30 Stat. 484, there were granted to the Territory of New Mexico sections 16 and 36 in every township in the State for the support of common schools. If such sections should be mineral, other lands were to be granted in lieu thereof, to be selected as provided in other sections of the act.

Section 6 of an act approved June 20, 1910, 36 Stat. 557, 561, which was an act to enable the people of New Mexico to form a constitution and state government and be admitted into the Union, granted, in addition to sections 16 and 36, sections 2 and 32 in every township in the proposed State not otherwise appropriated at the date of the passage of the act. This grant also was for the support of the common schools.

It was provided in § 10 that such lands and those theretofore granted were "expressly transferred and confirmed to the said State," and should "be by the said State held in trust," etc.

By § 12, except as modified or repealed by the act, all

grants of lands were ratified and confirmed to the State, subject to the provisions of the act.

On January 6, 1912, New Mexico was admitted to the Union on an equal footing with the other States and became and is the beneficiary of the school-land grant of June 21, 1898. Such grant had been held a grant *in præsenti* under which absolute title in fee to all sections 16 and 36 in the Territory which were at that date identified passed to the Territory at the date of the approval of the act, unless known to be mineral, and no certificate or patent was necessary to pass such title.

Township 15 N. of R. 18 W. was surveyed by the United States Government in 1881. The survey was approved by the Surveyor General of New Mexico November 30, 1881, and a township plat duly filed in the local land office and the land became subject to disposal July 21, 1882, which was many years prior to the grant of June 21, 1898.

Section 16 was not disposed of or otherwise reserved and therefore passed to the Territory by the grant of June 21, 1898, and the land described above was not at that time known to be mineral in character and was not then known coal land under the interpretation of the coal land law which had uniformly prevailed, in that at such date there had been no attempt on the part of any one to discover or develop coal upon it and no coal had been produced or extracted therefrom until 1911, 13 years after the title in fee had vested in the Territory.

The decision of the Department and of the Supreme Court (this court) was that land could not be held to be "known coal land" unless there had been a mine opened thereon and an actual production of coal in such quantity as to make the land more valuable on that account than for other purposes, and that such construction had become a rule of property and title vested under it could not be divested by a change of construction.

The construction was known to Congress when it passed the Act of June 21, 1898, was adopted by it when it enacted that act, and became the rule of construction for the future administration of the land, and the acceptance of the grant became an executed contract between the Territory and the United States to be construed and interpreted as then understood. Notwithstanding, the Commissioner of the General Land Office and the Secretary of the Interior have decided that a locator on the land whose claim was filed in 1911 is entitled to have a patent for the tract above described and they are about to issue a patent to him.

On May 12, 1911, one George A. Keepers filed in the local land office at Sante Fe, New Mexico, a coal declaratory statement under § 2348, Rev. Stats., for the land in controversy, and three days thereafter he applied to purchase the same as coal land under § 2347, Rev. Stats., and publication of notice thereof as provided by the mining laws and regulations of the Interior Department was duly had, beginning May 19, 1911, and ending June 16, 1911.

Within the period of publication protests were filed against the application, and the Territory of New Mexico intervened, claiming the land under the Act of June 21, 1898, on the ground that it was not coal land at the date of the grant. A hearing was allowed to determine the land's character.

It is conceded that the Commissioner of the General Land Office had the right and authority to determine the question whether the land was known coal land at the date of the grant of June 21, 1898. Nevertheless in such determination that official was restricted to ascertaining the single fact whether at the date of the grant a mine had been opened on the land or coal produced therefrom, and this was the sole question that he could investigate. But, notwithstanding, he undertook and directed a

hearing "to determine their true character" at the date of the hearing, which was in excess of his authority.

At the hearing by the local land office, testimony was taken largely addressed to the geological condition of the land and no testimony was adduced showing that any coal had ever been produced or extracted from the land prior to the date of the Act of June 21, 1898, or for many years thereafter and up until 1911. Nevertheless it was decided, upon developments made subsequently to that date and on other matters subsequently occurring, including the subsequent classification of the land as coal land by the Geological Survey in 1907, that the land contained coal at the date of the act and was for that reason known coal land at that date.

Upon appeal the ruling of the local officers was affirmed by the Commissioner and subsequently by the First Assistant Secretary of the Interior. There was no finding in his decision that the land was of known coal character at the date of the granting act and the only fact relied upon was that certain "disclosures" *now*, not *then*, indicated that the Black Diamond coal bed underlay a portion of the tract, which even if known would not under the law as then construed and interpreted have rendered the land known coal land. The decision, therefore, was purely arbitrary.

The State duly filed a motion for re-hearing, which was denied, and the decision promulgated and the local officers directed to issue a final certificate to Keepers.

The bill avers "that when said final certificate shall be issued, as it undoubtedly has been, and upon its receipt at the General Land Office, the officials thereof, following the regulations of the Interior Department in such cases made and provided, will at once proceed to issue a patent to said Keepers for said S. W. ¼ of the N. E. ¼ of said section 16, unless restrained by this honorable court in the meantime, which said tract is owned by and belongs

to your orator as a part of its school-land grant which was vested immediately in fee in the Territory of New Mexico, at the date of said school-land grant of June 21, 1898, to which right and title your orator has succeeded, as aforesaid, and such patent, if issued to said Keepers, will be a cloud upon the title of your orator to said tract, being an attempt, unlawfully, to deprive your orator of its title in fee simple thereto."

It is prayed that the Secretary of the Interior and the Commissioner of the General Land Office be subpœnæd to appear and answer the bill, but not under oath; that it be decreed that the title immediately vested in the Territory of New Mexico at the date of the Act of June 21, 1898, and has become vested in the State as the successor of the Territory; that the Secretary and Commissioner have not had since the date of the act or now have authority to interfere with the State's title and that they be enjoined from executing their orders and decision. General relief is also prayed.

A motion to dismiss the bill is made on the grounds: (1) The United States is a necessary party because it appears the title to the land involved is in the United States, and that it is the purpose of the defendants to dispose of the land in accordance with the provisions of the mineral land laws of the United States, and that if the defendants be enjoined from executing such purpose the United States would be deprived of the purchase price of the land. (2) It appears from the bill that the State has no title or interest in the land because it was known coal land at the date of the passage of the Act of June 21, 1898, and was not intended to be granted nor granted to the Territory of New Mexico by that act nor any subsequent act. (3) That complete inquiry was made by the officers of the Land Department and they found the fact to be that at the date of the act the land was known to be valuable for mineral purposes. (4) It

appears that one Keepers had purchased the land and therefore was an indispensable party. (5) The bill is in other respects uncertain, informal and insufficient and does not state facts sufficient to entitle the State to any relief.

The motion should be granted on the ground that the suit is one against the United States, under the authority of *Louisiana* v. *Garfield*, 211 U. S. 70. In that case a bill was brought in this court to establish the title of the State of Louisiana to certain swamp lands which it claimed under the statutes of the United States and to enjoin the Secretary of the Interior and other officers of the Land Department from carrying out an order making different disposition of the land.

Under the statute it was contended the land vested in the State in fee simple, that is, the act was contended to have the same character and efficacy as the Act of June 21, 1898, is asserted to have in the case at bar. And certain facts were necessary to be determined as elements of decision. This court said that in the case there were questions of law and of fact upon which the United States would have to be heard. So in the present case there is a question of law whether the Act of June 21, 1898, had the quality as a grant of the land asserted of it, whether of itself or because of its terms or their prior construction and its adoption, indeed, whether there was such a prior construction or its adoption, and again of the fact of the character of the land at the time of the grant and the evidence of it and the knowledge of it.

It would seem, besides, that under the averments of the bill Keepers is an indispensable party, he having become, according to the bill, a purchaser of the land and paid the purchase price thereof. To make him a party would oust this court of jurisdiction, if he is a citizen of New Mexico, and the presumption expressed by defendants that he is, complainant does not deny. *California* v. *Southern Pacific Co.*, 157 U. S. 229. *Dismissed.*

DONOHUE *v.* VOSPER ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 445. Argued January 26, 1917.—Decided March 6, 1917.

When it appears by the state court's opinion that both parties relied upon the construction and effect to be given a decree of a federal court, and that the court applied it against one of them, rejecting the construction relied on by the other, a federal question is presented which this court may determine on writ of error.

In a suit by the United States to determine the title to certain land, rival claims, arising independently under the public land laws and based on facts existing before the litigation, were asserted by two individuals on the one part and by two corporations on another. One of the individuals had deeded to the other with warranty before the suit, and the second corporation had succeeded to the first during its progress. By consent of the United States and the individuals a decree was entered declaring that the title at the commencement of the suit was fully and completely vested in the first corporation and, pending the suit, had become fully and completely vested in the second, that neither the United States nor the individuals had any right, title or interest in the land, that the title should be quieted in the second corporation against the United States and the individuals, and that the decree should operate as a release from the United States and each of the individuals of all right and title to the land and might be recorded as such in the county records.

Held, (1) That the decree should be construed, not as divesting any interest of the individuals or affecting their relations *inter sese*, but as adjudging that both were devoid of interest from before the beginning of the suit, and, consequently,

(2) That the covenant of warranty between them attached by estoppel to the title when afterwards acquired by the warrantor.

The warrantor, having acquired the title, conveyed to the plaintiff in error, the warrantee deeded part of his interest to another, and thereafter the plaintiff in error joined with the warrantee and the latter's grantee in an option and lease of the property, reciting the warrantee's interest. *Held*, that this was a practical construction of the decree to the effect that it had not disturbed the warranty.

A decision by a state court against a claim of title by adverse possession,

where the question is essentially local and dependent on an appreciation of evidence as to the conduct of parties, is not reviewable by this court.

189 Michigan, 78, affirmed.

THE case is stated in the opinion.

Mr. A. H. Ryall for plaintiff in error.

Mr. Dan H. Ball for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit to declare certain deeds to lands in Michigan to be void, and that plaintiff in error (as he was plaintiff in the court below we shall so refer to him) be declared to be the owner of the lands and of the minerals therein, that defendants have no title thereto, for an accounting of certain royalties collected by certain of the defendants from the Buffalo Iron Mining Company and that the latter be restrained from paying any further royalties. The lands are described as follows: W. ½ of N. W. ¼ and N. W. ¼ of S. W. ¼, section 23, T. 43 N., R. 35 W., County of Iron, Michigan.

An answer, which was also claimed to be a cross bill, was filed, and upon the issues thus formed, and after hearing, the court by a decree dismissed the bill, adjudged title to the land to be in the defendants Vosper, Abbott and Tonkin in certain proportions and all the ores and minerals therein, that title to the lands in the proportions mentioned be quieted against plaintiff and all persons claiming under him, that he execute a deed to Vosper, Abbott and Tonkin of the interests decreed and in default thereof the decree to operate as such release and conveyance.

The decree was affirmed by the Supreme Court of the State.

The facts of the case were found by the Supreme Court substantially as follows:

The land was conveyed to the State of Michigan to aid in the construction of two railroads, one to Marquette and the other to Ontonagon. The land applicable to the Marquette road was released by the State to the United States and later, in 1866, under an act of Congress granting lands to the State for canal purposes, this land inured to the benefit of the Lake Superior Ship Canal, Railway & Iron Company by a grant from the State.

The land to be used for the benefit of the Ontonagon road was not released and it was subsequently decided that the title to an undivided one-half of the "common lands"—that is, lands at the intersection of the proposed railroads—still remained in the State for the purposes of that road, except as affected by an act of Congress of 1889 by which Congress declared a forfeiture of grants in the State of Michigan for all unconstructed railroads and confirmed title in all persons who had made cash entries within the limits of the grants and all persons claiming state selections, such as the Canal Company. By an exception in the act the title was not confirmed to those lands on which there were *bona fide* preëmption or homestead claims asserted by actual occupation on May 1, 1888.

Michael Donohue, plaintiff's grantor, together with various other persons, had entered upon these "common lands" as preëmptors and homesteaders, and asserted rights thereto under the Act of 1889 referred to above.

Prior to the Act of 1889 the Canal Company brought ejectment suits against those settlers. In 1894, in the ejectment suits, it was decided that the title of the Canal Company to the lands selected by the State was confirmed by the Act of 1889, subject to the exceptions provided in the act, and that it should be determined in an equity suit in the United States court what lands came

within the excepting clause. It was also decided that the title of the State to the lands granted for the Ontonagon road, including an undivided one-half of the "common lands," was forfeited to the United States.

Defendant Vosper had rendered service in this litigation to Donohue and the other claimants and took from Donohue a warranty deed on December 29, 1894, to an undivided one-quarter interest in the land.

At the instigation of persons claiming under the Act of 1889, the United States filed a bill against the Canal Company. In that suit the Canal Company filed a cross bill against the claimants under the homestead and preëmption laws, including Donohue. Vosper was also made a party. The issue in the litigation, therefore, was whether Donohue and the other claimants were *bona fide* homesteaders or preëmptors on May 1, 1888.

Pending the suit the Canal Company conveyed to the Keweenaw Association, Limited.

A decree was entered, Donohue and the other claimants and Vosper consenting, quieting the title to the lands in the Keweenaw Association, Limited, as successor of the Canal Company. The decree was entered in 1896 and adjudged that the Canal Company at the commencement of the suit was fully and completely vested with the title to the lands and since the commencement of the suit it became fully and completely vested in said Keweenaw Association, Limited, as successor of the Canal Company, and that neither the United States of America nor any of the defendants consenting to the decree had "any right, title, or interest therein." And it was adjudged that title to the lands be quieted against the United States and the consenting defendants and further that the decree should operate as a release and conveyance from the United States and each and every of the other of said defendants of all right and title to said lands and might be recorded as such in the records of the proper county.

November 19, 1896, the Keweenaw Association, Limited, conveyed the lands by quit-claim deed to Donohue.

It is the contention of Vosper that he and Donohue agreed to this arrangement, by which a sum of money was to be paid for the timber cut and the lands were to be conveyed by the Keweenaw Association to Donohue.

December 3, 1896, Michael Donohue delivered to plaintiff a quit-claim deed to the premises and on April 3, 1908, Vosper quit-claimed an undivided one-eighth interest to defendant Abbott, and on December 18th following plaintiff joined with Vosper and Abbott in the execution and delivery of an option for a mining lease of the premises.

February 3, 1909, Abbott quit-claimed an undivided one-thirty-second interest in the minerals to Tonkin, and on March 7, 1910, plaintiff joined Vosper, Abbott and Tonkin in the execution and delivery of a mining lease in pursuance of the option given before.

The mining lease, which was for a term of 30 years, was issued to the Niagara Iron Mining Company as lessee and was by that company assigned to the Buffalo Mining Company. The Niagara Company was and the Buffalo Company has been and is now in possession of the premises for mining purposes.

The trial and supreme courts found that Donohue executed the deed to Vosper. About this there is no controversy. Here the contentions of the parties turn upon the effect of the decree which was rendered by consent in the suit of the United States against the Canal Company, and this makes, it is contended, a federal question.

Defendants, however, assert that the decree does not present a federal question and that, besides, it was not claimed or urged as such by plaintiff in the state courts but appears for the first time in the petition for writ of error, and defendants refer to the bill of complaint to sustain their assertion.

But the Supreme Court in its opinion declared that a contention of plaintiff invoked "the effect of the decree of the federal court." And, discussing the decree, the court decided that its effect was "to oust Vosper from the land, of which he had the actual or constructive possession of an undivided quarter interest,—it appearing that Michael Donohue continued in possession of the undivided one-half of the claim from the time of his original entry until his quit claim deed to the complainant [plaintiff], despite the alleged trespasses of the canal company and its successor, which possession would inure to Vosper under the warranty deed." And the court further said that by the paramount title thus established in a third party by the decree Vosper was evicted from his title and possession and a "clear case for the application of the doctrine of estoppel by warranty" is made in his favor.

The decree, therefore, was made an element in the decision against plaintiff, and it was claimed by him to be an element in his favor. The motion to dismiss is, therefore, denied.

The contention was in the state courts and is here that the decree operated as a conveyance from Michael Donohue and Vosper to the Keweenaw Association and that by virtue of its effect as a conveyance it released the interest that Vosper had in the lands through the warranty deed from Donohue to him and that no interest remained in Vosper upon which an estoppel could rest. In other words, that by the decree Vosper's interest passed to the Keweenaw Association and from the latter to Michael Donohue; and a number of cases are cited to show that Vosper could make a conveyance of his interest and that his grantee, in this case the Keweenaw Association, and plaintiff through the latter, would take his interest.

The contention puts out of view a great deal that is material in the situation. The suit in which the decree was entered was one to determine whether the Canal

Company or its grantee, the Keweenaw Association, had derived title from the United States or whether Donohue had. Vosper was made a party because of the deed from Donohue to him and the decree quieted title in the Keweenaw Association. If it had gone no further there would probably be no dispute about its effect, but it declared that it should "stand and operate as a release and conveyance from the United States, and each and every of the other of said defendants, of all right and title to said lands" and might "be recorded as such in the records of the proper county." Standing alone these latter words might have the effect for which plaintiff contended, but they must be construed by what precedes them and by the nature of the suit. This demonstrates that the decree was but the clearing away of obstructions to the rights of the Keweenaw Association and was not intended to convey to it any interests the defendants had but left unaffected whatever obligations existed between themselves. This is found by the Supreme Court of the State and that Michael Donohue was paid a sum of money by the Keweenaw Association for the timber cut upon the land and the land was to be conveyed by the Keweenaw Association to Michael Donohue, leaving, as we have said, the rights between him and Vosper unaffected, and this is demonstrated by their subsequent relations.

On April 3, 1908, Vosper quit-claimed an undivided one-eighth interest in the land to Abbott and in the following December plaintiff and Vosper and Abbott executed and delivered an option for a mining lease of the premises and subsequently a lease in fulfillment of the option to the Niagara Iron Mining Company for the term of 30 years. The option and the lease recited that Vosper was the owner of an undivided one-eighth interest in the land.

It is further contended that plaintiff had acquired title to the land by adverse possession, but the state courts

decided against the contention. This was essentially a local question, involving an appreciation of the evidence as to the conduct of the parties, and we cannot review it.

Decree affirmed.

THOMSEN ET AL., COMPOSING THE FIRM OF THOMSEN & COMPANY, *v.* CAYSER ET AL., COMPOSING THE FIRM OF CAYSER, IRVINE & COMPANY, ET AL.

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

No. 2. Argued April 28, 29, 1914; restored to docket for reargument June 21, 1915; reargued January 19, 22, 1917.—Decided March 6, 1917.

For review in this court of a final judgment of the Circuit Court of Appeals directing that an action be dismissed, the writ of error should go to that court; and its efficacy is not impaired by the circumstances that, before allowance of the writ by that court, the trial court, obeying the mandate, has entered judgment of dismissal and has adjourned for the term before any application has been made to recall its action.

When parties in the Circuit Court of Appeals, desiring to shorten the litigation by bringing the merits directly to this court, consent that a final judgment may be made against them in lieu of one remanding the cause for a re-trial, the consent is not a waiver of errors relied on, and a final judgment entered as requested is reviewable here.

Foreign owners of steamship lines, common carriers between New York and ports in South Africa, formed a combination, or "conference," to end competition among themselves and suppress it from without. They adopted uniform net tariff rates, and, for the purpose of constraining shippers to use their ships and avoid others, exacted deposits ("primage") of ten per cent. of and in addition to the net freight charges, to be repaid as rebates or "commissions" in each case upon the lapse of a period of many months, but then

only if the shipper, up to the date set for repayment, had used the vessels of the coalition to the exclusion of all competitors. In respect of particular consignments the shipper's right to the refund was made similarly dependent on the "loyalty" of his consignee to vessels of the combination. The hold thus gained on shippers, through the accumulation of their deposits, enabled the coalition to maintain its tariff and custom, in general, while cutting rates with competitors in particular cases by means of "fighting ships." Several important rivals were gathered into the combination from time to time, and a virtual monopoly was effected. *Held*, that the combination violated the Sherman Act.

Common carriers are under a duty to compete, and are subject in a peculiar degree to the policy of the Sherman Act.

A combination is not excusable upon the ground that it was induced by good motives and produced good results.

The conduct of property embarked in the public service is subject to the policies of the law.

The fact that the participants might have withheld the commercial service they rendered, i. e., stayed out of the business, can not justify an unlawful combination.

A combination affecting the foreign commerce of this country and put in operation here, is within the act although formed abroad; and

Those who actively participate in managing the affairs of the combination in this country are liable under § 7 although they are not the principals.

When more than a reasonable rate is exacted as a result of an unlawful combination, the excess over what was reasonable affords a basis for the damages recoverable under § 7, and whether, and to what extent, such rate was unreasonable are questions determinable by the jury, on proper evidence and instructions.

When claims for damages for loss of custom are definitely stated, a charge advising the jury that the burden of proof is on the plaintiff, that they must not allow speculative damages, and that they are not required to guess at amounts but should be able to calculate them from the evidence, sufficiently guards against the danger of supposititious profits being considered as an element of the verdict.

Semble, that a general verdict for an amount which equals a particular claim of damages and interest may be assumed to have been responsive to that claim alone, although there were others which were submitted to the jury.

Failure to give an instruction upon the burden of proving rates un-

reasonable, *held*, at most a harmless error, in view of a painstaking trial and careful instructions upon the estimation of damages.

The trial court in its sound discretion may allow a new cause of action to be set up by amendment of the complaint.

190 Fed. Rep. 536, reversed.

Action, brought in the Circuit Court of the United States for the Southern District of New York, by plaintiffs in error against defendants in error and others under the Sherman Act to recover damages for injuries sustained as the result of a combination in restraint of foreign trade.

The defendants, it is charged, being common carriers between New York and South African ports, did, under certain company names, sometime prior to December, 1898, enter into a combination and conspiracy in restraint of trade and commerce between New York and ports in South Africa to be rendered effective by making certain discriminations in rates of freight to be charged which were calculated to coerce and prevent plaintiffs and other shippers and merchants similarly situated from employing such agencies and facilities of transportation as might be afforded them by other common carriers.

For such purpose they united under the name of "The South African Steam Lines" and distributed a circular [1]

---

[1] "The South African Steam Lines.

"Notice to Shippers in the United States.

"Commission in Respect of Shipments by Steam and Sailing Vessels.

"London, 31st December, 1898.

"1. Shippers to all Ports of the Cape Colony and of Natal, and to Delagoa Bay, are hereby informed that until further notice, and subject to the conditions and terms set out herein each of the under-named Lines will pay Shippers by their Line a commission of ten per cent., calculated upon the net amount of freight at tariff rates received by such Line from such Shippers on their shipments from the United States to South Africa.

"2. The said Commission to be computed every six months up to the 31st January and 31st July in each year, and to be payable nine months after such respective dates to those shippers only who, until

(Exhibit A) promising to pay shippers by their lines 10% upon the net amount of freight at tariff rates received on shipments from the United States to Africa, the commission to be computed every six months up to the thirty-first of January and the thirty-first of July in each year and to be payable nine months after such respective dates, but only to shippers who shipped exclusively by their lines to certain African ports, and provided that the shippers directly or indirectly have not made or have not been interested in any shipments by other vessels.

The commission is not payable on the goods of any consignee who directly or indirectly imports goods by vessels other than those dispatched by the combining lines.

These terms, it is charged, are against public policy and in restraint of trade.

About the middle of the year 1901 the defendant Deutsche Dampschiffahrts Gesellschaft, Hansa, and the firm of Funch, Edye & Co., as its agent, offered to trans-

---

the date at which the Commission shall become payable shall have shipped exclusively by vessels despatched by the undernamed Lines respectively from the United States to Ports of the Cape Colony, Natal, and Delagoa Bay, provided that such shippers, either as Principals or as Agents, have not directly or indirectly made or been interested in any shipments to any of the aforesaid Ports by vessels other than those despatched by the under-named, and also provided that the Statement of Claim for such commission shall be made in the annexed form, within twelve months of the date of shipment, to the Line which shall have carried the goods in respect of which the Commission is claimed.

"3. The above commission is not payable on the goods of any Consignee who directly or indirectly imports goods by vessels other than those despatched by the under-named Lines.

"(Subscribed) AMERICAN & AFRICAN STEAMSHIP LINE.
UNION-CLAN LINE.

"All previous notices to Shippers or Consignees with reference to returns on Freight are cancelled.

"Note.—The above Commission will be payable to the Shippers whose names appear on the Bills of Lading or to their Order."

port merchandise to South African ports at reasonable rates and lower than those imposed by the other defendants. Thereupon the other defendants, for the purpose of avoiding the competition of those carriers, accepted them into the scheme and combination and there was agreement between them to continue the monopoly, and another circular was issued like the first, including only the additional announcement that the Deutsche Dampschiffahrts Gesellschaft, Hansa, had been added as one of the parties to the first-named agreement. The circular is attached to the complaint as Exhibit B.

Subsequently the defendants adopted a verbal agreement that altered the circulars to the effect that the so-called "loyal" consignees could collect the so-called rebates regardless of whether the shippers were also loyal; but on the condition that where the shippers and consignees were both loyal the rebates would be paid to the shippers, while if the consignee alone were loyal the rebate would be paid by the defendants in London direct to the so-called loyal consignee.

Defendants have not dispatched steamers to African ports at stated and regular dates but have placed steamers on berth to receive general cargo only at such times and for such ports in South Africa as they deemed best for their private gain and profit.

By reason of the monopoly so created by defendants, shippers—among whom are plaintiffs—have been compelled to submit to hardships and inconvenience, and to pay unreasonable and higher rates to such extent as to leave at the present time in the possession of defendants collectively, as plaintiffs are informed, about one and one-half million dollars representing the extortion of their rates, and that of such amount £1,112, 7s. 11d. has been extorted from plaintiffs.

Two steamship companies, the Prince Line and the Houston Line, have since the spring of 1902 offered to

carry from the United States to South African ports merchandise for a reasonable and remunerative rate lower than that exacted by defendants.

Defendants, to prevent such steamers from competing, have, in addition to the terms imposed on the South African trade by the circulars above mentioned, imposed further conditions which, while they ostensibly reduced the lower rate of freight and announced that defendants would pay the greater difference arising therefrom, by them called a special commission, they still exacted the payment of the higher rates, by them called tariff rates, at the time of shipment and imposed the following further conditions: (1) Precedent to the payment of such difference they require all shippers to be loyal to them. (2) Each shipper to disclose the name of his consignee. (3) The difference in rates to be computed only on those steamers which would come into direct competition with the steamers of either the Prince Line or the Houston Line, called by defendants "fighting steamers." (4) The special commission or rebate to be granted only on limited amounts of freight room, to be allotted at the will and discretion of defendants, additional freight room to be paid for at the higher rate under the conditions expressed in the circulars.

These additional conditions are intended to further restrain trade and in fact have prevented shippers who had already shipped goods under the original conditions imposed by the circulars from further exporting as much merchandise to South African ports at reasonable rates offered other shippers.

To further secure the monopoly of the carrying trade to such ports and oust competition defendants have threatened to withhold and have withheld by way of forfeit the repayment of the so-called rebates from all those, among whom are plaintiffs, so-called by them "loyal shippers" and "loyal consignees," as aforesaid,

"who would not continue to remain loyal under the additional conditions superimposed as aforesaid."

For illustration plaintiffs adduce two instances when they were obliged to pay higher rates on a portion of the shipments, which rates were higher than those offered by the opposition lines, and defendants threatened, if plaintiffs made the shipments over the latter lines upon the more favorable terms, to withhold from repaying plaintiffs all sums previously so compulsorily paid by plaintiffs.

Plaintiffs are informed and believe that since the opposition lines have offered to carry freight to South African ports defendants have, by reason of their conspiracy, refused to allot uniform and proportionate freight room on their steamers and have arbitrarily discriminated between several shippers and even against the so-called "loyal" shippers and consignees, with the unlawful intent that the moneys so held by them would be sufficient security to prevent such shippers or consignees from making shipments of or importing their goods by the competing vessels.

By reason of the conspiracy plaintiff and others similarly situated have been compelled either not to ship at all and to lose a great deal of their trade or to ship on defendants' steamers a small portion of merchandise at the lower rates and the remainder, of the same class and even of the identical lot of merchandise, at the higher rates, which is practically prohibitive of any trade whatever by reason of the fact that the substantial difference between the two rates would be a discrimination against the various consignees and customers of plaintiffs and the various shippers and customers of other shippers by the same steamer.

The conspiracy violates the laws of the United States and especially the Act of July 2, 1890, entitled "An Act to Protect Trade and Commerce against unlawful Restraints and Monopolies."

Plaintiffs allege damages in the sum of £1,112, 7s. 11d., equal to $5,560, for which they pray as the excess over a reasonable rate, and the further sum of $10,000 damages, and the trebling of these sums.

The defendants, by their company names, filed separate answers in which they deny some of the allegations of the complaint and admit others. They deny conspiracy and combination for the purpose or with the effect set out in the complaint. They admit the making and issuing of the circulars designated A and B in the complaint, but deny that they have the effect or were intended to have the effect ascribed to them.

They admit the refusal to pay plaintiffs certain claims as rebates, but deny the distinction between loyal shippers and loyal consignees and all of the inferences and assertions in regard thereto.

As a separate defense they allege that all freight carried by them for plaintiffs was carried on bills of lading, each of which contained on its face the statement of the amount of freight to be paid and in respect to which in every instance plaintiffs either paid the freight or agreed to pay the amount of freight stated in the bill of lading and in each instance gave a due bill which was subsequently paid; that the payments were made freely and voluntarily and without protest; and that so far as any of the payments were made pursuant or with reference to the printed circulars plaintiffs coöperated knowingly in such transactions and cannot now be entitled to any relief on account of payments of freight made thereunder.

It was prayed that the complaint be dismissed.

Upon the issues thus formed there were two trials. At the conclusion of the testimony on the first trial the court considered that no cause of action was established under the Sherman Law and upon motion of defendants dismissed the complaint. 149 Fed. Rep. 933.

The judgment was reversed by the Circuit Court of Appeals (October, 1908). 166 Fed. Rep. 251.

Upon the return of the case to the Circuit Court it was tried to a jury, resulting in a verdict for plaintiffs against the defendants composing the firms of Cayser, Irvine & Company; Barber & Company; and Norton & Son, the action as to the other defendants having abated or been dismissed by the court.

The judgment recites that the action was brought under the Act of Congress of July 2, 1890, and that a verdict had been rendered against the defendants above named for the sum of $5,600, with interest in the sum of $1,973.06, in all $7,573.06; that thereupon the court directed the clerk to treble the amount of the verdict pursuant to the terms of the act of Congress, making the amount $22,719.18, and that, the parties consenting, the court fixed $2,500 as an attorney's fee. The judgment was reversed by the Circuit Court of Appeals, one member dissenting (July, 1911). 190 Fed. Rep. 536.

The Circuit Court at the first trial (Judge Hough sitting) was of opinion that the testimony did not establish that the combination charged against defendants was in unreasonable restraint of trade. The Circuit Court of Appeals expressed a different opinion. The court said that the substance of the complaint was that defendants were engaged as carriers in South African trade and had entered into a combination in restraint of foreign trade and commerce in violation of the act of Congress by means of a scheme under which they united as "The South African Lines," fixed rates, and shut off outside competition by requiring shippers to pay a percentage in addition to a reasonable freight rate, which they should receive back in case—and only in case—they refrained from shipping by other lines. And the court said the evidence showed the existence of a "conference" for the purpose of fixing and maintaining rates and a return "commission" to "loyal"

shippers. The manifest purpose of the combination and its effect were, it was further said, to restrain competition and that it was therefore in contravention of the Federal Anti-Trust Act.

The court considered that whether the restraint was reasonable or unreasonable was immaterial under the decisions of this court, or whether the combination was entered into before or after plaintiffs commenced business, the statute applying to continuing combinations, or whether the combination was formed in a foreign country, as it affected the foreign commerce of this country and was put into operation here. And as the plaintiffs had alleged damage, the court decided that they were entitled to an opportunity to prove it and remanded the case to the Circuit Court.

Upon the second appeal the court declared a change of view, saying: "When this case was in this court before we said, upon the authority of the decisions of the Supreme Court as we then interpreted them, that whether the restraint of trade imposed by the combination in question was reasonable or unreasonable was immaterial," and that it was "also apparent from the record that the Circuit Court upon the second trial in holding as a matter of law that the combination shown was in violation of the statute, acted upon the same view of the law." And further: "In the light of the recent decisions of the Supreme Court in the Standard Oil and Tobacco Cases, the construction so placed upon the statute by this court and the Circuit Court must be regarded as erroneous and a new trial must be granted unless the contentions of the parties are correct that, upon the facts shown, this court can now determine the legality of the combination."

The court then said that it was impossible to hold that the record disclosed a combination in unreasonable restraint of trade, but that it would be unduly prejudicial to plaintiffs to reverse the judgment with instructions to

dismiss; that as the plaintiffs had presented their case in view of the decision of the court that the reasonableness of the restraint was immaterial, it would be unjust to them to dismiss the complaint because their proof did not conform to another standard, and that upon another trial the plaintiffs might be able to "produce additional testimony tending to make out a case within the Supreme Court decisions referred to." Accordingly, the court remanded the case for a new trial.

Subsequently a rehearing was granted on petition of plaintiffs, who waived any right to a new trial and consented that the case should be disposed of one way or the other. As a result of the rehearing the mandate was recalled and the judgment reversed with instructions to enter an order dismissing the complaint.

This writ of error was then allowed.

Mr. A. Leo Everett and *Mr. Lorenzo Ullo* for plaintiffs in error:

Shippers are peculiarly at a disadvantage and carriers are forbidden to subject them to unreasonable conditions. *Lockwood* v. *New York Central R. R. Co.*, 17 Wall. 357; *Menacho* v. *Ward*, 27 Fed. Rep. 259. The maxim *volenti non fit injuria* therefore does not apply. The ten per cent. payments were made under duress. *Swift Company* v. *United States*, 111 U. S. 22. The parties were not *in pari delicto*. *Duval* v. *Wellman*, 124 N. Y. 156; *Interstate Commerce Commission* v. *Texas & Pacific R. R.*, 52 Fed. Rep. 187; *Loder* v. *Jayne*, 142 Fed. Rep. 1015. Tender of goods and protest by plaintiffs, and refusal to carry by defendants were unnecessary.

Unreasonable or coercive rates of freight are recoverable. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Herserman* v. *Burlington, Cedar Rapids & Northern Ry. Co.*, 63 Iowa, 732; *Parker* v. *Great Western R. R. Co.*, 7 M. & G. 253.

All parties to the unlawful combination are liable *in solido*. *Atlanta* v. *Chattanooga Foundry*, 127 Fed. Rep. 23; *Interstate Commerce Commission* v. *Texas & Pacific R. R., supra; Loder* v. *Jayne, supra.*

Agents of principals are equally responsible *in solido* with all parties to the illegal combination. See *Leonard* v. *Pool*, 114 N. Y. 371.

The jury found that the ten per cent. exaction was an unreasonable and coercive rate. There is no doubt that the verdict was for the amount so exacted and paid, and not for other items of damage which plaintiffs had claimed. This establishes in itself that the effect of the combination was unreasonable. Noncompetitive rates are presumably unreasonable, especially where the lack of competition is the achievement of the party fixing the rate. *China and Japan Trading Co.* v. *Georgia R. R.*, 12 I. C. C. 241; Taft, J., as quoted with approval in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 237; *Menacho* v. *Ward, supra.*

That the Anti-trust Act was violated is plain under *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; and *Nash* v. *United States*, 229 U. S. 373. The court's reasoning in the first of these cases is directed to the question whether the acts complained of, and claimed to have benefited the trade, were reasonably to be held in restraint of trade; whether they were within the condemnation of the statute, reasonably construed, considering the contracts or agreements, their necessary effect, and the character of the parties by whom they were made. But a "reasonable construction" of the statute is far different from an examination into the reasonableness of the restraint. The examination into the reasonableness of the cause of the restraint is what calls for a reasonable construction of the statute. When by a reasonable construction of the statute, the acts complained of are found to cause actually

or potentially a restraint of trade within the meaning of the prohibition, a further inquiry as to the reasonableness of its effect is immaterial.

This combination is not an "aggregation of capital" necessary for the development of trade; nor is it a unification of interests to cheapen freight rates or general expenses, but it is avowedly a combination to suppress competition among the constituents and keep away outside competition, by coercive means. It is prejudicial to the public interest of the United States. *Nash* v. *United States, supra; United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87.

The doctrine of *Mogul Steamship Line* v. *McGregor*, 31 L. R. 554 (1888); 23 L. R. 598 (1889); 17 App. Cases, 25 (1891), was not approved by this court in the *Standard Oil Case;* it was based on the British legislative policy of the time, and differs from the earlier common law as inherited in this country and federalized by the Sherman Act. *Hooker* v. *Van DeWater*, 4 Denio, 349; *Stanton* v. *Allen*, 5 Denio, 434; *Atchison* v. *Mallon*, 43 N. Y. 147; *Elmira Coal Co. Case*, 68 N. Y. 558; *People* v. *Sheldon*, 139 N. Y. 251; *Lough* v. *Outeridge*, 143 N. Y. 271. The *Mogul Case* also involved a different scheme and a different cause of action.

Under the Sherman Act, contracts and combinations which before the act were merely unenforceable as between the parties, became actionable and criminal. This necessarily resulted, because the definition of combinations was expressed in terms which embraced those which were unlawful but not actionable, such as the *Mogul* combination. The British authorities seem to agree that such a state of facts would, in the United States, be interpreted as coming within the prohibition of the Sherman Act. See the reports of the Members of the Royal Commission on Shipping Conferences in the Journal of the Society of Comparative Legislation, New Series,

vol. X (1909), p. 144, and *Attorney General* v. *Adelaide Steamship Co.*, A. C. (1913), 781.

The courts of this country hold, concurring in the British view, that where a situation is governed by the Sherman Act the *Mogul Case* is not applicable. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. Rep. 271, 286; *Wheeler-Stenzel Co.* v. *National Window Glass Association*, 152 Fed. Rep. 864, 873.

On the evils of the "conferences" and deferred rebate system, as practiced by British shipowners, and their use of "fighting ships," see Report of Committee on Merchant Marine, 63d Cong., vol. IV, p. 307. The policy of this country is recently and specifically expressed by the Shipping Board Act of September 7, 1916, 39 Stat. 728.

Mr. Thomas Thacher and *Mr. J. Parker Kirlin*, with whom *Mr. Charles R. Hickox* was on the briefs, for defendants in error:

Restraint of competition is restraint of trade only when unfavorable to trade or commerce, and therefore unreasonable and prejudicial to the public interests. *United States* v. *Hamburg-American S. S. Line*, 216 Fed. Rep. 971; *United States* v. *Prince Line* and *United States* v. *American-Asiatic S. S. Co.*, 220 Fed. Rep. 230; *United States* v. *United States Steel Co.*, 223 Fed. Rep. 55; *Patterson* v. *United States*, 222 Fed. Rep. 599; *United States* v. *United Shoe Machinery Co.*, 222 Fed. Rep. 349; *United States* v. *International Harvester Co.*, 214 Fed. Rep. 987; *United States* v. *Keystone Watch Case Co.*, 218 Fed. Rep. 502. This is the view taken in the *Powder Trust Case*, 188 Fed. Rep. 339, 373. Such is the doctrine of this court. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Joint Traffic Association*, 171 U. S. 505.

The history of the Sherman Act shows a clear intent

on the part of Congress not to condemn contracts and combinations merely because they are in restraint of competition or merely because they operate to raise the cost of commodities to consumers. See also its title: "To protect trade and commerce." It looked to the development and increase of trade and commerce in the interest of the public, to the removal of obstacles to its growth and expansion. The combination must prejudice the public interests either by unduly restricting competition or by unduly obstructing the course of trade. *Standard Oil* and *Tobacco Cases, supra; Nash* v. *United States*, 229 U. S. 373, 376; *United States* v. *Terminal R. R. Association of St. Louis*, 224 U. S. 383; 236 U. S. 194; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600, 609, 610.

Restriction of competition by the union of competing carriers, or an obstruction of the course of trade, is not undue, unless the result is to injure the public, by decreasing the facilities open to the public for trade or commerce, leading to a diminution of exchange of commodities or less favorable conditions for the development of trade or commerce. The emphasis is now put by the decisions of this court upon the words "undue" and "unreasonable," and these words are used with relation to the public interest. That which is the ultimate concern in the constitutional grant of power over commerce, and in the exercise of such power by the Anti-trust Act, is the exchange and distribution of commodities.

This was recognized by Mr. Justice Peckham in the *Joint Traffic Association Case*, 171 U. S. 505. The paramount interest of the public is in the efficiency of the service to the public in transporting freight and passengers in aid of commercial intercourse.

This is recognized in the *St. Louis Terminal Association Case*, 224 U. S. 383, 394, and in the *Union Pacific Case*,

226 U. S. 61, 88. See *Attorney General* v. *Adelaide Steamship Co.*, A. C. (1913) 781.

The question arising in this case becomes substantially the same as that which arose in the *Mogul Steamship Company Case*, A. C. (1892), 25, although the courts there dealt not with any statute, but with the common law. *Mogul Steamship Company Case*, 21 Q. B. D. 544, 548. See also *North-Western Salt Co.* v. *Electrolytic Alkali Co.*, 30 Law Times Rep. 313.

That to do business on the rebate or commission plan is not to monopolize or attempt to monopolize, see *In re Corning*, 51 Fed. Rep. 205; *In re Terrell*, 51 Fed. Rep. 213; *In re Greene*, 52 Fed. Rep. 104; *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. Rep. 454.

The burden was on the plaintiffs to prove an unlawful combination. It was error for the trial court to assume that an unlawful combination had been established as matter of law.

The principals were not shown to have combined as alleged; the evidence established the contrary. Neither did it appear, by undisputed evidence, as it must to justify the court's action, that the defendants (mere agents) were parties to the assumed combination. They had nothing to do with making any combination (whatever was done in that respect was done abroad), and nothing to do with the business except to carry out instructions from their London principals.

The assumed combination could not have been illegal under the act because it was formed, if formed anywhere, beyond the jurisdiction of the United States. For this proposition we need only refer to *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347. If a partnership or corporation had been formed to own and operate the ships belonging to the original shipowners, there would seem to be no room for doubt that its legality would not be affected by the Sherman Act. If, so uniting their

properties and business, these shipowners had done business here in substantially the mode in which they are alleged to have done it, there could be no charge of an illegal combination or conspiracy under our law.

The proof showed that commerce was actually promoted.

There was no proof that plaintiffs were injured. This was essential to a cause of action under § 7 of the act.

The Circuit Court erred in declining to charge the jury that the burden was on the plaintiffs to show that the rates were unreasonable; in not leaving the question of combination to the jury; in permitting the jury to consider supposititious profits that the plaintiffs claimed they would have made if they had followed a different course; and in permitting the plaintiffs during the trial to amend their complaint so as to set up a new cause of action.

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

A motion to dismiss the writ of error is made, two grounds being urged: (1) The Circuit Court of Appeals was without jurisdiction to allow the writ on March 15, 1912, for the reason that its judgment had become executed and the judgment entered thereon in the Circuit Court November 24, 1911, had become final and irrevocable before the petition for the writ was filed and the order allowed. (2) The judgment of the Circuit Court was entered in the form finally adopted at the request of plaintiffs and by their consent, and the errors assigned by plaintiffs were waived by such request and consent.

The argument to support the motion is somewhat roundabout. It gets back to the Circuit Court and charges that because that court had entered judgment on the original mandate and had adjourned for the term without any application having been made to recall that

judgment and because no writ of error to review it was sought, the judgment became a final disposition of the case.

We are not concerned with what the Circuit Court might have done, but only with what the Circuit Court of Appeals did and the jurisdiction it possessed. It received and granted a petition for rehearing, ordered a recall of the mandate previously issued, set aside the judgment of the Circuit Court, and remanded the case with directions to dismiss the complaint. The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay.

Subsequently a petition for the writ of error was filed and allowed and all further proceedings upon the part of the defendants for the enforcement of the judgment were suspended and stayed until the final determination by this court upon the writ of error, in return to which the record was properly furnished. *Atherton* v. *Fowler*, 91 U. S. 143.

The motion to dismiss is denied.

The case in the courts below had a various fate, victory alternating between the parties but finally resting with defendants.

The plaintiffs, dissatisfied, have brought the case here. We are confronted at the outset, in view of the proceedings in the courts below, with contentions as to what questions of law or fact are before us.

Notwithstanding two trials and two appeals and reviews in the Circuit Court of Appeals, defendants insist the facts are yet in controversy. We cannot assent.

It will be observed from the excerpts from the opinions of the Circuit Court of Appeals that the case was decided upon the proposition of law that the combination charged against defendants was not in unreasonable restraint of

trade and that such character was necessary to make it illegal under the Federal Anti-trust Act. As to the fact of combination and restraint and the means employed both trial and appellate courts concurred, and their conclusion is not shown to be erroneous.

There is a contention that "there is not in the record any direct proof whatever of the terms of any conference or agreement participated in by any of the defendants. All that appears is that certain steamship owners consisting of firms, the identity of whose members is not established, operated steamers in the trade from New York to South African ports without competing with one another." But more than that appears, and it cannot be assumed that the circulars that were issued and the concerted course of dealing under them were the accidents of particular occasions having no premeditation or subsequent unity in execution. The contention did not prevail with the courts below and we are brought to the consideration of the grounds upon which the Circuit Court of Appeals changed its ruling, that is, that it was constrained to do so by the *Standard Oil* and *Tobacco Cases*, 221 U. S. 1, 106.

It is not contended that the facts of those cases or their decision constrained such conclusion, but only that they announced a rule which, when applied to the case at bar, demonstrated the inoffensive character of the combination of defendants. In other words, it is contended that it was decided in those cases that "the rule of reason" must be applied in every case "for the purpose of determining whether the subject before the court was within the statute," to quote the words of the opinion, and, as explained in subsequent cases, it is the effect of the rule that only such contracts and combinations are within the act as, by reason of their intent or the inherent nature of the contemplated acts, prejudice the public interest by unduly restricting competition or unduly obstructing the

course of trade. *Nash* v. *United States*, 229 U. S. 373, 376; *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600, 609.

But the cited cases did not overrule prior cases. Indeed, they declare that prior cases, aside from certain expressions in two of them [1] or asserted implications from them, were examples of the rule and show its thorough adequacy to prevent evasions of the policy of the law "by resort to any disguise or subterfuge of form" or the escape of its prohibitions "by any indirection." And we have since declared that it cannot "be evaded by good motives," the law being "its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties and, it may be, of some good results." *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49; *International Harvester Co.* v. *Missouri*, 234 U. S. 199.

The rule condemns the combination of defendants, indeed, must have a stricter application to it than to the combinations passed on in the cited cases. The defendants were common carriers and it was their duty to compete, not combine; and their duty takes from them palliation, subjects them in a special sense to the policy of the law.

Their plan of evasion was simple and as effective as simple. They established a uniform freight rate, including in it what they called a primage charge. This charge was refunded subsequently, but only to shippers who shipped exclusively by the lines of the combining companies and who had not directly or indirectly made or been interested in any shipment by other vessels. And there was the further condition that the rebate was not

---

[1] *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505.

payable on the goods of any consignee who directly or indirectly imported goods by vessels other than those of the "conference"—to use the word employed by the witnesses to describe the combining companies. This loyalty on the part of the consignees was subsequently not exacted, but loyalty upon the part of shippers was continued to be required and its reward was the refunding of the primage charge. That the combination was effective both the lower courts agreed. Upon its extent they differed, the Court of Appeals considering that while it was in restraint of trade the restraint was reasonable and therefore not obnoxious to the law.

The Court of Appeals has not given us its reason for its conclusion. Counsel for defendants say that the *Standard Oil* and *Tobacco Cases* furnish the explanation, and that they support what the history of the act establishes, that it was the "clear intent upon the part of Congress not to condemn contracts and combinations merely because they are in restraint of competition or merely because they operate to raise the cost of commodities to consumers."

The argument that is employed to sustain the contention is one that has been addressed to this court in all of the cases and we may omit an extended consideration of it. It terminates, as it has always terminated, in the assertion that the particular combination involved promoted trade, did not restrain it, and that it was a beneficial and not a detrimental agency of commerce.

We have already seen that a combination is not excused because it was induced by good motives or produced good results, and yet such is the justification of defendants. They assert first that they are voluntary agencies of commerce, free to go where they will, not compelled to run from New York to Africa, and that, "unlike railroads, neither law, nor any other necessity, fixes them upon particular courses;" and therefore, it is asked, "who can say that otherwise than under the plan adopted, any of

the ships of the defendants would have supplied facilities for transportation of commodities between New York and South Africa during the time referred to in the complaint?" The resultant good of the plan, it is said, was "regularity of service, with steadiness of rates"; and that "the whole purpose of the plan under which the defendants acted was to achieve this result."

We may answer the conjectures of the argument by the counter one that if defendants had not entered the trade others might have done so and been willing to serve shippers without constraining them, been willing to compete against others for the patronage of the trade. And it appears from the testimony that certain lines so competed until they were taken into the defendants' combination.

Nor can it be said that under defendants as competitors or that under competing lines service would not be regular or rates certain, or, if uncertain, that they would be detrimentally so.

That the combination was intended to prevent the competition of the lines which formed it is testified, and it cannot be justified by the conjectures offered by counsel; nor can we say that the success of the trade required a constraint upon shippers or the employment of "fighting ships" to kill off competing vessels which, tempted by the profits of the trade, used the free and unfixed courses of the seas, to paraphrase the language of counsel, to break in upon defendants' monopoly. And monopoly it was; shippers constrained by their necessities, competitors kept off by the "fighting ships." And it finds no justification in the fact that defendants' "contributions to trade and commerce" might "have been withheld." This can be said of any of the enterprises of capital and has been urged before to exempt them from regulation even when engaged in business which is of public concern. The contention has long since been worn out and it is established that the

conduct of property embarked in the public service is subject to the policies of the law.

It is contended that the combination, if there was one, was formed in a foreign country and that, therefore, it was not within the act of Congress; and that, besides, the principals in the combination and not their agents were amenable to the law. To this we do not assent. As was said by the Circuit Court of Appeals, the combination affected the foreign commerce of this country and was put into operation here. *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87. It, therefore, is within the law, and its managers here were more than simply agents—they were participants in the combination.

It is, however, contended that even if it be assumed the facts show an illegal combination, they do not show injury to the plaintiffs by reason thereof. The contention is untenable. Section 7 of the act gives a cause of action to any person injured in his person or property by reason of anything forbidden by the act and the right to recover threefold the damages by him sustained. The plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that more than a reasonable rate was secured by the combination, the excess over what was reasonable was an element of injury. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436. The unreasonableness of the rate and to what extent unreasonable was submitted to the jury and the verdict represented their conclusion.

The next contention is that the fact of combination should have been submitted to the jury and not decided as a matter of law by the court. We are unable to assent. There was no conflict in the evidence, nothing, therefore, for the jury to pass upon; and the court properly assumed the decision of what was done and its illegal effect.

It is next contended that the jury was permitted to consider as elements of damage supposititious profits. The

record does not sustain the contention. The profits were not left to speculation. There were different sums stated, resulting from the loss of particular customers, and the fact of their certainty was submitted to the judgment of the jury. They were told that they "ought not to allow any speculative damages," that they were not "required to guess" as to what damages "plaintiffs claim to have sustained." And, further, that the burden of proof was upon plaintiffs and that from the evidence the jury should be able to make a calculation of what the damages were. Besides, plaintiffs alleged an overcharge, and the verdict of the jury was for its amount and interest.

Two other contentions are made: (1) The court should have charged the jury that the burden was on the plaintiffs to show that the rates on their shipments were excessive and unreasonable. (2) The court erred in permitting plaintiffs to amend their complaint so as to set up a new cause of action.

(1) If there was error in this its effect is not appreciable. The record shows a most painstaking trial of the case on the part of counsel and the court, a full exposition of all of the elements of judgment and careful instructions of the court for their estimate. It would be going very far to reverse a case upon the effect of the bare abstraction asserted by the contention, even granting it could be sustained.

(2) Permitting the amendment of the complaint was not an abuse of the discretion which a court necessarily possesses.

The above are the main contentions of defendants. They make, besides, a contention comprehensive of all of the rulings against them; but to give a detailed review of such rulings would require a reproduction of the record, and we therefore only say that they have been given attention and no prejudicial error is discovered in them.

Judgment of the Circuit Court of Appeals is reversed and that of the Circuit Court is affirmed.

McDONALD *v.* MABEE.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 135. Submitted January 31, 1917.—Decided March 6, 1917.

A person domiciled in Texas left the State intending to make his home elsewhere, his family residing there meanwhile. During his absence an action for money was begun against him in a Texas court. After returning and remaining for a short time, he departed finally and established a domicile in another State. The only service in the action was by publication in a newspaper after his final departure. Based on this service, a personal judgment for money was rendered against him which was sustained under the laws of Texas by the Supreme Court of the State. *Held*, that the judgment was absolutely void under the Fourteenth Amendment.

Quære: Whether the judgment would have been good if a summons had been left at his last and usual place of abode in Texas while the family was in that State and before the new domicile was acquired?

An ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the State of its rendition as it is elsewhere.

Since judgments are of reciprocal obligation, a judgment void if sued on by the plaintiff is void also when interposed by the defendant as a bar to the original cause of action.

175 S. W. Rep. 676, reversed.

The case is stated in the opinion.

Mr. Henry D. McDonald, pro se, and *Mr. A. P. Park* for plaintiff in error.

Mr. Joseph W. Bailey for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit upon a promissory note. The only defence now material is that the plaintiff had recovered a judg-

ment upon the same note in a previous suit in Texas which purported to bind the defendant personally as well as to foreclose a lien by which the note was secured. When the former suit was begun the defendant, Mabee, was domiciled in Texas but had left the State with intent to establish a home elsewhere, his family, however, still residing there. He subsequently returned to Texas for a short time and later established his domicile in Missouri. The only service upon him was by publication in a newspaper once a week for four successive weeks after his final departure from the State, and he did not appear in the suit. The Supreme Court of the State held that this satisfied the Texas statutes and that the judgment was a good personal judgment, overruling the plaintiff's contention that to give it that effect was to deny the constitutional right to due process of law. 175 S. W. Rep. 676.

The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person. *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346, 353. *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining & Milling Co.*, decided to-day, *post*, 93. No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind. Subject to its conception of sovereignty even the common law required a judgment not to be contrary to natural justice. *Douglas* v. *Forrest*, 4 Bing. 686, 700, 701. *Becquet* v. *MacCarthy*, 2 B. & Ad. 951, 959. *Maubourquet* v. *Wyse* (1867), 1 Ir. Rep. C. L. 471, 481. And in States bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact. *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394.

There is no dispute that service by publication does not warrant a personal judgment against a non-resident. *Pennoyer* v. *Neff*, 95 U. S. 714. *Riverside & Dan River Cotton Mills* v. *Menefee*, 237 U. S. 189. Some language of *Pennoyer* v. *Neff* would justify the extension of the same principle to absent parties, but we shall go no farther than the precise facts of this case require. When the former suit was begun Mabee, although technically domiciled in Texas, had left the State intending to establish his home elsewhere. Perhaps in view of his technical position and the actual presence of his family in the State a summons left at his last and usual place of abode would have been enough. But it appears to us that an advertisement in a local newspaper is not sufficient notice to bind a person who has left a State intending not to return. To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done. We repeat also that the ground for giving subsequent effect to a judgment is that the court rendering it had acquired power to carry it out; and that it is going to the extreme to hold such power gained even by service at the last and usual place of abode.

Whatever may be the rule with regard to decrees concerning status or its incidents, *Haddock* v. *Haddock*, 201 U. S. 562, 569, 632, an ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the State as it is outside of it. 201 U. S. 567, 568. If the former judgment had been sued upon in another State by the plaintiff we think that the better opinion would justify a denial of its effect. If so, it was no more effective in Texas. *De la Montanya* v. *De la Montanya*, 112 California, 101. *Boring* v. *Penniman*, 134 California, 514.

The usual occasion for testing the principle to be applied would be such as we have supposed, where the defendant

was denying the validity of the judgment against him. But the obligations of the judgment are reciprocal and the fact that here the defendant is asserting and the plaintiff denying its personal effect does not alter the case. *Whittier* v. *Wendell*, 7 N. H. 257. *Rangely* v. *Webster*, 11 N. H. 299. *Middlesex Bank* v. *Butman*, 29 Maine, 19. The personal judgment was not merely voidable, as was assumed in the slightly different case of *Henderson* v. *Staniford*, 105 Massachusetts, 504, but was void. See *Needham* v. *Thayer*, 147 Massachusetts, 536. In *Henderson* v. *Staniford* the absent defendant intended to return to his State.

Judgment reversed.

PENNSYLVANIA FIRE INSURANCE COMPANY OF PHILADELPHIA *v.* GOLD ISSUE MINING AND MILLING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 584. Argued January 29, 1917.—Decided March 6, 1917.

A fire insurance company, to obtain a license to do business in Missouri, filed with the Superintendent of the Insurance Department of that State, under Missouri Rev. Stats., 1909, § 7042, a power of attorney consenting that service of process on him should be deemed personal service on the company so long as it should have any liabilities outstanding in the State. The Missouri Supreme Court, construing the statute, held that the consent covered service in an action in Missouri on a policy issued in Colorado insuring buildings in the latter State. *Held*, that the construction had a rational basis in the statute and therefore could not be deemed to deprive the company of due process of law, even if it took it by surprise. *O'Neil* v. *Northern Colorado Irrigation Co.*, 242 U. S. 20, 26.

When a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it

by the courts. *Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 8, and *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, distinguished.

A mere error of construction committed by a state court in a candid effort to construe the laws of another State is not a denial of full faith and credit (Const., Art. IV, § 1), entitling the complaining party to come to this court.

267 Missouri, 524, affirmed.

THE case is stated in the opinion.

Mr. Fred Herrington, with whom *Mr. Mason A. Lewis*, *Mr. James B. Grant* and *Mr. David H. Robertson* were on the brief, for plaintiff in error.

Mr. Patrick Henry Cullen, with whom *Mr. Thomas T. Fauntleroy* and *Mr. Charles M. Hay* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit upon a policy of insurance issued in Colorado by the defendant, the plaintiff in error, to the defendant in error, an Arizona corporation, insuring buildings in Colorado. The defendant insurance company had obtained a license to do business in Missouri and to that end, in compliance with what is now Rev. Stats. Mo., 1909, § 7042, had filed with the Superintendent of the Insurance Department a power of attorney consenting that service of process upon the superintendent should be deemed personal service upon the company so long as it should have any liabilities outstanding in the State. The present suit was begun by service upon the superintendent. The insurance company set up that such service was insufficient except in suits upon Missouri contracts and that if the statute were construed to govern the

present case it encountered the Fourteenth Amendment by denying to the defendant due process of law. The Supreme Court of Missouri held that the statute applied and was consistent with the Constitution of the United States. 267 Missouri, 524.

The construction of the Missouri statute thus adopted hardly leaves a constitutional question open. The defendant had executed a power of attorney that made service on the superintendent the equivalent of personal service. If by a corporate vote it had accepted service in this specific case there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases, there would be equally little doubt. *New York, Lake Erie & Western R. R. Co.* v. *Estill,* 147 U. S. 591. It did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that length, and the construction did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert. *O'Neil* v. *Northern Colorado Irrigation Co.,* 242 U. S. 20, 26. Other state laws have been construed in a similar way; *e. g., Bagdon* v. *Philadelphia & Reading Coal & Iron Co.,* 217 N. Y. 432. *Johnston* v. *Trade Insurance Co.,* 132 Massachusetts, 432.

The defendant relies upon *Old Wayne Mutual Life Association* v. *McDonough,* 204 U. S. 8, and *Simon* v. *Southern Railway Co.,* 236 U. S. 115. But the distinction between those cases and the one before us is shown at length in the judgment of the court below, quoting a brief and pointed statement in *Smolik* v. *Philadelphia & Reading Coal & Iron Co.,* 222 Fed. Rep. 148; a statement reinforced by Cardozo, J., in *Bagdon* v. *Philadelphia & Reading Coal & Iron Co.,* 217 N. Y. 432. In the above mentioned suits the corporations had been doing business in certain States without authority. They had not ap-

pointed the agent as required by statute, and it was held that service upon the agent whom they should have appointed was ineffective in suits upon causes of action arising in other States. The case of service upon an agent voluntarily appointed was left untouched. 236 U. S. 129, 130. If the business out of which the action arose had been local it was admitted that the service would have been good, and it was said that the corporation would be presumed to have assented. Of course, as stated by Learned Hand, J., in 222 Fed. Rep. 148, 151, this consent is a mere fiction, justified by holding the corporation estopped to set up its own wrong as a defence. Presumably the fiction was adopted to reconcile the intimation with the general rules concerning jurisdiction. *Lafayette Insurance Co.* v. *French*, 18 How. 404. *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346, 353. But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act. *The Eliza Lines*, 199 U. S. 119, 130, 131.

The insurance company also sets up that the Supreme Court of Missouri failed to give full faith and credit to the public acts of Colorado. The ground is that one condition of the policy was that the insured was the owner in fee simple of the land under the insured buildings; that when the plaintiff bought the land, as it did, it had not taken out a license to do business in Colorado, and that the laws of that State forbade the plaintiff to acquire any real or personal property until the license fees should have been paid. The Missouri court held that it was enough if the plaintiff had paid the fees and got the license before instituting this suit. There is nothing to suggest that it was not candidly construing the Colorado statutes to the best of its ability, and even if it was wrong something more than an error of construction is necessary in order to entitle a party to come here under Article IV, § 1.

Johnson v. *New York Life Insurance Co.*, 187 U. S. 491, 496. *Finney* v. *Guy*, 189 U. S. 335. *Allen* v. *Alleghany Co.*, 196 U. S. 458, 464, 465. *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36, 51, 52. *Western Life Indemnity Co.* v. *Rupp*, 235 U. S. 261, 275.

The plaintiff suggests that the whole controversy is *res judicata* by reason of the decision in *State* v. *Barnett*, 239 Missouri, 193, in which the insurance company is said to have been one of the relators, and which followed the decision in *State* v. *Grimm*, 239 Missouri, 135. It also urges that the defendant waived any objection it might have had to the validity of this service by appearing and pleading to the merits. As the facts hardly appear and as the state court discussed the merits of the case we do not pass upon these matters which in a different state of the record might need at least a few words.

Judgment affirmed.

THE FIVE PER CENT. DISCOUNT CASES.[1]

CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

Nos. 149 to 162. Argued February 25, 28, 1916; restored to docket for reargument March 6, 1916; reargued February 2, 1917.—Decided March 6, 1917.

Section IV, paragraph J, subsection 7, of the Tariff Act of October 3, 1913, c. 16, 38 Stat. 114, 196, after declaring that a discount of five per centum on all duties imposed by the act shall be allowed on such goods as shall be imported in vessels admitted to registration under

---

[1] The docket titles of these cases are: No. 149, *United States* v. *M. H. Pulaski Co., et al.;* No. 150, *United States* v. *R. B. Henry Co., et al.;* No. 151. *United States* v. *James Elliott & Co., et al.;* No. 152, *United*

the laws of the United States, adds, by way of proviso, "that nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation." *Held*, that the grant of the discount is confined to goods in American bottoms, and the effect of the proviso is to respect the treaty privileges with which such a grant would be in conflict, not by extending the grant to goods borne in foreign vessels, but by suspending the grant entirely while such privileges exist.

6 Cust. App. Rep. 291, reversed.

THE case is stated in the opinion.

The Solicitor General for the United States:

The legislative history of § IV, paragraph J, subsection 7, shows it to be the result of a vain effort to compose differences between the House, which favored discriminating duties to American vessels, and the Senate, which resisted a disturbance of existing treaties. It was the purpose of the House to limit the discount to goods in American vessels only, thus discriminating in their favor against the ships of all other nations. The Senate was equally determined to brook no disturbance of existing treaties. The conference committee vainly endeavored to harmonize these divergent and wholly irreconcilable purposes.

The subsection is void by reason of the irreconcilability of its main clause and proviso; or at least is without present force or effect. The discount cannot be allowed to goods in American vessels alone, because, so construed, the

---

States v. *J. Wile Sons & Co.;* No. 153, *United States* v. *Robert Muller & Co.;* No. 154, *United States* v. *Wood & Selick, et al.;* No. 155, *United States* v. *E. La Montagne's Sons;* No. 156, *United States* v. *Albert Lorsch & Co., et al.;* No. 157, *United States* v. *Cullman Brothers, et al.;* No. 158, *United States* v. *G. W. Faber, Inc.;* No. 159, *United States* v. *Louis Meyers & Son;* No. 160, *United States* v. *William Openhym & Sons, et al.;* No. 161, *United States* v. *Park & Tilford;* No. 162, *United States* v. *Selgas & Co.*

subsection would abrogate, impair or affect the provisions of existing treaties. If self-executing, the treaties would be abrogated or impaired by such a grant. A treaty is abrogated by a subsequent inconsistent statute. *Rainey* v. *United States*, 232 U. S. 310; *Taylor* v. *Morton*, 2 Curtis, 454; *Whitney* v. *Robertson*, 124 U. S. 190.

The treaties are, as a matter of fact, not self-executing but executory; nevertheless, Congress did not design to contravene them. *Foster* v. *Neilson*, 2 Pet. 253, 313. Congress has evidenced its understanding that the treaties are executory. Act March 1, 1816, 3 Stat. 255, c. 22; Act December 17, 1903, 33 Stat. 3, c. 1; Crandall, Treaties, their Making and Enforcement, p. 145; Willoughby on Constitution, § 209. The decisions regard the treaties as executory. *Taylor* v. *Morton, supra; Whitney* v. *Robertson, supra.*

The discount cannot be allowed to goods in both American and treaty vessels. Such was manifestly not the intent of Congress, nor is it the legal consequence of the words employed. The language of the act does not support the construction suggested. The proviso was not intended to enlarge the operation of the discount clause, but, on the contrary, to restrict it. It is the usual office of a proviso to "limit and restrict the operation of the enacting clause." *Minis* v. *United States*, 15 Pet. 423, 445; *Quackenbush* v. *United States*, 177 U. S. 20, 26; *White* v. *United States*, 191 U. S. 545, 551.

The discount is, *pro tanto*, an exemption from taxation. Such exemptions are not to be raised or extended by implication. *Central R. R. & Banking Co.* v. *Georgia*, 92 U. S. 665, 674; *Ford* v. *Delta and Pine Land Co.*, 164 U. S. 662, 666.

Congress was fully advised of the apt words proper to accomplish an extension of the grant, and declined to use them.

To grant the discount to goods in American and treaty

bottoms alike would result in no substantial benefit to the former but would be a virtual donation to shippers in the latter and a wholly useless sacrifice of revenue. Results of allowance of discount to American and treaty bottoms demonstrate that Congress did not intend such construction. A discrimination against non-treaty ships alone is not a discrimination in favor of American vessels. There is evidence elsewhere in the act that Congress had no thought of singling out for discrimination British and French vessels in the indirect trade and ships of non-treaty countries.

The discrimination, if directed solely against non-treaty vessels, could have been more clearly and effectively accomplished without sacrifice of revenue by modifying § IV, paragraph J, subsection 1, and adding five per cent. to the discriminating duty of ten per cent. thereby imposed. In order to make the discount clause presently effective, a meaning should not be enforced which is repugnant to the main, revenue-producing portions of the act. *Van Dyke* v. *Cordova Copper Co.*, 234 U. S. 188.

Since it is impossible to give to the act any application to existing circumstances, it must be declared void, or operative only upon future condition. *Farmers' Bank* v. *Hale*, 59 N. Y. 53; *In re Hendricks*, 60 Kansas, 796, 806; *United States* v. *Cantril*, 4 Cranch, 167.

Mr. Frederick W. Lehmann and *Mr. James M. Beck* for respondents. The following counsel, representing various respondents, were also on the brief: *Mr. Thomas M. Lane*, *Mr. Albert H. Washburn*, *Mr. George J. Puckhafer*, *Mr. John A. Kratz*, *Mr. Henry J. Webster*, *Mr. John G. Duffy*, *Mr. Frederick W. Brooks, Jr.*, *Mr. B. A. Levett*, *Mr. Rufus W. Sprague, Jr.*, *Mr. Edward P. Sharretts*, *Mr. Homer S. Cummings*, *Mr. James L. Gerry*, *Mr. Edwin R. Wakefield* and *Mr. Allan R. Brown.*

The proviso operates to prevent the possible repeal

of the treaties by the later act, and in effect makes the treaty stipulations a part of the act, of equal efficacy with the provision for discount. The resulting law of the case is that the duties prescribed by the Tariff Act are to be discounted five per cent. on imports in American bottoms and no other or higher duties are to be levied upon imports in the vessels of treaty nations than in those of the United States. The number of such treaty nations would not alter the terms of the act and so could not alter its construction.

It is immaterial whether or not the treaty clauses involved operate *ex proprio vigore*, since the very statute under consideration gives them the force and effect of laws. Congress has recognized that such treaty provisions are self-executing. Treaty with Great Britain, 1815; Act of March 1, 1916, 3 Stat. 255; 14th Annals of Congress, 1st sess., p. 674; *ibid.*, pp. 46, 49–50; Reports of Committee on Foreign Relations, 1789–1901, vol. 8, p. 25. The executive branch has treated similar treaty provisions as self-executing without legislation by Congress. Treasury Decision, 20386; Foreign Relations U. S., 1899, pp. 740 *et seq.;* Act August 30, 1842, 5 Stat. 560. *Bartram* v. *Robertson*, 122 U. S. 116, compared.

The view that treaty provisions are executory contracts whose fulfillment is addressed solely to Congress has been repeatedly disavowed by this court. *Foster* v. *Neilson*, 2 Pet. 253, explained; *United States* v. *Percheman*, 7 Pet. 51, 89; *United States* v. *Schooner Peggy*, 1 Cranch, 103; *Ware* v. *Hylton*, 3 Dall. 199; *Hauenstein* v. *Lynham*, 100 U. S. 483; *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188; *Tucker* v. *Alexandroff*, 183 U. S. 424, 429; *Oldfield* v. *Marriott*, 10 How. 146; *Geofroy* v. *Riggs*, 133 U. S. 258, 267; *Rainey* v. *United States*, 232 U. S. 310, 316; *Head Money Cases*, 112 U. S. 580, 598; *DeLima* v. *Bidwell*, 182 U. S. 1, 195. *Taylor* v. *Morton*, 2 Curtis, 254, distinguished.

Congress had power to grant the discount to imports in vessels of the United States and of nations with which the United States had reciprocal commercial treaty agreements. The contention of the Government makes the proviso a condition to the taking effect of the main clause and destroys the subsection in its entirety, while respondents' construction gives effect to the subsection as a whole, *Austin* v. *United States*, 155 U. S. 417, distinguished; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1; *McLean* v. *United States*, 226 U. S. 374, 383.

The function of a proviso is to be determined in each case by what is there intended. It is frequently used to enlarge the operation of a law as well as to restrict it. *Georgia R. & B. Co.* v. *Smith*, 128 U. S. 174, 181; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36.

A rational interpretation will be given to a statute and a proviso and not one by which the statute will, through the proviso, destroy itself. *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *United States* v. *Mille Lac Chippewas*, 229 U. S. 498.

The provision as it stands, and considered with reference to its terms, has a meaning and bears a sensible construction. It is not a meaningless or contradictory jumble of words. Explaining or distinguishing: *United States* v. *Cantril*, 4 Cranch, 167; *City of Mobile* v. *Eslava*, 16 Pet. 234, 247; *In re Hendricks*, 60 Kansas, 796; *Farmers' Bank* v. *Hale*, 59 N. Y. 53; *International Harvester Company* v. *Kentucky*, 234 U. S. 216; *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 197, 254.

The provision is not self-contradictory, nor contradictory of the reason of the legislation which was discrimination in favor of American shipping. Upon the contrary, the statute is responsive to that reason and in aid of that purpose. *Pirie* v. *Chicago Title and Trust Co.*, 182 U. S. 438, 451.

The addition of the proviso diminished but did not

exhaust the discrimination effected by the main clause. This goes to the usefulness of the statute and not its meaning or validity. *United States* v. *Plowman*, 216 U. S. 372, 375; *Unity* v. *Burrage*, 103 U. S. 447, 456.

It is not permitted under any rule of statutory construction to say that the proviso was a stroke of legislative *finesse*, designed by the Senate to nullify the section as formulated by the House, under pretense of merely qualifying it. Nothing savoring of fraud or farce may be imputed to either house. *McLean* v. *United States*, 226 U. S. 374, 383.

Courts will decline to avoid an act of legislation upon any suggestion as to the motives of legislators or of the unwisdom or impolicy of the act. *Weber* v. *Freed*, 239 U. S. 325, 330; *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 72; *United States* v. *Goldenberg*, 168 U. S. 95, 102; *Dewey* v. *United States*, 178 U. S. 510, 521.

In our legislation the intent to save treaty rights has always been manifest. The form of words employed has varied, but language similar to that of the proviso to subsection 7 has been frequently used. Acts of March 27, 1804, § 6, 2 Stat. 300, c. 57; February 5, 1816, § 3, 3 Stat. 253, c. 10; April 27, 1816, § 6, 3 Stat. 314, c. 107; January 14, 1817, § 1, 3 Stat. 344, c. 3; August 30, 1842, § 8, par. 5, 5 Stat. 560, c. 260; Messages and Papers of the Presidents, vol. IV, pp. 400, 401; Act July 14, 1862, § 15, 12 Stat. 558, c. 163; Act March 3, 1883, § 11, 22 Stat. 525, c. 121; *Kelly* v. *Hedden*, 124 U. S. 196.

In more recent tariff legislation, Congress, in effecting its purpose of saving treaty rights, has repeatedly expressed a preference for the precise form of language found in the proviso of subsection 7. Act March 3, 1891, 26 Stat. 844, c. 534; Treasury Decision, 10824; Acts of August 27, 1894, par. 182½, 28 Stat. 521, c. 349; July 24, 1897, par. 209, 30 Stat. 168; August 5, 1909, § 3, 36 Stat. 83, c. 6; October 3, 1913, § IV, par. B, 38 Stat. 192.

The act is not to be nullified as unwise or impolitic because it may not in its immediate operation discriminate in favor of American shipping to the extent Congress intended should ultimately result. By the express terms of its proviso, it recognizes that the scope of its discrimination will be reduced by treaty provisions. There are nations whose trade is not protected by any treaty, and the treaties of some other nations are not comprehensive of all their trade with us. To such unprotected trade the discount would not apply. The legislation, as its history shows, was deliberately enacted, with a full knowledge of the facts and circumstances to which it applied, and of how it would operate, and with its consequences very distinctly pressed upon the attention of Congress. Each house of Congress conceded something and each house held to something of its views. The House of Representatives secured the discount on imports in American vessels and the Senate the preservation of our treaty stipulations by extending the discount to imports in treaty nation vessels. A present advantage to American shipping was intended, which would be great or small as the field of the practical operation of the proviso was small or great—an advantage which might be enlarged from time to time by changes in our treaty agreements. Subsections 1 and 7 of paragraph J of § IV of the Tariff Act of October 3, 1913, are laws of the same general nature operating by converse methods. In each case the advantage conferred by the general enactments upon American vessels is diminished by the proviso or qualifying clause as to treaty nation vessels; in the one case by suspending the discriminating duty and in the other by extending the discount. In neither case does the proviso nullify the subsection.

Substantial discrimination in favor of American vessels in fact results from respondents' construction. The official figures of our foreign commerce show that, by the inducement of the five per cent. discount, the volume

of merchandise imported in American vessels may be greatly increased. The extent to which other nations share the discount affects only the measure in which the obvious purpose of the act is realized in operation.

Mr. William L. Wemple, by leave of court, filed a brief as *amicus curiæ.*

Mr. Edward S. Hatch and *Mr. Walter F. Welch,* by leave of court, filed a brief as *amici curiæ.*

Mr. Justice Holmes delivered the opinion of the court.

In these cases the Court of Customs Appeals has held that by § IV, paragraph J, subsection 7, of the Act of October 3, 1913, c. 16, 38 Stat. 114, 196, merchandise imported in the registered vessels of the United States, or in the registered vessels of other nations entitled by treaty to pay no higher duties than those levied upon vessels of the United States, is granted a discount of five per cent. upon the duties imposed by the act. Following an enactment that, except as otherwise specially provided in the statute, duties should be levied upon all articles imported from any foreign country at the rates prescribed in the schedules, the above mentioned subsection 7 is as follows: "That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided,* That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation." More or less complete reciprocity is established by treaty with nearly all the commercial countries of the world, and the discount of five per centum was extended by the Court of Customs Appeals to goods imported in vessels of Belgium, the

Netherlands, Great Britain, Austria-Hungary, Germany, Italy, Spain and Japan.

The Government contends that while the subsection may indicate a reversal of the policy of reciprocity that has prevailed more or less for the better part of a century, Rev. Stats., § 4228, it relies upon future negotiations to make the change effective and suspends action while the present treaties remain in force, since it could not give the discount to merchandise in American bottoms alone without breaking the numerous treaties to which we have referred. The argument on the other side is that the words of the subsection are satisfied by extending the discount to goods from all the treaty countries, whereas by the construction contended for by the Government they are emptied of meaning or at least of present effect. We are of opinion that the Government is right, and as the meaning of the words seems to us to be intelligible upon a simple reading and to be fortified by the facts preceding their adoption, we shall spend no time upon generalities concerning the principles of interpretation.

We have a clear opinion as to what the subsection means if the words are taken in their natural, straightforward and literal sense. It grants a discount only to goods imported in vessels registered under the laws of the United States, and conditions even that grant upon its not affecting treaties. There is a strong presumption that the literal meaning is the true one, especially as against a construction that is not interpretation but perversion; that takes from the proviso its ostensible purpose to impose a condition precedent, in order to universalize a grant that purports to be made to a single class, and to do so notwithstanding the express requirement of the statute that specified rates should be paid. Nobody would express such an intent in such words unless in a contest of opposing interests where the two sides both hoped to profit by an ambiguous phrase. But the section is

not ambiguous on its face, and there is no sufficient ground for creating an ambiguity from without, when it is considered that the purpose to favor American shipping was the manifest inducement for putting the subsection in.

The tariff bill as it first passed the House granted an exemption in favor of American shipping without the proviso. The clause was struck out by the Senate, and after it had been pointed out that such an enactment would violate many treaties there was a conference which led to the passage of the subsection in its present form. It seems to us obviously more reasonable to suppose that Congress was content to indicate a policy to be pursued when possible than that by circuitous and inapt language it enacted that there should be a general discount from the rates specifically directed to be charged. That the subsection means what it says and no more seems to us still plainer when it is considered that without going into nice calculations the benefit to American shipping of such a general discount would be at least problematical and certainly would be relatively small. A grant in present terms subject to a condition precedent is familiar to the law and is not unknown in grants of the present kind. *Dunlap* v. *United States*, 173 U. S. 65.

There was some discussion at the bar and in the court below upon the question whether the treaties operated as laws or were simply executory contracts, but it seems to us superfluous. If the statute bore the meaning attributed to it below it granted the discount to the nations having treaties of reciprocity, even if those treaties were only contracts. As in our opinion the subsection means what it says it grants the discount to none.

Judgments allowing the discount of five per centum reversed.

MR. JUSTICE DAY is of opinion that the statute was interpreted correctly by the Court of Customs Appeals, and therefore dissents.

GANNON *v.* JOHNSTON ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 131. Argued December 22, 1916.—Decided March 6, 1917.

Under the Choctaw-Chickasaw supplemental agreement of July 1, 1902, §§ 11, 12, 15 and 16, 32 Stat. 641, surplus lands, selected by a member of the Chickasaw Tribe, become alienable only with the expiration of the respective periods after patent fixed in § 16; these restrictions accompany the land when it passes to a tribal member by inheritance, and a conveyance by him while the periods are running is void. *Mullen* v. *United States*, 224 U. S. 448, distinguished.

The Act of April 26, 1906, 34 Stat. 137, in providing that conveyances of allotments made after selection should not be declared invalid solely because made prior to patent, was not intended to validate deeds made before removal of restrictions on alienation; on the contrary it expressly declares them null and void.

40 Oklahoma, 695, affirmed.

THE case is stated in the opinion.

Mr. H. A. Ledbetter, with whom *Mr. F. M. Adams*, *Mr. D. M. Bridges* and *Mr. John Vertrees* were on the brief, for plaintiff in error.

Mr. A. C. Cruce, *Mr. F. E. Kennamer*, *Mr. Chas. A. Coakley*, *Mr. Guy Green* and *Mr. Cham Jones* for defendants in error, submitted.

MR. JUSTICE DAY delivered the opinion of the court.

The case in the state court was begun in the District Court of Jefferson County, Oklahoma, in 1911, by D. R. Johnston, against C. E. Gannon, for the recovery of certain lands, originally allotted in 1903 to Agnes Wolfe,

a full-blood Chickasaw Indian. Afterwards, by amended petition, Wilburn Wolfe was made a party plaintiff. To this amended petition answer was filed by Gannon, asserting his title, and upon issues being made up judgment was rendered in favor of Johnston and Wolfe as to the "surplus allotment" of said Agnes Wolfe, and of Gannon as to the "homestead allotment." Upon writ of error, the Supreme Court of Oklahoma affirmed the judgment (40 Oklahoma, 695), and the case is here upon writ of error to the last-named court. The decision as to the surplus lands is all that is called in question.

The lands in controversy were allotted to Agnes Wolfe, the certificate of allotment bearing date July 7th, 1903; the patent was signed by the Governor September 12th, 1905, and approved by the Secretary of the Interior October 7th, 1905. Upon her death in 1903, the title passed to her brother and sole heir at law, Wilburn Wolfe, defendant in error here. The Supreme Court finds that it fairly appears from the record that the allotment was selected in the lifetime of Agnes Wolfe.

Upon October 13th, 1903, for a consideration of $1,050.00, Wilburn Wolfe executed and delivered to one A. J. Waldock a warranty deed for the lands; several transfers of this title were made through various persons and corporations until, on November 30th, 1907, it was acquired, by warranty deed, and for a good and valuable consideration, by C. E. Gannon, plaintiff in error. Since that date he has been in possession and control of the lands and has received the profits therefrom, either personally or by agents and tenants.

Upon January 4th, 1909, Wilburn Wolfe executed and delivered to D. R. Johnston a warranty deed for the lands in controversy, which deed was approved by the County Judge of Pontotoc County, Oklahoma, on March 23d, 1909, and by the Secretary of the Interior on July 2d, 1910, in accordance with the laws of Con-

gress, and it is through this deed that Johnston asserts his title.

The correctness of the decision of the Supreme Court of Oklahoma turns upon the question whether when Wilburn Wolfe made his deed to A. J. Waldock, Wolfe was competent to convey title to the surplus lands, it being conceded that the title of the plaintiff in error was derived through the grantee in the Waldock deed.

This inquiry involves a consideration of §§ 11, 12, 15, and 16 of the supplemental agreement between the United States and the Choctaw and Chickasaw Indians, approved July 1st, 1902, 32 Stat. 641. Section 11 provides for allotting to each member of these tribes land equal in value to 320 acres of the average allottable land, and to each freedman land equal in value to 40 acres of the average allottable land. Section 12 provides that at the time of the selection each member of the tribes shall designate as a homestead out of such allotment 160 acres, which shall be inalienable "during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead." Sections 15 and 16 are as follows:

"15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this Act, nor shall said lands be sold except as herein provided.

"16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: *Provided*, That such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw

and Chickasaw tribal governments for less than its appraised value."

The provisions of these sections, it seems to us, lead to the conclusion that Congress intended to make them binding upon the surplus lands not only in the lifetime of the allottee, but as well during the periods named when the lands might descend as in this case to and be owned by a member of the tribe. Section 15 is positive in its requirement that lands allotted to members shall not be sold except as in the act provided. Section 16 makes the land alienable after the issuance of patent, except as to the homestead, not involved here, one-fourth in acreage in one year, one-fourth in three years, and the balance in five years from the date of the patent, and provides that the lands shall not be alienable by the allottee, "or his heirs," at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than the appraised value.

It seems quite clear that in thus enacting a statute for the protection of a dependent people, Congress intended to bind the surplus lands in the hands of the heirs as well as when in the ownership of the original allottee, and to make such land inalienable during the periods named. Congress intended to prevent improvident sales of the lands, and distributed the right of alienation over a period of years, giving the right to sell at the appraised value and in the quantities named. In view of the positive provision of § 15, and its prohibition of alienation except as permitted in the act, we think Congress manifested its intention to make any other alienation void.

Counsel for plaintiff in error rely very much in support of their contentions upon the case of *Mullen* v. *United States*, 224 U. S. 448. But that case dealt with an allotment of lands under § 22 where provision is made for allotment in the right of a member of the tribe who has died subsequently to the ratification of the agreement

and before receiving an allotment. Because of the difference between § 22 and the other sections it was held that there was no restriction upon the right of the heirs to make the conveyance in question.

The later case of *Bowling and Miami Investment Co.* v. *United States*, 233 U. S. 528, dealt with restrictions like those under consideration now. The Secretary of the Interior was authorized to make an allotment to each member of the tribe, subject to the restriction that the land should not be subject to alienation for the period of twenty-five years from the date of the issuance of the patents, and that the patents should recite in the body thereof that the land described and conveyed should not be alienated for twenty-five years from its date, and that any contract or agreement to sell or convey such allotments so patented entered into before the expiration of said term of years should be null and void. Of such restrictions, Mr. Justice Hughes, who also wrote the opinion in the *Mullen Case*, speaking for the court, said, at page 535:

"The question then is, whether the restriction imposed by the act of 1889 was a merely personal one, operative only upon the allottee, or ran with the land binding his heirs as well. This must be answered by ascertaining the intent of Congress as expressed in the statute. The restriction was not limited to 'the lifetime of the allottee,' as in *Mullen* v. *United States*, 224 U. S. 448, 453, nor was the prohibition directed against conveyances made by the allottee personally. Congress explicitly provided that 'the land so allotted' should not be subject to alienation for twenty-five years from the date of patent. 'Said lands so allotted and patented' were to be exempt 'from levy, sale, taxation, or forfeiture for a like period of years.' The patent was expressly to set forth that 'the land therein described and conveyed' should not be alienated during this period, and all contracts 'to sell or convey

such land' which should be entered into 'before the expiration of said term of years' were to be absolutely void. These reiterated statements of the restriction clearly define its scope and effect. It bound the land for the time stated, whether in the hands of the allottee or of his heirs."

We think this principle is controlling here, and that it was the intention of Congress to make a restriction which should bind the surplus lands, whether in the hands of the original allottee in his lifetime or of his heirs after the decease of the original allottee during the periods named. The restriction was upon alienation of the lands as such, and was not merely personal to the allottee any more than it was in the *Bowling Case*.

In the Act of 1906, validating conveyances made by the members of the Five Civilized Tribes, 34 Stat. 137, where it was provided that conveyances made by members of the Five Civilized Tribes subsequent to selection of allotment and removal of restrictions where patents thereafter issue should not be declared invalid solely because the conveyances were made prior to the issuance and delivery of the patents, it was nevertheless provided that deeds executed or contracts entered into before the removal of restrictions should be null and void.

A contention that many investments have been made upon a construction of the law differing from that given in this case by the Supreme Court of Oklahoma, and that such construction and the common understanding of the bar have operated to establish a rule of property which cannot be changed was denied by the Supreme Court of Oklahoma and rightly so. The matters relied upon were inadequate to overcome the meaning of the statutory provisions in question.

A contention that the deed from Wolfe to Johnston was champertous within the statute of the State was considered and decided by the Supreme Court of Oklahoma

in the light of its own and other decisions, and the holding of the court did not, in our opinion, involve the denial of a federal right such as would make that ruling reviewable here.

We think the federal questions involved were correctly decided, and affirm the judgment of the Supreme Court of Oklahoma.

Affirmed.

BAKER ET AL. *v.* SCHOFIELD, RECEIVER OF THE MERCHANTS' NATIONAL BANK OF SEATTLE.

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

No. 133. Submitted January 15, 1917.—Decided March 6, 1917.

The rule that concurrent findings of fact by two lower courts will not be disturbed unless clearly wrong is here applied in support of findings of fraud and breach of fiduciary duty resulting in a trust.

Defendant, as receiver of a national bank, contracted on its behalf, with the approval of the Comptroller of the Currency, for the purchase of certain realty, used some of the bank's money in payments on the price, and, under apparent authority from the court, sold and assigned the contract for cash paid the bank. The assignee acted secretly for the defendant in taking the contract, and thereafter assigned it secretly to him as an individual. Defendant resigned as receiver, and subsequently the contract was fully performed and the real property became vested in a corporation whose shares for the most part were issued to the defendant. In a suit brought by his successor to regain the property for the bank, *Held:* (1) That the transaction was a gross breach of defendant's duty as receiver; (2) That he was estopped to claim that the purchase of the property was beyond the powers of the bank, *Case* v. *Kelly*, 133 U. S. 21, distinguished; (3) That delay of the suit for sixteen years after the making of the contract and fourteen years after defendant's resignation as receiver was not laches, in view of the find-

ing that his successors in the receivership had no knowledge or equivalent notice of the fraud.

The seven year statute of limitations of Washington, Remington & Ballinger's Ann. Codes and Stats., § 789, does not apply when the claim of title accompanying possession is not made in good faith.

221 Fed. Rep. 322, affirmed.

THE case is stated in the opinion.

Mr. B. S. Grosscup and *Mr. Corwin S. Shank* for appellants.

Mr. Frederick Bausman, Mr. R. P. Oldham and *Mr. R. C. Goodale* for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

This is an action by John W. Schofield, as receiver of the Merchants' National Bank of Seattle, Washington, insolvent since 1895, against Charles H. Baker, receiver of the bank from 1895 to 1899, and others, seeking a decree declaring the defendants to be holders of certain real property in Seattle in trust for the plaintiff, and asking a conveyance thereof to the plaintiff.

The property in controversy is block 430 of Seattle Tide Lands, a tract of some twelve acres, and the leasehold of the harbor area lying in front of that block. In conformity with the provisions of the state law, the Merchants' National Bank had, prior to its failure, made application to purchase these lands. After the failure and the appointment of Charles H. Baker, receiver, this application was accepted by the State Board of Land Commissioners, and upon January 12, 1897, a contract was entered into between the State of Washington and the bank, through the receiver, by which the State agreed to sell and the bank to purchase block 430 of Seattle Tide Lands for $1488, payable in ten annual installments, sub-

ject to all liens for filling, and all taxes and assessments that might be levied or assessed on the land, and with a forfeiture clause in case the bank should fail to pay any of the amounts, either principal, interest, taxes or assessments, when the same should become due and for six months thereafter. Permission to make this contract was obtained by the receiver from the Comptroller of the Currency, and thereafter partial payments were made upon the contract.

Upon October 6, 1897, by order of the United States Circuit Court upon the receiver's petition to that effect, he was authorized to sell at private sale certain doubtful personal assets of the defunct bank, and thereafter, Baker, as receiver, assigned to S. G. Simpson the contract above mentioned for the consideration of $198.80, the transfer being approved by the Commissioner of Public Lands.

The assignment authorized the State of Washington to receive from Simpson, or his assigns, the performance of all covenants and agreements specified in the contract to be performed by the bank, and upon such performance to execute to him a patent for such tide land. By virtue of the ownership by Simpson of the contract to purchase tide lands block No. 430, he became entitled, under the laws of the State of Washington, to the preference right to lease certain harbor area adjacent and appurtenant to block No. 430. Upon the purchase by Simpson of the contract to purchase the tide lands, there was issued to him by the State of Washington a certain lease, designated "Harbor Lease No. 181," covering the harbor area appurtenant to the block.

In March, 1899, the contract between the bank and the State of Washington for the purchase of block No. 430, together with the harbor lease, was transferred by Simpson to Baker in his personal capacity, the record title continuing in the name of Simpson. On August 11, 1905, Simpson, acting for and on behalf of Baker, assigned the

contract for the purchase of block No. 430, together with harbor lease No. 181, to one Norton, the consideration named being one dollar. This assignment contained the same authorization as to the patent to be issued by the State as was contained in the assignment to Simpson. On October 16, 1905, the State of Washington issued to Norton a patent covering block No. 430, with the exception of a strip of land, thirty feet wide, which had been granted to a railroad company. In August, 1907, there was organized under the laws of the State of Washington the Seattle Water Front Realty Company. Upon incorporation of this company, Norton conveyed to it block No. 430, together with harbor lease No. 181, in payment for the issue of its capital stock of $250,000. About ninety-five per cent. of the stock was issued to Baker or to others who held for him.

In April, 1899, and a month after receiving the assignment from Simpson, Baker resigned as receiver; whereupon A. W. Frater was appointed receiver. On February 12, 1913, Frater resigned, and the present plaintiff was appointed receiver in his stead, and this suit was immediately begun.

Under this state of facts, the District Court entered a decree adjudging that the assignment by Baker to Simpson was fraudulent and was made for the sole use and benefit of Baker, and that the assignment of the contract to the defendant Norton by Simpson and the conveyance of Norton to the Seattle Water Front Realty Company were null and void. The decree provided that the Realty Company should execute and deliver to the clerk of the court below for the benefit of the plaintiff, as receiver, a deed covering its interest in block No. 430 and the assignment of harbor lease No. 181, and the receiver was directed to pay to the clerk of the court for the Realty Company the sum of $10,977.13, being the amount of the payment, with interest, made by the defendants to the State of

Washington under the contract for the purchase of block No. 430, and upon the harbor lease, and for taxes. 212 Fed. Rep. 504. Upon appeal, this decree was affirmed by the Circuit Court of Appeals for the Ninth Circuit. 221 Fed. Rep. 322.

Both the District Court and the Circuit Court of Appeals found that the sale from Baker to Simpson was only colorable, and that Simpson purchased the property for Baker. Our consideration of the evidence must be governed by the well-settled rule in this court that, when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous. *Stuart* v. *Hayden*, 169 U. S. 1, 14; *Baker* v. *Cummings*, 169 U. S. 189, 198; *Towson* v. *Moore*, 173 U. S. 17, 24; *Hy-yu-tse-mil-kin* v. *Smith*, 194 U. S. 401, 412; *Dun* v. *Lumbermen's Credit Association*, 209 U. S. 20, 23; *Texas & Pacific Ry. Co.* v. *Railroad Commission of Louisiana*, 232 U. S. 338, 339; *Washington Securities Company* v. *United States*, 234 U. S. 76, 78; *Gilson* v. *United States*, 234 U. S. 380, 383. The concurrent decisions of the courts upon the establishment of a trust as a question of fact will be followed unless shown to be clearly erroneous. *Brainard* v. *Buck*, 184 U. S. 99.

The various defenses urged in the court below and involved in the points argued in this court for the appellants must be considered in view of this finding of fact as to the nature of the transfer by Baker, as receiver, to Simpson.

That the secret arrangement between Baker and Simpson was fraudulent and a gross breach of the receiver's duty is too plain to require detailed consideration. *Michoud* v. *Girod*, 4 How. 503, 555; *Magruder* v. *Drury*, 235 U. S. 106, 119.

It is urged that the contract of purchase was *ultra vires* the corporate powers of the bank. The Court of Appeals, in deciding this point, referred to the decisions of this court which have held that objections to the passing of title in

conveyances to National Banks, although made in excess of any legal authority given the bank by the law, can only be made by the Government in a direct proceeding, and will not defeat the vesting of the title in the bank when it takes a conveyance in good faith for a valuable consideration. *National Bank* v. *Matthews*, 98 U. S. 621; *National Bank* v. *Whitney*, 103 U. S. 99; *Reynolds* v. *Crawfordsville First National Bank*, 112 U. S. 405; *Thompson* v. *Saint Nicholas National Bank*, 146 U. S. 240; *Schuyler National Bank* v. *Gadsden*, 191 U. S. 451.

But without questioning the correctness of this conclusion, we are of opinion that the authority of the bank to make this purchase, or of the Comptroller to approve of it, or of the court to order the sale of this asset upon the petition of Baker, as receiver, need not necessarily be considered in determining the right to recover in this proceeding.

Upon the plainest principles governing the relation of the parties here, in view of the finding that there was a secret trust in Baker's favor in the transfer to Simpson, Baker could not be heard to question the authority by which he acquired the property ostensibly for the benefit of his trust, but in reality for himself in breach of his trust. To sanction this would be to permit Baker to take advantage of his own wrong. It is not for him to say that he can acquire title in fraud of his trust because the bank could not legally acquire it, or the Comptroller approve or the court authorize, its sale. As the facts are found, Baker assumed to act upon the understanding that the bank owned the contract of purchase and under an order invoked by him he undertook to sell it for the benefit of the trust, but in reality conveyed it to one who secretly held it for him. Under such circumstances, the trustee can take nothing by his wrongful act and can be compelled to restore the property to the authorized representative of the trust estate.

Plaintiff relies greatly upon *Case* v. *Kelly*, 133 U. S. 21, where certain officers of a railroad had procured conveyances of lands intended to be used in the construction of the road and had taken title to themselves personally, and the railroad was seeking to recover the lands although forbidden by its charter to take and hold title to such lands. In this case, Mr. Justice Miller, speaking for the court said:

"We need not stop here to inquire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids."

But the present case is not so. Here the State has parted with its title, and made the contract to convey to the bank at the instance of the receiver who now seeks to hold the title for his own benefit in breach of his trust.

As to the defense of laches, both courts below found that the facts show entire want of knowledge on the part of the present plaintiff or his predecessor in office of the secret arrangement by which Baker acquired the title to

the contract of purchase. Until knowledge of this fraudulent transaction, or facts equivalent thereto, was brought home to those authorized to act, there could be no laches in the failure to prosecute the suit.

Nor do we find merit in the contention that the seven-year statute of limitations (Remington & Ballinger's Annotated Codes and Statutes of Washington, § 789), in favor of persons in the actual and notorious possession of lands under claim of title in good faith, has any application here. Under the facts found Baker does not come within the class protected by this statute.

Other points are urged but it is enough to say that we find no error in the decree of the Circuit Court of Appeals, and it is

Affirmed.

WILLIAM R. STAATS COMPANY ET AL. *v.* SECURITY TRUST AND SAVINGS BANK, TRUSTEE.

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

No. 608. Motion to dismiss. Submitted January 10, 1917.—Decided March 6, 1917.

A suit brought by a trustee in bankruptcy under § 60b of the Bankruptcy Act to set aside an unlawful preference is a controversy arising in a bankruptcy proceeding.

In such controversies, judgments and decrees of the Circuit Courts of Appeals which might otherwise have come within the general appellate powers of this court as defined by the Judicial Code are, by the Act of January 28, 1915, 38 Stat. 804, made final, and this court may review them only by certiorari.

Appeal to review 233 Fed. Rep. 514. dismissed.

The case is stated in the opinion.

Mr. Jefferson P. Chandler and *Mr. W. T. Craig* for appellee, in support of the motion.

Mr. H. W. O'Melveny, Mr. Alexander Britton and *Mr. Evans Browne* for appellants, in opposition to the motion.

Memorandum opinion, by direction of the court, by Mr. Justice Day.

This is a motion to dismiss the appeal in a suit brought originally in the United States District Court for the Southern District of California by the Security Trust and Savings Bank, as trustee in bankruptcy of the estate of Fielding J. Stilson Company, against William R. Staats Company and Title Insurance and Trust Company, the complaint alleging that the Stilson Company was adjudged a bankrupt on October 24th, 1912; that the Stilson Company made and delivered to the Title Insurance and Trust Company a deed of trust for certain realty, situated in the City of Los Angeles, to secure an indebtedness in the sum of $3,870.00, due by the Stilson Company to the Staats Company; that the effect of this conveyance was to enable the Staats Company to receive a greater percentage of its indebtedness than other creditors of the same class, and that the conveyance was made with a view to giving a preference, in violation of the Bankruptcy Act, and a decree was prayed declaring the conveyance void and of no effect.

The suit was brought by authority of § 60b of the Bankruptcy Act of 1898. On issues made, the case was referred to a special master, who found the conveyance by the Stilson Company to the Title Insurance and Trust Company to have been made and received as security for an indebtedness in the sum of $3,870.00, then due by the Stilson Company to the Staats Company and that the same was an unlawful preference within the meaning

of the Bankruptcy Act. Upon exceptions to the master's report, the District Court overruled some exceptions and sustained others, and dismissed the complaint. An appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, which court reached the conclusion that the conveyance in question was a preference within the meaning of the Bankruptcy Act, reversed the decree of the District Court, and remanded the case to that court with directions to enter a judgment in favor of the complainant. 233 Fed. Rep. 514. Afterwards an appeal from this decree of the Circuit Court of Appeals was allowed to this court.

We think it is plain that this appeal must be dismissed. The decree of the Circuit Court of Appeals was made final by the Act of Congress of January 28, 1915, 38 Stat. 804, and the only right of review in this court is by writ of certiorari. This act provides: "That the judgments and decrees of the circuit courts of appeals in all proceedings and cases arising under the Bankruptcy Act and in all controversies arising in such proceedings and cases shall be final, save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such proceeding, case, or controversy unless the petition therefor is presented to the Supreme Court within three months from the date of such judgment or decree."

The language of this act is very comprehensive, and embraces proceedings and cases arising under the Bankruptcy Act and controversies arising in such proceedings, and provides that the judgments and decrees of the Circuit Court of Appeals in such controversies, proceedings and cases shall be final. The case now under con-

sideration is a controversy arising in a bankruptcy proceeding. *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *Coder* v. *Arts*, 213 U. S. 223; *Tefft, Weller & Company* v. *Munsuri*, 222 U. S. 114; *Barnes* v. *Pampel*, Circuit Court of Appeals, 6th Circuit, 192 Fed. Rep. 525.

We find no merit in the contention that, after the passage of the Act of 1915, appellate proceedings in this court in such suits as this should continue to be controlled by the general provisions of the Judicial Code. This statute manifested the purpose of Congress to relieve this court from the necessity of considering cases of this character, except when brought here by the writ of certiorari. *Central Trust Co.* v. *Lueders*, 239 U. S. 11; *Shattuck, Trustee*, v. *Title Guaranty & Surety Co.*, 239 U. S. 637.

It follows that the motion to dismiss this appeal for want of jurisdiction must be granted.

Appeal dismissed.

THE STEAMSHIP APPAM.[1]

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

Nos. 650, 722. Argued January 15, 16, 1917.—Decided March 6, 1917.

The British merchant steamship *Appam*, captured on the high seas by a German cruiser and navigated to a port of the United States in control of German officers and crew, during the war between

[1] The docket titles of these cases are: No. 650, *Hans Berg, Prize Master in charge of the Prize Ship "Appam," and L. M. Von Schilling, Vice-Consul of the German Empire, Appellants*, v. *British & African Steam Navigation Co.;* No. 722, *Same* v. *Henry G. Harrison, Master of the Steamship "Appam."*

Great Britain and Germany, is *held* to have been brought here as a prize.

Under the principles of international law, as recognized by our government since an early day in its history and as emphasized in its attitude in the Hague Conference of 1907, it is a clear breach of our neutral rights for one of two belligerent governments, with both of which we are at peace, to make use of our ports for the indefinite storing and safe-keeping of prizes captured from its adversary on the high seas.

Failure of our government to issue a proclamation on the subject will not warrant the use of our ports to store prizes indefinitely, and certainly not where the possibility of removal depends upon recruiting crews in violation of our established rules of neutrality.

The Treaty with Prussia of 1799, 8 Stat. 172, 173, Article 19, makes no provision for indefinite stay of vessels, and includes prizes only when in charge of vessels of war.

The violation of neutrality committed by a belligerent in wrongfully making use of one of our ports for storing indefinitely a merchant vessel and cargo captured on the high seas, affords jurisdiction in admiralty to the United States District Court of the locality to seize the vessel and cargo and restore them to their private owners.

In such case, proceedings in a prize court of the belligerent country could not oust the jurisdiction of the District Court having the vessel in custody or defeat its judgment.

234 Fed. Rep. 389, affirmed.

THE case is stated in the opinion.

Mr. Frederick W. Lehmann, with whom *Mr. John W. Clifton, Mr. Norvin R. Lindheim, Mr. Robert M. Hughes* and *Mr. Walter S. Penfield* were on the briefs, for appellants: [1]

The capture of the *Appam* was a lawful act of war, and vested the property in the ship in the German Empire, as between the parties to this suit, since confessedly no property rights of neutrals or of individual captors are

[1] Lack of space prevents a full representation of the interesting arguments made in this case. The reply briefs have suffered especially in the attempt at condensation.

involved. *The Mary Ford*, 3 Dall. 188. As between the belligerents, the capture, undoubtedly, produces a complete divestiture of property. *The Adventure*, 8 Cranch, 221, 226; *The Adeline*, 9 Cranch, 244, 285; *The Astrea*, 1 Wheat. 125; *The Josefa Segunda*, 5 Wheat. 338; *The Sally Magee*, 3 Wall. 451; *The Nassau*, 4 Wall. 635; *Manila Prize Cases*, 188 U. S. 254; Westlake, International Law, vol. 2, 2d ed., p. 309; Wheaton, Maritime Captures and Prizes, c. 9, § 5, p. 259; Mr. Lansing to the English Ambassador, March 13, 1915, Diplomatic Correspondence, European War, Department of State, No. 2, p. 140. The property of a neutral is of course not divested until sentence of condemnation. *Hudson* v. *Guestier*, 4 Cranch, 293, 295.

That jurisdiction of prize cases is vested exclusively in the courts of the captor government, and that the mere entry of a prize into neutral waters is not necessarily a breach of neutrality, are propositions conceded by the appellees.

It is not essential to the jurisdiction of the courts of the captor country that the prize be brought into one of its ports. *Hudson* v. *Guestier*, *supra; Jecker* v. *Montgomery*, 13 How. 498, 515. The courts of the neutral country may inquire whether the vessel is held as a prize of war, or whether her taking was a violation of the neutrality of their country, but no further. *The Alerta*, 9 Cranch, 359; *The Betsey*, 3 Dall. 6; *The Invincible*, 13 Fed. Cas. 72; *The Invincible*, 1 Wheat. 238. Under all the decisions of this court, when the *Appam* was found to be a prize of war, the libel should have been dismissed, unless it was further found that in the circumstances of the capture itself there was a violation of our neutrality.

Bringing the *Appam* into our waters did not authorize restitution to the original British owners. The breach of neutrality which will forfeit a prize of war must be one which invalidates the capture itself, which involves

the neutral nation as a participant in the act of war committed in taking the prize. If the capture is made in the neutral waters and the prize is brought within the jurisdiction of the sovereign whose neutrality has been violated, restitution will be decreed, because the capture was an act of trespass upon the sovereignty of the neutral power, and moreover, a violation of the shelter and asylum which the captured vessel had a right to expect in the neutral waters.

And of like nature is the case where the captor ship has been equipped, or its equipment has been augmented, within the neutral territory. Bringing the vessel in is not the foundation of the right to redress, it simply gives opportunity to award and enforce redress. The exceptions to the rule as to the exclusive cognizance of prize cases by the courts of the captor country have never been extended to cases of alleged violation of neutrality after the capture, and not inherent in the capture. The policy of our government was fixed and made public during the administration of Washington, and has been adhered to ever since, and the decisions of this court are in perfect harmony with that policy. See Jefferson to British Minister, 1793, 4 Jefferson's Works, H. A. Washington ed., p. 78; Washington to Congress, 1793, 1 Am. State Papers, p. 21; *Talbot* v. *Jansen*, 3 Dall. 133; *The Alerta*, *supra*, 359; *The Invincible*, 1 Wheat. 238; *The Divina Pastora*, 4 Wheat. 52; *The Estrella*, 4 Wheat. 298; *The Neustra Senora de la Caridad*, 4 Wheat. 497; *La Amistad de Rues*, 5 Wheat. 385; *La Conception*, 6 Wheat. 235; *The Santissima Trinidad*, 7 Wheat. 283; *The Gran Para*, 7 Wheat. 471; *The Santa Maria*, 7 Wheat. 490; *The Monte Allegre*, 7 Wheat. 520.

Where, as in this case, the capture was a valid act of war, made under the commission of a belligerent power on the high seas, and the capture is complete, the crew of the captured ship submitting to the control of the cap-

tors, and there remains nothing but the hope of recapture, a hope that is not realized, the captured ship is good prize and is the property of the captor government, as much so as are its ships of war, and what its rights or privileges in our ports may be, how long it may stay, or whether it may come into them at all, are questions between our government and the government of the captors, and do not at all concern the original owner of the captured ship. He has not been injured, he has lost nothing by such acts. See *The Anne*, 3 Wheat. 435; *The Sir William Peel*, 5 Wall. 517; *The Adela*, 6 Wall. 266; *The Florida*, 101 U. S. 37; *Queen* v. *The Chesapeake*, 1 Oldright (Nova Scotia), 797; *Williams* v. *Armroyd*, 7 Cranch, 423.

The *Appam* is a public ship of the German Empire, and entitled to all the rights and immunities of such a ship. As the property of the German Government the ship was public property—a public ship—and could be nothing else. That government might devote her to any use it deemed proper or might destroy her altogether. A ship may be a public ship without being a ship of war. Hall, International Law, 5th ed., p. 161. The Government of the United States in this war has announced its intention to treat a prize as a public vessel. Neutrality Proclamation *re* Panama Canal, November 13, 1914, Diplomatic Correspondence, European War, Department of State, No. 2, pp. 18, 19. Our ports are open to the public ships of friendly powers, and they may remain while our government allows. *The Exchange*, 7 Cranch, 116. Their exemption from the jurisdiction of our courts depends rather upon their public than upon their military character. *Briggs* v. *Light Boats*, 11 Allen, 157, 186. The general practice of our government has been in harmony with the views we present. John Paul Jones to Robert Morris, 1783, 7 Diplomatic Correspondence of the United States, p. 288; Franklin to Danish Minister, 3 Wharton,

Diplomatic Correspondence of the American Revolution, p. 433; Franklin to Jones, 1785, 7 Diplomatic Correspondence of the United States, p. 341; Resolution of Congress of Confederation, October 25, 1787, *id.*, p. 362; Jefferson to Danish Secretary, 1788, 6 Jefferson's Works, Monticello ed., p. 414; Jefferson to British Minister, 1793, 1 Am. State Papers, Foreign Relations, p. 176; 4 Jefferson's Works, H. A. Washington ed., p. 65; Moore's International Law Digest, vol. 7, p. 983; Wheaton to Prussian Minister, 1843, *id.*, p. 982; Cushing to Marcy, 7 Ops. Atty. Gen. 122, 125, 129, 131; Semmes' Correspondence with British authorities, 1864, Semmes' Service Afloat, pp. 663, 741, 743.

In the treaties with Prussia, 1785 and 1799, Art. XIX, the purpose of each party was to obtain shelter for its warships and prizes in the ports of the other. The right of prizes to come into port and their immunity while there constitute the substance of the article, not the manner of coming in or going out. They may "come and enter," and may be "carried out again" at any time. The common and proper use of the word "carry" includes the ideas of *sending* and *bringing*. In *The Felicity*, 2 Dods. 281; *s. c.*, 2 Roscoe's Prize Cases, 233, Sir William Scott used *carry* and *bring* interchangeably. A prize may be brought into port by a prize crew as well as under convoy. *The Alexander*, 8 Cranch, 169; *The Eleanor*, 2 Wheat. 345. The bringing in either case is the act of the captor. In all the correspondence leading up to these treaties we have seen nothing to suggest that on either side it was deemed material whether a prize was brought in alone, by the prize crew, or whether it was brought in by the captor vessel. Everything indicates that it was all one to the parties how the prize got into port so long as it got there. And our commissioners abroad used the words *carry* and *send* indifferently to describe the taking of a prize into port, whether with or without convoy. Franklin to Ver-

gennes, concerning the prizes "sent to Bergen," 1782, 7 Franklin's Works, (ed. John Bigelow), p. 397. In a minute of their proceedings, as ministers plenipotentiary on August 30, 1784, Franklin, Adams, and Jefferson speak of these prizes as taken by Jones and "*carried* into Bergen." 2 Diplomatic Correspondence of the United States, p. 196. Jones himself in a letter to the Marechal de Castries, of February 18, 1784, speaks of them as "*sent* into port." 7 Diplomatic Correspondence of the United States, p. 294. See also Franklin to Jones, 1778, 1 Sparks' Diplomatic Correspondence, American Revolution, p. 361; Jefferson to Baron de Blome, 1786, 2 Jefferson's Works, (ed. H. A. Washington), p. 13; Order of Congress, 1787, 7 Diplomatic Correspondence of the United States, p. 364; Act of March 28, 1806, 6 Stat. 61. The treaty is to be construed in view of the circumstances and conditions which prompted to its adoption. Vattel, Book II, c. 17, § 287; *Hauenstein* v. *Lynham*, 100 U. S. 483; *Tucker* v. *Alexandroff*, 183 U. S. 424. The arrangement with Prussia originated while we were at war with England, and anxious to war on British shipping and safeguard prizes. Prussia had no navy or large maritime interests. The treaty was made out of friendship to this country and at its earnest solicitation. The similar treaty with France of February 6, 1778, Art. XVII, Molloy, vol. 1, p. 474, actuated by the same motive, was construed as allowing prizes to be sent in without convoys. Franklin to Jones, 1779, Senate Reports, 63, 29th Cong., 2d sess., p. 5; Hamilton to Collectors of Customs, 1793, 1 Am. State Papers, Foreign Relations, p. 140; Jefferson's opinion, 6 Jefferson's Writings, p. 223; Jefferson to Genet, *re The Fanny*, 1793. l. c. 329, note. See also questions and opinion formulated by Jefferson for the Cabinet, 1793, l. c. 351, 370, and his letters to Morris and the British Minister, same year, l. c. 383, 423, 444. See further Washington's Message of December 3, 1793, 1 Messages of the Presidents (Rich-

ardson), p. 139; *Solderondo* v. *The Nostra Signora*, 21 Fed. Cas. 225; *Reid* v. *Vere*, 20 Fed. Cas. 488. See the treaties of like purpose and effect with *The Netherlands*, October 8, 1782, Molloy, vol. 2, pp. 1238, 1239; 3 Wharton, International Law, p. 527; and with Sweden, April 3, 1783, Molloy, vol. 2, p. 1732, the latter taken as a model by Prussia. 8 Works of John Adams, pp. 183, 191, 193. Further as to the purpose and history of the Prussian Treaty: Franklin and Deane to Continental Congress, 1777, 2 Wharton, Diplomatic Correspondence, American Revolution, p. 322; Lee's letter from Berlin, 1777, 2 Sparks' Diplomatic Correspondence, American Revolution, p. 88; Baron Schulenburg to Lee, 1778, 2 Wharton, Diplomatic Correspondence, American Revolution, p. 472; Adams, Franklin and Jefferson to Baron Thulemeier, 1785, 2 Diplomatic Correspondence of the United States, p. 276; the latter's reply, 1785, l. c. 304; Washington to Rochambeau, 1786, 9 Sparks' Writings of Washington, pp. 182, 183; Hamilton, 1795, 5 Hamilton's Works (ed. Henry Cabot Lodge), p. 113.

Article XIX of the first Prussian Treaty, modified in 1799, was revived by the Treaty of 1828, excluding the provision which related to prizes made on British subjects. The letters exchanged March 31 and April 4, 1916, between the British Ambassador and the Secretary of State (Diplomatic Correspondence, European War, Department of State, No. 3, pp. 341 *et seq.*), show a definite ruling by our political department that the presence of the *Appam* in our waters did not violate neutrality. The treaty, as re-enacted in 1828, is undoubtedly still in force.

The municipal law of the United States is in accord with international law as declared by this court. 35 Stat. 1090, 1091; Fenwick, Neutrality Laws of the United States, c. 2, p. 26; 1 Am. State Papers, p. 140.

The neutrality proclamations of the United States are

in accord with its municipal law and with general international law. Having failed to interdict the entrance of prizes into our ports, permission to enter must be assumed. Our traditional policy, differing from that of Europe, but adhered to in this war and throughout our history, is not to forbid asylum for prizes. Montague Bernard's Neutrality of Great Britain during the American Civil War (London, 1870), pp. 133, 145 *et seq.*

It has consistently been held, that in the absence of express prohibition, prizes may enter and remain in neutral ports. 7 Ops. Atty. Gen. 122; Moore's International Law Digest, vol. 7, p. 982; Twiss, Law of Nations, 2d ed., vol. 2, pp. 453, 454; Hall, International Law, 5th ed., p. 618; Halleck, International Law, 1st ed., p. 523; Calvo, Le Droit International Theorique et Pratique, 3d ed. (1880), vol. 3, p. 498; *The Exchange*, 7 Cranch, 116.

The questions at issue are not affected by the provisions of the Hague Convention. The Hague Conventions do not necessarily declare existing law, they may change it. Scott's Texts of Hague Peace Conferences, 1899–1907, Intro., pp. ix, xix; Preamble to Convention XIII, Scott's Hague Peace Conferences, vol. 2, p. 507. Expressly, these rules are subject to existing treaties. They apply only if all belligerents are parties to the Convention. Article 28, *id.*, p. 519. Great Britain and Turkey have not ratified; Convention XIII therefore does not apply. *The Farn Case*, Mr. Lansing to British Ambassador, Diplomatic Correspondence, European War, Department of State, No. 2, p. 140. The convention may not be taken as evidence in the face of the consistent policy of this country maintained by all branches of its government and never reversed. Besides, the Convention, taken literally, does not deny permission to enter, and no penalty could fall, under Art. 21, until after notice, which has never been given.

Mr. Frederic R. Coudert and *Mr. James K. Symmers*, with whom *Mr. Howard Thayer Kingsbury*, *Mr. Herbert Barry*, *Mr. Floyd Hughes*, *Mr. Ralph James M. Bullowa* and *Mr. Munroe Smith* were on the briefs, for appellees:

Unless they are expressly excluded, prizes may seek temporary shelter in a neutral port, but not permanent or indefinite asylum. This rule is the product of a long course of historical development in the various maritime countries. French Ordinances of 1543, 1674 and 1689; French Prize Code of 1784. See Naval War College, International Law Situations, 1908, p. 54, and appendix to 5 Wheaton, 52–58. In 1650, and again in 1681, France prohibited the stay of foreign prizes in her ports for more than twenty-four hours. Pistoye & Duverdy, Traité des Prises Maritimes, vol. 2, pp. 449, 452. This is, perhaps, the origin of the twenty-four hour limitation for belligerent war vessels in neutral ports. Edict of the States General of Holland of November 7, 1658, in note to *The Josefa Segunda*, 5 Wheat. 349, citing Duponceau's Translation of Bynkershoek. The English authorities recognize the same general rule. *The Flad Oyen*, 1 C. Rob. 135; *The Henrick and Maria*, 4 C. Rob. 43; *The Polka*, Spinks, Ecclesiastical and Admiralty Reports, p. 447. The German Prize Code expressly recognizes it, Huberich & King, pp. 64, 65. There is a striking agreement of opinion among the leading text-writers. Wheaton's Treatise on Capture (1815), pp. 262, 263; Wheaton, International Law, 8th Am. ed., § 391, note; Hall, International Law, 5th ed., p. 618; Westlake, International Law, part 2, p. 215; Risley, The Law of War, p. 176; Dr. James Brown Scott, in American Journal of International Law, January, 1916, pp. 104–112; Bluntschli, International Law, § 778, note.

During our Civil War, our War with Spain, and in the Russo-Japanese War, neutral nations generally either excluded prizes or allowed only temporary entrance in cases

of necessity. Bernard's History of British Neutrality, pp. 137–141; Naval War College, International Law Situations, 1908, pp. 70–73; American Journal of International Law, January, 1916, pp. 109 *et seq.*

The provisions of Arts. 21 and 22 of Convention XIII of the Hague Conference of 1907 are declaratory of the existing law of nations. The express refusal of the United States to accede to Art. 23 was notice to the world that this country would not allow the sequestration of prizes in our ports. The policy of the United States, as well as that of Great Britain, is clearly shown by Arts. 21 and 22 which were signed, adhered to or ratified by forty-three of the powers. This is indicative of the very general agreement among the nations that these articles declared existing international law. The German Prize Code is equally convincing.

Article 23 is evidently inconsistent with Arts. 21 and 22 and contrary to the general rule of neutrality and the modern practice developed by the nations. The attitude of the United States in its reservation indicates its disavowal of the proposed innovation. In the proceedings of the Convention that article was decided upon as a compromise measure. While all agreed on 21 and 22 as expressing existing law, Art. 23 was debated as an innovation, and from the standpoint of policy. These debates disclose the fact that Great Britain and the United States stood for the codification of existing international law as finally embodied in 21 and 22; Germany also acquiesced, proposing to add to the original draft of Art. 21 the words: "for lack of provisions or fuel." This amendment was accepted. The German delegation evidently followed the view of their government as now embodied in their present Prize Code.

The adhesion of the United States to Arts. 21 and 22 was clearly no accidental compromise, but was done in pursuance of the fixed policy of this country and that

of other nations, as shown by their definitely proclaimed practice, at least since the middle of the nineteenth century. As pointed out in Oppenheim on International Law, vol. 2, pp. 395–397, only by adhering to this practice can neutrality be preserved.

After the termination of the Revolutionary War and as a consequence of our Treaties with France of 1778, numerous and protracted difficulties arose in regard to the bringing by French vessels into American ports of prizes. At that time it was permissible to give to one power or another certain privileges available in wartime. In discussing these treaties it must be remembered that the evolution of the law of neutrality, which has taken place since, especially as a consequence of these exclusive privileges given by the United States to France, wholly negatives this ancient view. The fundamental postulate of neutrality to-day is complete impartiality between the belligerents. This rule, embodied in the original statutes of the United States, and since so firmly adhered to, is not founded upon "bookish theoric" but is the resultant of painful national experience. McMaster's History of the People of the United States, vol. 2, pp. 103, 136; *Gray* v. *United States*, 21 Ct. Clms. 340, 360, 384; Moore on International Arbitrations, vol. 4, p. 3967.

The first act in the drama was Washington's proclamation of neutrality. The difficulty in maintaining it was largely due to the embarrassing position in which the United States was involved by having accorded to France exclusive treaty privileges, and especially the provision allowing such use of its ports as was necessarily incompatible with impartiality. *Id.*, pp. 3970–3977; *The Betsey*, 3 Dall. 6; *The Vrow Christina Magdalena*, Bee, 11, Fed. Cas. No. 7216. The case of *The Betsey*, not only overruled all the decisions of the lower courts refusing jurisdiction in this class of cases, but established at that early date (1794) the proposition that the courts of the United

States had power to enforce and vindicate international law. The French treaty clause was in vain invoked as excluding the jurisdiction of the court, precisely as the claimants here invoke the similar Prussian treaty clause.

The decision in the *Betsey Case* was followed on June 5, 1794, by the Neutrality Act, which, with some additions, has remained the law up to the present time. This act sought to meet the difficulties that had arisen out of the great European struggle and had for its object the declaration and codification of the policy followed by Washington and Jefferson and based by them upon the law of nations.

The construction placed by the executive upon the clauses allowing prizes to be taken into American ports, as set forth in Mr. Jefferson's letter to Gallatin, August 28, 1801, Moore's International Law Digest, vol. 7, § 1302, pp. 935, 936, and again by Mr. Pickering, Secretary of State, in 1796, *id.*, 936, make it apparent that under the interpretation placed upon the clause of the French treaty, similar to that of the Prussian treaty, now in question, little more was granted to the vessel and her prize than would now be allowed under the law as declared by Art. 21 of the Hague Convention XIII. It is idle to endeavor now to interpret the Prussian treaty by reference to the letters *inter sese* of the distinguished Americans who were engaged in the effort to persuade Prussia to make it.

War vessels with or without prizes might have been absolutely excluded from our ports; by treaties with some nations we allowed them temporary shelter. We refused to consider this temporary shelter as an asylum, and the treaties, even where applicable, were thus interpreted in a fashion not inconsistent with fair neutrality. Attorney General Wirt, 2 Ops. Atty. Gen. 86; Attorney General Cushing, 7 Ops. Atty. Gen. 212; Clay, Secretary of State, Moore's International Law Digest, vol. 7, p. 937;

Mr. Seward to Peruvian Legation, *id.*, p. 938; Attorney General Cushing, 7 Ops. Atty. Gen. 122. For the so-called Bergen prizes, see Moore's International Law Digest, § 1314; Act of March 28, 1806, 6 Stat. 61. The prizes were brought into Bergen under stress of weather and for necessary repairs. No precedent was created except one against the right of asylum.

There are certain other early treaties which show that, where it was intended to give or secure any greater privileges than those clearly expressed in the Prussian treaty, appropriate language was used. Treaty with Algiers, 1798, Arts. IX, X; Treaty with Algiers, 1816, Art. XVIII; Treaty with The Netherlands, 1782, Art. V; Treaty with Sweden, 1783, Arts. XVIII, XIX. See summary of treaties in regard to prizes in neutral ports in Phillmore's International Law, vol. 3, § 380.

The courts of admiralty of a neutral country have jurisdiction of a suit by the owner of a prize which has been brought into a port of the neutral, and may award restitution when there has been a violation of neutrality on the part of the captor, whether inherent in the capture, or prior or subsequent thereto. *Palachi's Case*, 1 Rolle, 175, 3 Bulstrode, 27; Lex Mercatoria (London, 1729), p. 179; Molloy's De Jure Maritimo, vol. 1, pp. 14, 15, 58; Laws of the Admiralty (London, 1767), vol. 1, p. 219; *The Betsey*, 3 Dall. 6; *The Santissima Trinidad*, 1 Brock. 478, Fed. Cas. No. 2568; affirmed in 7 Wheat. 283; *The Exchange*, 7 Cranch, 116; *The Invincible*, 1 Wheat. 238; *The Divina Pastora*, 4 Wheat. 52; *The Estrella*, 4 Wheat. 298; *La Amistad de Rues*, 5 Wheat. 385; *The Arrogante Barcelones*, 7 Wheat. 496; and other cases. *Queen* v. *The Chesapeake*, 1 Oldright (Nova Scotia), 797; *La Reine des Anges*, Stewart's Admiralty Rep. (Nova Scotia), 11; *The Purissima Concepcion*, 6 Rob. 45; *The Vrow Anna Catharine*, 5 Rob. 15; *The Eliza Ann*, 1 Dods. 244; *The Diligentia*, 1 Dods. 404; *The Twee Gebroeders*,

3 Rob. 161; *The Anna,* 5 Rob. 373; *The Sir William Peel,* 5 Wall. 517; *The Florida,* 101 U. S. 37.

In the case at bar the violation of neutrality was subsequent to the act of capture and was a deliberate attempt to use an American port as a naval base for the safekeeping of the prize during the war. The time of the violation of neutrality is immaterial; there has been a violation and the prize has been voluntarily brought within the jurisdiction of the American courts. The power and duty to make restitution follow as a matter of course.

The Prussian treaties of 1799 and 1828 do not apply. Examination of the French and English texts shows that these and the contemporary treaties with Sweden, France and England, apply only to prizes which are brought into port by vessels of war. They constitute exceptions and necessitate strict construction. They contemplate merely a temporary stay for some particular necessity and do not permit a neutral port of refuge to be made a port of ultimate destination or of indefinite asylum. Opinion of Secretary of State, March 2, 1916. The French text of the Prussian Treaty of 1799 is free from the ambiguity that appellants impute to the English. Appellants' historical review of the negotiations for the treaty actually militates against their own contentions. The convoy of a war vessel to protect its prizes was insisted upon as essential because, as the Prussian sovereign pointed out, some of his principal ports were not fortified, and he therefore could not protect a prize which came in for shelter without a war vessel to defend it against hostile attack.

The German ambassador expressly admitted in his memorandum for the State Department that the Prussian Treaty of 1799 "made it necessary that the prize was brought into port by the capturing vessel," and contended for a wider application in view of "the development of modern cruiser warfare."

Complete title to a prize, whether neutral or belliger-

ent, does not fully vest in the captor until the prize has been brought into one of the captor's ports and duly condemned by a competent prize court of the captor's country. Until then the prize may be lost by recapture, abandonment or violation of another nation's neutrality. Prior to such condemnation the captor has merely a right *ad rem* and no right *in re;* in other words, merely that limited right which possession gives until by condemnation *dominium* or plenary title is acquired. Amos, Roman Civil Law, pp. 157, 158. There is considerable diversity among the early authorities on this question. Grotius, Liber 3, c. 6, § 3, note 3; Bynkershoek's Treatise on the Law of War, Du Ponceau's Translation, c. 5, p. 41; Burlamaqui, Principles of Politic Law, Part 4, c. 7, §§ 15–18; Richard Lee, Treatise of Captures in War, pp. 82, 96; *Goss* v. *Withers*, 2 Burrow's Rep. 638; *Assievedo* v. *Cambridge*, 10 Mod. 77; March's New Cases, p. 110; Wooddeson's Lectures, vol. 2, p. 274; *The Flad Oyen*, 1 C. Rob. 135.

The American rule requires that the captured vessel be brought within the jurisdiction of the captor's country in order to divest the title of the original owners, and that a sentence of condemnation be duly pronounced by a competent court. Attorney General Lee, 1 Ops. Atty. Gen. 78; *Stewart* v. *United States*, 1 Ct. Clms. 113, 119; *Manila Prize Cases*, 188 U. S. 254, 260, 278. See also *Miller* v. *The Resolution*, 2 Dall. 1; *The Nassau*, 4 Wall. 634, 641.

It seems clear from the language of *The Adventure*, 8 Cranch, 221, that, even assuming that the capture, of itself, divested their property, leaving only a *spes recuperandi*, all the rights of the British owners were revived the moment the *Appam* was brought by the prize-master into our neutral waters.

Leading French, German and English commentaries are in agreement that until condemnation the original owner's rights are never finally extinguished but merely

remain in abeyance. Bluntschli, International Law Codified, paragraphs 739, 740, 741, 860; Bonfils, Manuel de Droit International Public (Paris, 1914), paragraphs 1416, 1420; Wheaton, International Law (Phillipson, 1916), p. 581; Oppenheim, International Law, vol. 2, § 196; Upton, Maritime Warfare and Prize (1861); Rev. Stats., § 4652; *Oakes* v. *United States*, 30 Ct. Clms. 378; *The Star*, 3 Wheat. 86; *The Beaver*, 3 C. Rob. 292; "The Emily St. Pierre" and "The Experience," Dana's notes to Wheaton, pp. 474, 475; U. S. Diplomatic Correspondence, 1862, pp. 75–148. See Pitt Cobbett, Leading Cases on International Law (1913), pp. 204, 205.

In any event, as held in the case of *The Santissima Trinidad*, 7 Wheat. 355, the pendency of prize proceedings in a foreign court cannot be set up against the jurisdiction of our courts to deal with a *res* actually in their custody. The case of *The Mary Ford*, 3 Dall. 188, is not a controlling authority. This decision was rendered in 1794, when the whole law of prize was in a very unsettled condition. The conclusion reached is entirely inconsistent with the later decision in the case of *The Adventure*, *supra*.

The *Appam* is not a German public vessel or entitled to the exemptions of a public vessel. An uncondemned prize stands in a category by herself. She may, after condemnation, be sold to a private purchaser and become a private vessel under new ownership, or she may be appropriated to public uses, pacific or belligerent. She may, in certain exceptional cases, be converted into a public vessel even before condemnation. But to effect this she must be regularly commissioned as such by some competent authority. She may then become entitled to the exemptions of a public vessel. *The Exchange*, 7 Cranch, 116. As to the case of *The Farn*, see Diplomatic Correspondence, European War, Department of State, No. 2, pp. 139, 140. *The Tuscaloosa* was restored expressly on the ground that she had been commissioned as a ship of

war, and converted into a tender to the *Alabama*. Semmes, Memoirs of Service Afloat, pp. 739–743; Molloy, Treaties, &c., 1776–1909, vol. 1, p. 721.

Nothing whatever has been done to take the *Appam* out of the category of prize, and convert her into a public vessel, or devote her to public use. She would not, as a German public vessel, bring several hundred prisoners to the United States for the purpose of setting them free. She could not bring them here to hold them as prisoners in our waters without manifestly violating our neutrality, as she in fact did in this respect, and the express prohibition of the American statutes. Rev. Stats., § 5286. The neutrality regulations applicable to the Panama Canal Zone, referred to by appellants, merely provide that in passing through the Canal prizes shall be subject to the same restrictions as war vessels. This does not constitute a recognition of prizes as public vessels. Moreover, such use of the Canal is necessarily temporary.

The sending of a prize to a neutral port with a prize crew insufficient to navigate her, and with intention to lay her up, is equivalent to an abandonment and thereby divests the captors' inchoate right. To hold a capture merely by putting on board a prize-master, with or without a small crew, the prize-master must actually bring the prize into a home port for condemnation. *The Alexander*, 8 Cranch, 169; *Wilcocks* v. *Union Ins. Co.*, 2 Binney, 574, 578; Attorney General Grundy, 3 Ops. Atty. Gen. 377.

Under the prize laws of the United States, the failure to bring proceedings with due diligence in a competent court for an adjudication of prize is in itself ground for the release of the vessel. Rev. Stats., § 2645.

In like manner, the German Prize Code provides for the bringing of proceedings for condemnation in due season. Here the *res* is in the custody of our court, and the pendency of proceedings in a German prize court is

mere *brutum fulmen*, under the decision in *The Santissima Trinidad*, 7 Wheat. 355.

Restitution to the owner is the appropriate and only adequate remedy. The inquiry to be made by our courts is whether the prize was brought in for permitted purposes, and, if so, whether she remains longer than her necessities require. If she acts otherwise, then she is, in the language of the Hague Convention, to be "released." If released, she must necessarily revert to her owners, since the temporary adverse possession of the captors is thus removed. This, however, was no new invention of the Hague Conference. Its roots go back at least to the Edict of the States General of Holland of 1658, already cited, which expressly provided that, in such event:

"The prize should be restored to the former owners as though it had never been taken." Consolato del Mare, Benedict's Admiralty, § 119. See Diplomatic Correspondence, European War, Department of State, No. 2, p. 141. If internment were the only remedy, the captor's chief purpose, of securing a place of safe-keeping for his spoils, would be accomplished. Moreover, the German Government has expressly disclaimed and objected to internment in this case.

That restitution is made by court decree rather than by executive action is the result of the historic development of our judicial and diplomatic precedents. The remedies are concurrent; but for many years it has been the policy of this government to leave such questions to the courts rather than to dispose of them summarily by executive action. (See Chief Justice Marshall's opinion, in the Circuit Court in *The Santissima Trinidad*, *supra*.)

Mr. Justice Day delivered the opinion of the court.

These are appeals from the District Court of the United States for the Eastern District of Virginia, in two ad-

miralty cases. No. 650 was brought by the British & African Steam Navigation Company, Limited, owner of the British steamship, *Appam*, to recover possession of that vessel. No. 722 was a suit by the master of the *Appam* to recover possession of the cargo. In each of the cases the decree was in favor of the libellant.

The facts are not in dispute and from them it appears: That during the existence of the present war between Great Britain and Germany, on the fifteenth day of January, 1916, the steamship *Appam* was captured on the high seas by the German cruiser, *Moewe*. The *Appam* was a ship under the British flag, registered as an English vessel, and is a modern cargo and passenger steamship of 7800 tons burden. At the time of her capture she was returning from the West Coast of Africa to Liverpool, carrying a general cargo of cocoa beans, palm oil, kernels, tin, maize, sixteen boxes of specie, and some other articles. At the West African port she took on 170 passengers, eight of whom were military prisoners of the English Government. She had a crew of 160 or thereabouts, and carried a three-pound gun at the stern. The *Appam* was brought to by a shot across her bows from the *Moewe*, when about a hundred yards away, and was boarded without resistance by an armed crew from the *Moewe*. This crew brought with them two bombs, one of which was slung over the bow and the other over the stern of the *Appam*. An officer from the *Moewe* said to the captain of the *Appam* that he was sorry he had to take his ship, asked him how many passengers he had, what cargo, whether he had any specie, and how much coal. When the shot was fired across the bows of the *Appam*, the captain instructed the wireless operator not to touch the wireless instrument, and his officers not to let any one touch the gun on board. The officers and crew of the *Appam*, with the exception of the engine-room force, thirty-five in number, and the second officer, were ordered

on board the *Moewe*. The captain, officers and crew of the *Appam* were sent below, where they were held until the evening of the seventeenth of January, when they and about 150 others, officers and crews of certain vessels previously sunk by the *Moewe*, were ordered back to the *Appam* and kept there as prisoners. At the time of the capture, the senior officer of the boarding party told the chief engineer of the *Appam* he was now a member of the German navy; if he did not obey orders his brains would be blown out, but if he obeyed, not a hair of his head should be touched. The *Appam's* officer was instructed to tell his staff the same thing, and if they did not obey orders they would be brought to the German officer and shot. Inquiries were made by the German officer in command of the *Appam* as to revolutions of the engines, the quantity of coal on hand and the coal consumption for different speeds, and instructions were given that steam be kept up handy, and afterwards the engineer was directed to set the engines at the revolutions required, and the ship got under way.

Lieutenant Berg, who was the German officer in command of the *Appam* after its capture, told the engineer on the second morning that he was then in charge of the ship, asked of him information as to fuel consumption, and said that he expected the engineer to help him all he could, and the more he did for him the better it would be for everybody on the ship. The engineer said he would, and did so. The engines were operated with a bomb secured to the port main injector valve, and a German sailor stationed alongside the bomb with a revolver. There was a guard below of four or five armed Germans, who were relieved from time to time, but did not interfere with the working of the ship. The German officer, Lieutenant Berg, gave directions as to working the engines, and was the only officer on board who wore a uniform.

On the night of the capture, the specie in the specie-room was taken on board the *Moewe*. After Lieutenant Berg took charge of the *Appam*, bombs were slung over her bow and stern, one large bomb, said to contain about two hundred pounds of explosive, was placed on the bridge, and several smaller ones in the chart room. Lieutenant Berg informed the captain of the *Appam*, pointing to one of the bombs, "That is a bomb; if there is any trouble, mutiny, or attempt to take the ship, I have orders to blow up the ship instantly." He also said, "There are other bombs about the ship; I do not want to use them, but I shall be compelled to if there is any trouble." The bombs were kept in the positions stated until the ship arrived at the Virginia Capes, when they were removed. Lieutenant Berg, on reaching Hampton Roads, asked the crew of the *Appam* to drop the anchor, as he had not men to do it.

During the trip to the westward, the officers and crew of the *Appam* were not allowed to see the ship's compass to ascertain her course, and all lights were obscured during the voyage. The German prisoners, with the exception of two who went on board the *Moewe*, were armed and placed over the passengers and crew of the *Appam* as a guard all the way across. For two days after the capture, the *Appam* remained in the vicinity of the *Moewe*, and then was started westward. Her course for the first two or three days was southwesterly, and afterwards westerly, and was continued until her arrival at the Virginia Capes on the thirty-first of January. The engine-room staff of the *Appam* was on duty operating the vessel across to the United States; the deck crew of the *Appam* kept the ship clean, and the navigation was conducted entirely by the Germans, the lookouts being mostly German prisoners.

At the time of the capture, the *Appam* was approximately distant 1,590 miles from Emden, the nearest German port; from the nearest available port, namely,

Punchello, in the Madeiras, 130 miles; from Liverpool, 1,450 miles; and from Hampton Roads, 3,051 miles. The *Appam* was found to be in first class order, sea-worthy, with plenty of provisions, both when captured and at the time of her arrival in Hampton Roads.

The order or commission delivered to Lieutenant Berg by the commander of the *Moewe* is as follows:

"Information for the American Authorities. The bearer of this, Lieutenant of the Naval Reserve Berg, is appointed by me to the command of the captured English steamer 'Appam,' and has orders to bring this ship into the nearest American harbor, and there to lay up. Kommando S. M. H. Moewe. Count Zu Dohna, *Cruiser Captain and Commander*. (Imperial Navy Stamp:) Kommando S. M. H. Moewe."

Upon arrival in Hampton Roads, Lieutenant Berg reported his arrival to the Collector, and filed a copy of his instructions to bring the *Appam* into the nearest American port and there to lay up.

On February 2d, His Excellency, the German Ambassador, informed the State Department of the intention, under alleged treaty rights, to stay in an American port until further notice, and requested that the crew of the *Appam* be detained in the United States for the remainder of the war.

The prisoners brought in by the *Appam* were released by order of the American Government.

On February 16th, and sixteen days after the arrival of the *Appam* in Hampton Roads, the owner of the *Appam* filed the libel in case No. 650, to which answer was filed on March 3d. On March 7th, by leave of court, an amended libel was filed, by which the libellant sought to recover the *Appam* upon the claim that holding and detaining the vessel in American waters was in violation of the law of nations and the laws of the United States and of the neutrality of the United States. The answer of the

respondents to the amended libel alleged that the *Appam* was brought in as a prize by a prize master, in reliance upon the Treaty of 1799 between the United States and Prussia; that by the general principles of international law the prize master was entitled to bring his ship into the neutral port under these circumstances, and that the length of stay was not a matter for judicial determination; and that proceedings had been instituted in a proper prize court of competent jurisdiction in Germany for the condemnation of the *Appam* as a prize of war; and averred that the American court had no jurisdiction.

The libel against the *Appam's* cargo was filed on March 13th, 1916, and answer filed on March 31st. During the progress of the case, libellant moved the court to sell a part of the cargo as perishable; on motion the court appointed surveyors, who examined the cargo and reported that the parts so designated as perishable should be sold; upon their report orders of sale were entered, under which such perishable parts were sold, and the proceeds of that sale, amounting to over $600,000, are now in the registry of the court, and the unsold portions of the cargo are now in the custody of the marshal of the Eastern District of Virginia.

The argument in this case has taken wide range, and orally and in printed briefs counsel have discussed many questions which we do not consider necessary to decide in determining the rights involved in these appeals.

From the facts which we have stated, we think the decisive questions resolve themselves into three: First, was the use of an American port, under the circumstances shown, a breach of this Nation's neutrality under the principles of international law? Second, was such use of an American port justified by the existing treaties between the German Government and our own? Third, was there jurisdiction and right to condemn the *Appam* and her cargo in a court of admiralty of the United States?

It is familiar international law that the usual course after the capture of the *Appam* would have been to take her into a German port, where a prize court of that Nation might have adjudicated her status, and, if it so determined, condemned the vessel as a prize of war. Instead of that, the vessel was neither taken to a German port, nor to the nearest port accessible of a neutral power, but was ordered to, and did, proceed over a distance of more than three thousand miles, with a view to laying up the captured ship in an American port.

It was not the purpose to bring the vessel here within the privileges universally recognized in international law, i. e., for necessary fuel or provisions, or because of stress of weather or necessity of repairs, and to leave as soon as the cause of such entry was satisfied or removed. The purpose for which the *Appam* was brought to Hampton Roads, and the character of the ship, are emphasized in the order which we have quoted to take her to an American port and there lay her up and in a note from His Excellency, The German Ambassador, to the Secretary of State, in which the right was claimed to keep the vessel in an American port until further notice, (Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties, Department of State, European War No. 3, p. 331,) and a further communication from the German Ambassador forwarding a memorandum of a telegram from the German Government concerning the *Appam* (*Idem*, p. 333), in which it was stated:

"*Appam* is not an auxiliary cruiser but a prize. Therefore she must be dealt with according to Article 19 of Prusso-American treaty of 1799. Article 21 of Hague Convention concerning neutrality at sea is not applicable, as this convention was not ratified by England and is therefore not binding in present war according to Article 28. The above-mentioned Article 19 authorizes a prize ship to remain in American ports as long as she

pleases. Neither the ship nor the prize crew can therefore be interned nor can there be question of turning the prize over to English."

In view of these facts, and this attitude of the Imperial Government of Germany, it is manifest that the *Appam* was not brought here in any other character than as a prize, captured at sea by a cruiser of the German navy, and that the right to keep her here, as shown in the attitude of the German Government and in the answer to the libel, was rested principally upon the Prussian-American Treaty of 1799.

The principles of international law recognized by this Government, leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents. If such use were permitted, it would constitute of the ports of a neutral country harbors of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept.

From the beginning of its history this country has been careful to maintain a neutral position between warring governments, and not to allow the use of its ports in violation of the obligations of neutrality; nor to permit such use beyond the necessities arising from the perils of the seas or the necessities of such vessels as to sea-worthiness, provisions and supplies. Such usage has the sanction of international law, Dana's Note to Wheaton on International Law, 1866, 8th American Edition, § 391, and accords with our own practice. Moore's Digest of International Law, vol. 7, 936, 937, 938.

A policy of neutrality between warring nations has been maintained from 1793 to this time. In that year President Washington firmly denied the use of our ports to the French Minister for the fitting out of privateers to destroy English commerce. This attitude led to the enactment of the Neutrality Act of 1794, afterwards embodied in the Act of 1818, enacting a code of neutrality,

which among other things inhibited the fitting out and arming of vessels; the augmenting or increasing of the force of armed vessels; or the setting on foot in our territory of military expeditions; and empowering the President to order foreign vessels of war to depart from our ports and compelling them so to do when required by the law of nations. Moore on International Arbitrations, vol. 4, 3967 *et seq.*

This policy of the American Government was emphasized in its attitude at the Hague Conference of 1907. Article 21 of the Hague Treaty provides:

"A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

"It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew."

Article 22 provides:

"A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21."

To these articles, adherence was given by Belgium, France, Austria-Hungary, Germany, the United States, and a number of other nations. They were not ratified by the British Government. This Government refused to adhere to Article 23, which provides:

"A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestrated pending the decision of a Prize Court. It may have the prize taken to another of its ports.

"If the prize is convoyed by a war-ship, the prize crew may go on board the convoying ship.

"If the prize is not under convoy, the prize crew are left at liberty."

And in the proclamation of the convention the President recited the resolution of the Senate adhering to it, subject to the "reservation and exclusion of its Article 23 and with the understanding that the last clause of Article 3 of the said Convention implies the duty of a neutral power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction." 36 Stat., Pt. II, p. 2438.

While this treaty may not be of binding obligation, owing to lack of ratification, it is very persuasive as showing the attitude of the American Government when the question is one of international law; from which it appears clearly that prizes could only be brought into our ports upon general principles recognized in international law, on account of unseaworthiness, stress of weather, or want of fuel or provisions, and we refused to recognize the principle that prizes might enter our ports and roadsteads, whether under convoy or not, to be sequestrated pending the decision of a prize court. From the history of the conference it appears that the reason for the attitude of the American delegates in refusing to accept Article 23 was that thereby a neutral might be involved in participation in the war to the extent of giving asylum to a prize which the belligerent might not be able to conduct to a home port. See Scott on Peace Conferences, 1899–1907, vol. II, p. 237 *et seq.*

Much stress is laid upon the failure of this Government to proclaim that its ports were not open to the reception of captured prizes, and it is argued that having failed to interdict the entrance of prizes into our ports permission to thus enter must be assumed. But whatever privilege might arise from this circumstance it would not warrant the attempted use of one of our ports as a place in which to store prizes indefinitely, and certainly not where no

means of taking them out are shown except by the augmentation of her crew, which would be a clear violation of established rules of neutrality.

As to the contention on behalf of the appellants that Article XIX of the Treaty of 1799 justifies bringing in and keeping the *Appam* in an American port, in the situation which we have outlined, it appears that in response to a note from His Excellency, The German Ambassador, making that contention, the American Secretary of State, considering the treaty, announced a different conclusion (Diplomatic Correspondence with Belligerent Governments, *supra*, p. 335 *et seq.*); and we think this view is justified by a consideration of the terms of the treaty. Article XIX of the Treaty of 1799, using the translation adopted by the American State Department, reads as follows.

"The vessels of war, public and private, of both parties, shall carry (*conduire*) freely, wheresoever they please, the vessels and effects taken (*pris*) from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes (*prises*) be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried (*conduites*) out again at any time by their captors (*le vaisseau preneur*) to the places expressed in their commissions, which the commanding officer of such vessel (*le dit vaisseau*) shall be obliged to show. But conformably to the treaties existing between the United States and Great Britain, no vessel (*vaisseau*) that shall have made a prize (*prise*) upon British subjects shall have a right to shelter in the ports of the United States, but if (*il est*) forced therein by tempests, or any other danger or accident of the sea, they (*il sera*) shall be obliged to depart as soon as possible." (The provision concerning the treaties between the United States and Great Britain is no longer

in force, having been omitted by the Treaty of 1828. See Compilation of Treaties in Force, 1904, pp. 641 and 646.)

We think an analysis of this article makes manifest that the permission granted is to vessels of war and their prizes, which are not to be arrested, searched, or put under legal process, when they come into the ports of the high contracting parties, to the end that they may be freely carried out by their captors to the places expressed in their commissions, which the commanding officer is obliged to show. When the *Appam* came into the American harbor she was not in charge of a vessel of war of the German Empire. She was a merchant vessel, captured on the high seas and sent into the American port with the intention of being kept there indefinitely, and without any means of leaving that port for another as contemplated in the treaty, and required to be shown in the commission of the vessel bringing in the prize. Certainly such use of a neutral port is very far from that contemplated by a treaty which made provision only for temporary asylum for certain purposes, and cannot be held to imply an intention to make of an American port a harbor of refuge for captured prizes of a belligerent government. We cannot avoid the conclusion that in thus making use of an American port there was a clear breach of the neutral rights of this Government, as recognized under principles of international law governing the obligations of neutrals, and that such use of one of our ports was in no wise sanctioned by the Treaty of 1799.

It remains to inquire whether there was jurisdiction and authority in an admiralty court of the United States, under these circumstances, to order restoration to an individual owner of the vessel and cargo.

The earliest authority upon this subject in the decisions of this court is found in the case of *Glass* v. *The Sloop Betsey*, 3 Dall. 6, decided in 1794, wherein it appeared that the commander of the French privateer, *The Citizen*

Genet, captured as a prize on the high seas the sloop *Betsey* and sent the vessel into Baltimore, where the owners of the sloop and cargo filed a libel in the District Court of Maryland, claiming restitution because the vessel belonged to subjects of the King of Sweden, a neutral power, and the cargo was owned jointly by Swedes and Americans. The District Court denied jurisdiction, the Circuit Court affirmed the decree, and an appeal was prosecuted to this court. The unanimous opinion was announced by Mr. Chief Justice Jay, holding that the District Courts of the United States possessed the powers of courts of admiralty, whether sitting as an instance or as a prize court, and sustained the jurisdiction of the District Court of Maryland, and held that that court was competent to inquire into and decide whether restitution should be made to the complainants conformably to the laws of nations and the treaties and laws of the United States.

The question came again before this court in the case of *The Santissima Trinidad*, decided in 1822, reported in 7 Wheat. 283. In that case it was held that an illegal capture would be invested with the character of a tort, and that the original owners were entitled to restitution when the property was brought within our jurisdiction. The opinion was delivered by Mr. Justice Story, and, after a full discussion of the matter, the court held that such an illegal capture, if brought into the jurisdiction of the courts of the United States, was subject to condemnation and restitution to the owners, and the learned justice said:

"If, indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction, could be asserted by private persons, or in any other manner than a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled, that as between the captors and the captured,

the question can never be litigated. It can arise only upon a claim of the neutral sovereign, asserted in his own courts, or the courts of the power having cognizance of the capture itself for the purposes of prize. And by analogy to this course of proceeding, the interposition of our own government might seem fit to have been required, before cognizance of the wrong could be taken by our courts. But the practice from the beginning, in this class of causes, a period of nearly thirty years, has been uniformly the other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent for Congress to apply at its pleasure the proper remedy." (p. 349.)

" . . . Whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality; and if the goods are landed from the public ship, in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge, that if illegally captured, they shall be exempted from the ordinary operation of our laws." (p. 354.)

In the subsequent cases in this court this doctrine has not been departed from. *L'Invincible*, 1 Wheat. 238, 258; *The Estrella*, 4 Wheat. 298, 308–311; *La Amistad de Rues*, 5 Wheat. 385, 390.

It is insisted that these cases involve illegal captures at sea, or violations of neutral obligation, not arising because of the use of a port by sending in a captured vessel and keeping her there in violation of our rights as a neutral. But we are at a loss to see any difference in principle between such cases and breaches of neutrality of the

character here involved in undertaking to make of an American port a depository of captured vessels with a view to keeping them there indefinitely. Nor can we consent to the insistence of counsel for appellant that the Prize Court of the German Empire has exclusive jurisdiction to determine the fate of the *Appam* as lawful prize. The vessel was in an American port and under our practice within the jurisdiction and possession of the District Court which had assumed to determine the alleged violation of neutral rights, with power to dispose of the vessel accordingly. The foreign tribunal under such circumstances could not oust the jurisdiction of the local court and thereby defeat its judgment. *The Santissima Trinidad, supra*, p. 355.

Were the rule otherwise than this court has frequently declared it to be, our ports might be filled in case of a general war such as is now in progress between the European countries, with captured prizes of one or the other of the belligerents, in utter violation of the principles of neutral obligation which have controlled this country from the beginning.

The violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people.

It follows that the decree in each case must be

Affirmed.

ENTERPRISE IRRIGATION DISTRICT ET AL. *v.* FARMERS MUTUAL CANAL COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 48. Argued January 22, 23, 1917.—Decided March 6, 1917.

In a suit to determine the relative rights of the parties to divert water for irrigation from a stream in Nebraska, the state court decided that superiority of the defendant's appropriation had been conclusively established against the plaintiff, consistently with due process, in proceedings before a state board, and, further and independently, that the plaintiff, having without objection stood by and permitted the defendant to go to enormous expense in the construction of a canal and diverting works, was estopped to question the validity of the defendant's appropriation on which it relied. The ground of estoppel being distinct, non-federal, and fairly supported by the facts, *Held*, that this court had no jurisdiction to review, although the state board's adjudication was challenged under the Fourteenth Amendment.

When the judgment of a state court is placed upon two grounds, one involving a federal question and the other not, the jurisdiction of this court depends upon whether the non-federal ground is independent of the federal ground and also broad enough to sustain the judgment; if so, the judgment does not depend upon the decision of any federal question, and this court has no power to disturb it.

Where the non-federal is so interwoven with the federal ground as not to be independent, or, standing alone, is not of sufficient breadth to sustain the judgment, the jurisdiction of this court attaches.

Where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question, the judgment rests upon the latter and may be reviewed here.

But, where the non-federal ground has fair support, this court may not inquire whether the decision upon it is right or wrong.

Questions of state law do not engage the due process clause of the Fourteenth Amendment.

Writ of error to review 92 Nebraska, 121, dismissed.

THE case is stated in the opinion.

Mr. Harry N. Haynes, with whom *Mr. Thomas M. Morrow*, *Mr. William Morrow* and *Mr. Harold D. Roberts* were on the brief, for plaintiffs in error.

Mr. Fred A. Wright and *Mr. Will R. King*, with whom *Mr. Carl C. Wright* was on the briefs, for defendants in error.

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

In form this was a suit to determine the relative rights of the parties to divert the waters of the North Platte River, in western Nebraska, for purposes of irrigation, but the only controversy disclosed was over the extent and priority of the right of the Farmers Mutual Canal Company, the principal defendant. Another defendant, the Tri-State Land Company, was interested as a stockholder of the canal company, and need be noticed only in another relation.

The canal company claimed a right to divert through its canal $1{,}142^{6}/_{7}$ cubic feet of water per second of time—usually spoken of as second feet—under an appropriation dating from September 16, 1887, and the other parties severally claimed rights to divert specific amounts under later appropriations. In so far as the canal company's claim exceeded 28 second feet with a priority dating from September 16, 1887, it was challenged on the grounds that the appropriation upon which it rested had not been perfected with reasonable diligence; that this was the situation when the appropriations under which the others were claiming were made and perfected; that if the claim subsequently was enlarged it could not as to the enlargement take priority over the intervening rights of others, and that if it originally covered $1{,}142^{6}/_{7}$ second feet, which was disputed, all right to more than 28 feet had

been lost by non-user. But the canal company asserted the validity of its entire claim, denied any loss by lack of diligence or non-user, and contended, among other things, that the State Board of Irrigation had sustained its entire claim in 1897 when the board was engaged under the state law (Laws 1895, c. 69, §§ 16–27) in adjudicating claims to the waters of the North Platte River, and that the other parties were estopped from questioning its right by reason of their attitude and conduct after 1904 when its predecessor in interest was completing the canal and diverting works at enormous cost. The other parties denied that there was any ground for an estoppel and insisted that, consistently with the due process and equal protection provisions of the Fourteenth Amendment, the claimed adjudication by the State Board of Irrigation could not be treated as in any way binding upon them, because (a) the law under which the board acted made no provision for notice and (b) the board had proceeded without notice and without affording an opportunity to be heard. Other contentions were advanced, but no purpose would be served by stating them here.

It was conceded that during portions of the irrigation season the flow of the stream had not been sufficient to satisfy all of these claims and that the State Board of Irrigation recently had recognized the canal company's claim by refusing to restrict its diversion in time of low water to less than $1{,}142^{6}/_{7}$ second feet.

The cause was submitted on the pleadings and on a "stipulation of facts" covering 84 printed pages and containing much that was purely evidential and not in the nature of a statement of ultimate facts.

The stipulation disclosed that the canal company's canal was about 80 miles in length, was completed in October, 1910, and was capable of irrigating 80,000 acres; that in 1895 it had cost about $100,000 and was capable of irrigating 30,000 acres; that by reason of financial diffi-

culties, a foreclosure suit and other litigation the work of construction was practically suspended from 1895 to 1905; that the work was actively resumed in 1905 and continued with vigor until October, 1910, when it was completed; that the cost of the work from 1905 to 1910 was in excess of $1,500,000, and more than $950,000 of this was expended before August, 1909, when this suit was begun; that the work done after 1905 included a needle-dam across the river costing $27,869.20, an additional head-gate of concrete and reinforced steel costing $52,113.20, and a waste-gate or spillway of similar construction costing $42,253.46; and that the number of acres actually reclaimed and irrigated by the canal was being rapidly increased, being less than 2,000 acres in 1905 and 20,000 acres in 1910.

The trial court held that the canal company's right, although prior in time, did not extend to more than 28.57 second feet of the water, and entered a decree to that effect. An injunction was also granted restraining the company from taking more than was thus accorded to it. In the Supreme Court the decree was reversed and the suit was dismissed on the merits so far as it concerned the canal company and the Tri-State Land Company, and without prejudice in respect of any controversy between the other parties. 92 Nebraska, 121.

The Supreme Court, recognizing that the case was of great importance to the parties and to all who were interested in irrigated lands in the State, and that any decision therein would almost inevitably result in serious loss to one or more of the parties, proceeded in a painstaking way to state, discuss and determine all the questions presented. Among other things, it sustained the authority of the State Board of Irrigation under the Act of 1895 to adjudicate claims like those to the waters of the North Platte River; described the board's power in that regard as quasi-judicial and its adjudications as final un-

less appealed from to the district court; held that the right to due notice and a reasonable opportunity to be heard was implied in the act; and reaffirmed its decision in *Farmers Canal Co.* v. *Frank,* 72 Nebraska, 136, made in 1904, that the board's action upon the canal company's claim amounted to an unconditional adjudication of the extent and priority of the claim and that a leading purpose of the Act of 1895 was to create a state board "whose records would evidence the priorities of title to the appropriation of water in such a public manner that no one might be misled."

As respects the notice actually given to the other parties, the opportunity which they had for opposing or contesting the canal company's claim before the board, and the knowledge of the board's action which they reasonably should be regarded as possessing, the court found, in substance, that before the board began to inquire into the claims to the waters of the North Platte it gave due notice of its purpose so to do; that under that notice all the parties to this suit, or their predecessors in interest, appeared before the secretary of the board, at the times and places indicated in the notice, and presented such evidence as they deemed appropriate in support of their respective claims—the evidence being preserved and becoming a part of the record in that proceeding; that the board's printed rules, which were duly brought to the attention of all the parties, permitted any claimant to contest the claim of another, but no one sought to contest the canal company's claim; that in ordinary course, after the evidence was presented, the claims were adjudicated—a separate opinion upon each claim being prepared by the secretary, who was the State Engineer, and afterwards adopted by the board; that each claimant was specially notified of the decision upon his own claim, but not of the decisions upon the claims of others; that the decision upon the canal company's claim, in addition to being en-

tered in the records of the state board, was shown in a list of established claims regularly appearing in the biennial reports of the board which the State required to be made and published, and was recorded in 1905 in the office of the county clerk of the county where the appropriation was made.

In these circumstances the court concluded that the contention that the board had proceeded without adequate notice to the parties, or without affording them a reasonable opportunity to be heard, had no real foundation. It also concluded that, in view of the nature of the enterprise, the large expenditures required and the circumstances surrounding the temporary suspension of the work, the contention that part of the canal company's claim had been lost through lack of diligence or non-user was highly inequitable and untenable.

Then coming to the question of estoppel the court held that, even if the other questions were decided against the canal company, it was entitled to prevail upon the ground that its adversaries were estopped by reason of their own conduct. In the course of its opinion the court referred at length to the admissions in the pleadings and stipulation and found, as matter of fact, that shortly after the decision in *Farmers Canal Co.* v. *Frank*, *supra*, the Tri-State Land Company, the canal company's immediate predecessor in interest, actively took up the work of completing the canal and diverting works and proceeded therewith in good faith and with vigor, relying upon that decision and the state board's adjudication and openly claiming the amount of water and priority specified in the latter, and that the other parties, with knowledge of that claim and situation, made no claim of superior right to the water, but remained silent for four years while the work, which the court described "as comparable only to the construction of a railroad," was being carried to completion at enormous cost and the water was being

diverted and used through the canal in increasing volume. And, having thus passed upon the questions of fact, the court said:

"Under these circumstances, and having this knowledge, it would be contrary to the plainest principles of equity if plaintiffs might stand silently by, seeing the defendants engage in such a monumental work under claim of right, and utter no word of warning as to their own claims, which, if eventually established, would deprive defendants of the water which the canal was built to carry, condemn the whole enterprise to failure, and result in the absolute loss of the money expended. It would be manifestly inequitable and unjust to allow the plaintiffs, after the works were practically finished and the money expended, to insist upon claims which, had they been asserted in good time, would at least have put the defendants upon their guard and have given them cause to pause and hesitate in their expenditures until the validity of their title had been determined."

Concisely stated, the assignments of error complain that the Supreme Court infringed the due process and equal protection provisions of the Fourteenth Amendment, first, by giving decisive effect to the state board's decision, instead of holding that it was made without lawful notice or opportunity to be heard and therefore was void, and, second, by misconceiving or misapplying the statute and common law of the State in disposing of other questions.

Our jurisdiction is disputed and must be considered, as, indeed, it should be, even if not challenged. As has been shown, several questions were presented to the Supreme Court and all were considered. One was whether the state board's decision could be given any conclusive effect consistently with the due process and equal protection clauses of the Fourteenth Amendment, and another was whether the defense of estoppel *in pais* was well grounded. The first was plainly a federal question and the other as

plainly non-federal. Both were resolved in favor of the canal company. The other questions, none of which was federal, may be put out of view in this connection. Thus we are concerned with a judgment placed upon two grounds, one involving a federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any federal question and we have no power to disturb it. *Hammond* v. *Johnston*, 142 U. S. 73, 78; *Eustis* v. *Bolles*, 150 U. S. 361; *Berea College* v. *Kentucky*, 211 U. S. 45, 53; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112, 116; *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 610. It has been so held in cases where the judgment was rested upon a federal ground and also upon an estoppel. *Pierce* v. *Somerset Ry.*, 171 U. S. 641, 648; *Lowry* v. *Silver City Gold & Silver Mining Co.*, 179 U. S. 196.[1] But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. See *Moran* v. *Horsky*, 178 U. S. 205, 208; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261. And this is true also where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question. *Leathe* v. *Thomas*, 207 U. S. 93, 99; *Vandalia R. R. Co.* v. *South Bend*, *ibid.*, 359, 367. But, where the non-federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-federal questions. *Murdock* v. *Memphis*, 20 Wall. 590, 635; *Eustis* v. *Bolles*, *supra*, p. 369;

[1] See also *Sherman* v. *Grinnell*, 144 U. S. 198, 202; *Gillis* v. *Stinchfield*, 159 U. S. 658, 660; *Hale* v. *Lewis*, 181 U. S. 473, 479–480.

Leathe v. *Thomas, supra; Arkansas Southern R. R. Co.* v. *German National Bank*, 207 U. S. 270, 275.

It does not, as we think, admit of doubt that the estoppel *in pais* is made an independent ground of the judgment. Instead of being interwoven with the validity of the state board's adjudication, which is the other ground, it is distinct from it, and is so treated in the court's opinion. In taking up the question of estoppel, as also in concluding its discussion of the subject, the court plainly shows that it is then indulging an assumption that the other ground is not tenable. True, the board's proceedings and adjudication are referred to as having some bearing upon the good faith of the canal company and upon the knowledge which the other parties had of that company's claim, but in this the court neither departs from the assumption indulged nor confuses the two grounds of the judgment. Even if invalid, the board's proceedings and adjudication could well have a real bearing upon the matters indicated.

In view of the facts before recited we think it cannot be said that the ruling upon the question of estoppel is without fair support or so unfounded as to be essentially arbitrary or merely a device to prevent a review of the other ground of the judgment. We therefore are not at liberty to inquire whether the ruling is right or wrong. And it may be well to add that the question did not originate with the court. It was presented by the pleadings, was in the minds of the parties when the stipulation was made, and was dealt with by counsel and court as a matter of obvious importance.

It is not urged, nor could it well be, that as a ground of decision the estoppel is not broad enough to sustain the judgment.

The claim that the court in disposing of some of the questions, including that of the estoppel, misconceived or misapplied the statutory and common law of the State and thereby infringed the due process and equal protection

clauses of the Fourteenth Amendment requires but brief notice. The due process clause does not take up the laws of the several States and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law. *Sayward* v. *Denny*, 158 U. S. 180, 186; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 112; *Castillo* v. *McConnico*, 168 U. S. 674, 683–684. The questions presented, other than those relating to the validity of the state board's adjudication, all turned exclusively upon the law of the State, and the state court's decision of them is controlling. *Preston* v. *Chicago*, 226 U. S. 447; *St. Louis & Kansas City Land Co.* v. *Kansas City*, 241 U. S. 419, 427; *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 116. The reference to the equal protection clause evidently is inadvertent, for there is no claim of unwarranted or arbitrary discrimination.

It results from what has been said that the judgment is one which is not open to review by this court.

Writ of error dismissed.

OWENSBORO, KENTUCKY, *v.* OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 79. Argued November 8, 1916.—Decided March 6, 1917.

A city granted to a water company a franchise to construct and operate water works, using the streets. The ordinance defined the grant as made "for the duration of the said Company" (the grantee), but elsewhere limited the term expressly to twenty-five years from the passage of the ordinance, which also contained a contract for the same period providing that, if, at the city's request, the company

should extend its pipes "during the said term of twenty-five years," the city would rent hydrants thereon "for the unexpired term of said franchise." Some years later, the city granted a similar, substitute franchise to a second company, successor to the first with the city's consent, by an ordinance defining the franchise term as "for and during the existence" of the second company, and recognizing the latter as the successor of the first company in respect of the contract for hydrant rental "as fully as if such existing contract had been originally made" with the second company "without the intervention" of the first. By the law of its creation, the life of the second company was twenty-five years primarily, with the right (reserved in its articles) to prolong the term by twenty-five year extensions.

Held: (1) That the life of the second franchise was not limited to twenty-five years, but was intended to endure while the corporate life of the grantee endured by extension beyond that period.

(2) The fact that the first franchise was expressly limited to twenty-five years while the second was granted for "the existence of the corporation" was evidence confirming this construction.

(3) Respecting the contract concerning hydrants, the second company became successor of the first only for the unexpired term of that contract.

(4) That later ordinances of the city requesting pipe line extensions and declaring that the city thereby rented the hydrants along such extensions "for the unexpired term of the franchises of the said Water Company," and compliance by the second company with the requests so made upon it, did not import a recognition by the parties that the franchise of that company was for a definite, known term not to be enlarged by extension of its corporate existence, but were referable only to the hydrant contract and its unexpired term—a conclusion which was corroborated by the action of the parties in ceasing to collect and pay rent for such hydrants when that term expired.

The question being whether a franchise granted by a city was limited to twenty-five years, the period for which the corporate grantee was primarily organized, or was meant to accompany an extension of the grantee's corporate life, the fact that the grantee, in former litigation in which that question was neither material nor adjudicated, the primary period having then some years to run, described the franchise as a franchise for twenty-five years, affords no basis for an estoppel by conduct or by judgment; and the more clearly so where the grantee, in the same litigation, also described the franchise as granted for the whole period of its corporate existence.

While in the computation of time beginning "from and after" a day named it is usual to exclude that day and begin with the next, this is not done where it will obviously defeat the purpose of those whose words are being construed or applied.

THE case is stated in the opinion.

Mr. George W. Jolly and *Mr. Ben D. Ringo*, with whom *Mr. John A. Dean, Jr.*, and *Mr. La Vega Clements* were on the briefs, for appellant.

Mr. William T. Ellis, with whom *Mr. James J. Sweeney* was on the brief, for appellee.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to enjoin the City of Owensboro, in the State of Kentucky, from obstructing and preventing the maintenance and operation of an existing water works plant in that city. The plaintiff relies upon a franchise from the city which the latter insists has expired. In the District Court the franchise was held to be still in force and the city was enjoined from giving effect to an ordinance and a resolution impairing the same.

By an ordinance of September 10, 1878, the city granted to the Owensboro Water Company, its successors and assigns, the privilege of constructing and operating water works within the city and of using its public highways for that purpose. In its first section the ordinance described this grant as made "for the duration of the said Company" and in another section expressly limited it to "twenty-five years from the passage of this ordinance." Other provisions required the water company to lay and maintain pipe lines in certain streets with a fire hydrant at each street intersection and obligated the city to rent and pay for the hydrants "for and during the term of twenty-five years

from the passage of this ordinance." Availing itself of the privilege so granted the water company constructed a water works plant in the city and operated the same until June 3, 1889, when it sold the plant to the Owensboro Water Works Company, the plaintiff in this suit. This company is a Kentucky corporation whose original articles of association stated that its existence was to begin on June 1, 1889, and terminate at the end of twenty-five years, "subject to such extensions of its term of existence as by law provided." On June 3, 1889, shortly before the plaintiff's purchase, the city adopted an ordinance containing the following provision, among others:

"Sec. 1. That in consideration of the purchase by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of the said corporation, to maintain, complete and operate water works in the city of Owensboro for supplying the city of Owensboro and the inhabitants of said city and its vicinity with water for public and private purposes, and to use within the present and future limits of the city of Owensboro, the streets, alleys and other public highways thereof for the purpose of laying, repairing and taking up mains, service pipes, hydrants, and other apparatus for the supply of water."

By the second section the city accepted the plaintiff "as the successor" of the other company in respect of "the contract for hydrant rental" then existing between the city and the other company "as fully as if such existing contract had been originally made" by the city with the plaintiff "without the intervention" of the other company; and by the third section the city gave its consent to "the consummation of the said purchase of the said water works."

The plaintiff accepted the provisions of this ordinance, relied upon them in consummating the purchase, and ever since has maintained and operated the water works and used the public highways of the city in that connection.

On May 6, 1914, the plaintiff's articles of association were amended, conformably to the state law (Ky. Gen. Stats. 1883, c. 56, § 7; Ky. Stats. 1903, §§ 540, 559, 574), by adding a provision the declared purpose of which was to extend the plaintiff's corporate existence for the period of twenty-five years.

Whether the plaintiff now has a franchise from the city turns chiefly upon the construction and effect of the ordinance of June 3, 1889. By it the city then said that "the franchise and license" to maintain, complete and operate water works in the city and to use its public highways for that purpose "are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of the said corporation." Now the city claims, first, that by the ordinance it merely assented to the purchase by the plaintiff of the rights of the other company under the ordinance of 1878; second, that if a franchise was granted to the plaintiff, it was only for the life of the other company, and, third, that even if a franchise was granted to the plaintiff for the period of its own existence, it was not to endure beyond the primary term of twenty-five years named in the plaintiff's articles of association. But none of these claims has any support in the ordinance. Its terms are direct and its meaning plain. In apt words its first section not only grants a franchise to the plaintiff, but makes the life of the franchise co-extensive with the plaintiff's existence; and we find nothing in the ordinance which suggests that the words fixing the duration of the franchise are to be taken as comprehending anything less than the full corporate existence of the plaintiff. The right to extend its existence beyond the primary term was

given by statute and expressly reserved in the articles of association, and so it is reasonable to believe that had there been a purpose to limit the franchise to that term it would have been plainly expressed, as was done in the ordinance of 1878. The reasonable implication from the inclusion of such a limitation in the earlier ordinance and its omission from the later one is that the franchise granted by the latter was not to be thus limited.

Of the suggestion that under this view the franchise may be made perpetual by repeated extensions of the plaintiff's corporate life, it is enough to say that we are here concerned with but a single extension already effected. The statute permitting such extensions may not be in force when the present twenty-five year period expires, and, if it be in force, nothing may be done under it.

Because the primary term—the first twenty-five years—expired May 31, 1914, and the amendment to the articles of association stated that the extension for another twenty-five years would begin "from and after" June 1, 1914, the city insists there was a hiatus of one day between the two periods and that in consequence the extension never became effective. We are not impressed with this contention. While in the computation of time that begins to run "from and after" a day named it is usual to exclude that day and begin with the next (*Sheets* v. *Selden's Lessee*, 2 Wall. 177, 190), this is not done where it will obviously defeat the purpose of those whose words are being construed or applied. The purpose of the amendment was to extend or prolong the plaintiff's corporate existence for another twenty-five years. It was adopted almost a month in advance of the expiration of the first twenty-five years, and, notwithstanding the use of the words "from and after," it shows very plainly that the second period was to begin where the first ended. Of course those words were not happily chosen, but as the amendment otherwise makes it certain that the extension was to be

effective on and after June 1, 1914, we think the amendment accomplished its purpose and that there was no hiatus.

By the ordinance of 1878, as before shown, the other company and the city entered into a contract respecting fire hydrants which was to be in force for twenty-five years from the date of the ordinance. One provision of that contract was to the effect that, if the company should make any extensions of its pipe lines at the city's request "during the said term of twenty-five years," the city would rent and pay for one hydrant at each street intersection along such extensions "for the unexpired term of said franchise." By a special provision in the ordinance of 1889, as we have seen, the plaintiff succeeded to the rights and duties of the other company under that contract as if it "had been originally made" by the city with the plaintiff; and this meant that the succession was only for the unexpired term of the contract. Acting under the contract the city from 1890 to 1895 adopted seven ordinances wherein it requested that particular extensions of the pipe lines be made by the plaintiff and declared that it (the city) thereby rented the hydrants along such extensions "for the unexpired term of the franchises of the said Water Company." The plaintiff accepted these ordinances and complied with the requests made in them. The city now claims that in what was thus done both parties plainly recognized that the franchise granted to the plaintiff was for a definite and known term of years, and was not to be affected by any extension of the plaintiff's corporate existence. But we think this claim disregards what was intended by the word "franchise" in the seven ordinances. They not only related to the same subject as did the contract of 1878, which was the maintenance and renting of fire hydrants, but they closely followed its words. That contract was made for a definite term, twenty-five years, and twelve of these had expired when

the seven ordinances were adopted. In adopting and accepting them the parties were not making a new hydrant contract, but acting under the one already in existence. It and the plaintiff's franchise were not co-terminous and should not be confused. The contract covered the old hydrants, of which there were many, as well as the new ones, and was to expire as to all at the same time, that is, on September 10, 1903, twenty-five years after the contract was made. That the city so understood—indeed, that both parties so understood—is affirmatively and clearly alleged in the city's answer, from which we excerpt the following:

"Defendant City says that after the passage of said [seven] ordinances the complainant Water Company did lay the mains required therein and attached the fire hydrants as provided in said ordinance and the defendant City paid it rentals in pursuance to said contract until September 10, 1903, at which time the complainant ceased to collect and the City ceased to pay rentals for said hydrants as provided in said ordinance and contracts, and said ordinances and contracts were construed to and did expire on September 10, 1903, and since that date the City has not paid to the complainant any hydrant rental under any of said rental contracts, or at all."

The plaintiff's franchise, as before shown, was granted June 3, 1889, and, of course, did not expire September 10, 1903. What did expire on that day was the contract made September 10, 1878, whereby the city agreed to rent and pay for the hydrants for the term of twenty-five years from that date. It is plain, therefore, that what was intended by the word "franchise" in the seven ordinances was that contract. There was nothing else to which it reasonably could refer.

The city further contends that the plaintiff is estopped from claiming a franchise extending beyond May 31, 1914, because in 1903 and 1904 in two suits against the

city it described its franchise as granted for a term of twenty-five years beginning June 1, 1889. But in neither suit was it material whether the life of the franchise was strictly limited to that period or was subject to prolongation by an extension of the plaintiff's corporate existence; and it is not claimed that this question was adjudicated in either suit. At that time nine or ten years of the primary period still remained and there was as yet no occasion to elect or determine whether the privilege of effecting an extension would be exercised. Besides, in both suits the franchise was also described by the plaintiff as granted for "the whole period of its corporate existence." Thus no basis is shown for an estoppel by conduct or by judgment.

Other objections are made to the decree, but they are of less merit and do not require special mention.

Decree affirmed.

MR. JUSTICE CLARKE, dissenting.

This case presents for decision the single but very important question whether the City of Owensboro, Kentucky, by ordinance passed on June 3, 1889, granted to the Owensboro Water Works Company a franchise renewable indefinitely and therefore in effect perpetual or only a franchise for twenty-five years "to maintain, complete and operate" water works in that city.

A perpetual right to the use of the streets of a city is such a serious burden upon a community that, though very reluctant to do so, I am impelled by an imperative sense of duty to place on record my reasons for concluding that the construction given by a majority of the court to the grant involved in this case is a mistaken one which can be reached only by violating two rules of construction which this court has repeatedly declared to express "sound doctrine which should be vigilantly observed and enforced."

The facts essential to an understanding and to a determination of the claim made in the record are as follows:

On the ninth day of September, 1878, a corporation named the "Owensboro Water Company" was incorporated under the laws of the State of Kentucky, and, on the next day, the City of Owensboro granted to that corporation the right and franchise to construct and operate in that city a water works plant, using the streets and alleys in the customary manner.

Section 1 of this ordinance grants to the Water Company the right to construct and operate water works within the city "*for the duration of the said Company.*"

After many details as to construction, service and rentals of hydrants by the city,§ 13 provides: "The rights, privileges and franchises hereby granted to and vested in said company shall remain in force and effect for twenty-five years from the passage of this ordinance." Thus it is too clear for discussion that the expression "for the duration of the said Company" in § 1 of this ordinance of September 10, 1878, was deemed, both by the city granting it and by the company accepting it, as meaning a term of twenty-five years.

The Water Company constructed a water works plant and operated it until the year 1889, when for the purpose of making larger capital available, a new corporation, bearing the name "Owensboro Water Works Company" was organized, with a charter, which contained in paragraph 6 this provision: "The time of commencement of the said corporation is the first day of June, in the year One Thousand Eight Hundred and Eighty-nine, *and it shall terminate twenty-five years thereafter, subject to such extensions of its term of existence as by law provided.*"

On June 3d, 1889, the council of the City of Owensboro, passed an ordinance, which was accepted by the new corporation, which, after reciting that the new corporation desired to purchase the water works of the old one, to-

gether with its existing contracts for supplying the city and its inhabitants with water; that the new company desired a grant of a franchise and license "to maintain, complete and operate water works in the city" and that the city should accept the new company as the successor of the old to the contracts for hydrant rentals, proceeds to ordain:

Section 1. That the franchise and license to maintain, complete and operate water works in the City of Owensboro "are hereby granted to the Owensboro Water Works Company, . . . and to its successors and assigns, *for and during the existence of the said corporation;*"

Section 2. That the new company shall be accepted by the city "as the successor to the contract for hydrant rental now existing between the City of Owensboro and the Owensboro Water Company as fully as if such existing contracts had been originally made by the City of Owensboro with the said The Owensboro Water Works Company, . . . without the intervention of the said Owensboro Water Company."

The Kentucky General Statutes of 1883, c. 56, § 7, p. 548, under which the Water Works Company was organized in 1889, contained this provision:

"Corporations for the construction of any work of internal improvement may be formed to endure for fifty years; *those formed for other purposes shall not exceed twenty-five years in duration;* but in either case they may be renewed from time to time for periods not greater than was at first permissible, *if three fourths of the votes cast at any regular election held for that purpose shall be in favor of such renewal.*"

While the plaintiff in error disputes it, we conclude that it is clear that, by appropriate action taken on the sixth of May, 1914, the Water Works Company amended its articles of incorporation by amending article 6 thereof (hereinbefore quoted) so that, as amended this section

became: "*The time of the commencement of said corporation is the first day of June, 1889, and it shall terminate twenty-five years thereafter,* subject to such extensions of its term as by law provided, and same is now, by these amended articles of incorporation, *extended for the period of twenty-five years from and after the 1st day of June, 1914.*"

Since confessedly the Water Works Company is not a corporation organized for the construction of "any work of internal improvement," if we read together the charter of the Water Company dated May 30, 1889, the ordinance of the City of Owensboro dated June 3d, 1889, and the statute of Kentucky, which we have quoted, limiting the duration of corporations to twenty-five years, we see that the question for decision is narrowed to this, viz:

Does the grant to the Water Works Company of the franchise and license "to maintain, complete and operate" water works "*for and during the existence of the said corporation*" confer on the company a franchise in effect perpetual to use the streets of the city for water works purposes, or is it limited to twenty-five years?

The limitation of the grant to the twenty-five years "duration" of the corporation would be beyond question were it not for the provision of the charter that the termination of the life of the company after 25 years shall be subject to such extensions as are provided for by law and for the provision of the statute quoted "that they [such corporations] may be renewed from time to time for periods not greater than was at first permissible"—in this case for an additional twenty-five years. The conclusion of the majority of the court is that this authority given to the stockholders to renew "the duration" of the corporation (a discretionary power which is found in the charter, not in the grant, and which might or might not be exercised) expanded and extended the expression of the grant "during the existence of the corporation" so as to make it as if it read "*during the existence of the said cor-*

poration" and also for such "renewals" of such existence as the stockholders of the company may, by appropriate action, favor some time in the future—thereby making the grant in effect a perpetual one.

The two rules for the construction of such grants, which have been referred to, have been firmly established by decisions of many courts, but no court has been more definite and resolute than this court has been in the emphasis with which it has announced and applied them. These rules are:

(1) As announced by this court most clearly, and with full consideration of the authorities, in *Blair* v. *Chicago*, 201 U. S. 400, 463: "It is a firmly established rule . . . that one who asserts private rights in public property under grants of the character of those under consideration [city ordinances], must, if he would establish them, come prepared to show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied." And the court gives as the sound reason for this rule that: "It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed" (p. 471). And from Cooley on Constitutional Limitations is quoted with approval this statement: "The just presumption . . . in every such case is that the State has granted in express terms all that it designed to grant at all. . . . This is sound doctrine, and should be vigilantly observed and enforced." (p. 471). Continuing to give to the rule the emphasis which it so richly deserves, the opinion continues and quotes from earlier decisions of this court declaring that "any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can

claim nothing that is not clearly given by the law. . . . The principle is this, that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption" (p. 472). The discussion concludes with the statement, quoted from *Slidell* v. *Grandjean*, 111 U. S. 412, that it is a wise doctrine because "it serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies" (p. 473).

(2) The second rule to which we have referred finds clear expression in *Chicago* v. *Sheldon*, 9 Wall. 50, 54, as follows: "In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

This rule was approved in terms in *Topliff* v. *Topliff*, 122 U. S. 121, and it has been repeatedly announced as the settled doctrine of this court.

Applying these rules in the reverse order of their statement I shall now give my reasons for concluding that the interpretation by the parties to it of the grant under consideration limits it to a life of twenty-five years.

The ordinance of 1878, in the part of it assumed by the Water Works Company by its acceptance of the ordinance of 1889, provided that "If . . . extensions of pipe shall be made by said company during the said term of twenty-

five years *at the instance or request of said city*," the city should be bound to rent and pay $50 a year for one hydrant at each street intersection. Under this provision, beginning on October 6, 1890 (a little more than a year after the grant was made), and continuing, certainly as the record shows, until September 16, 1895, the city, by ordinance made *seven distinct demands* upon the Water Works Company to lay additional pipes in the streets, and in each ordinance provided: "The City of Owensboro hereby rents of the said Water Company the above named hydrants *for the unexpired term of the franchises of the said Water Company*," and promises to pay, etc. Here is a plain declaration, seven times repeated, by the city, the first made, as we have stated, very shortly after the grant was made, that the city understood that the grant was not an unlimited or perpetual one, for it promises to pay only "*for the unexpired term* of the franchises of the said Water Company." By the acceptance of each one of these seven ordinances, the Water Company just as plainly assented to this construction of the grant. This is highly persuasive against the Water Company because such construction was so distinctly against its interest. The record shows that these ordinances bear dates as follows: (1) October 6, 1890; (2) February 2, 1891; (3) November 7, 1892; (4) December 5, 1892; (5) October 1, 1894; (6) May 7, 1894, and (7) September 16, 1895.

The most persuasive comment I think that can be made upon this construction of this grant by both of the parties to it is contained in the last sentence of the quotation we made from *Chicago* v. *Sheldon*, *supra*, "But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

But much more is to be found in the record as to what the parties, particularly as to what the

Water Works Company, thought was the term of this grant.

On the twenty-first day of September, 1903, the Water Works Company instituted a suit in the Circuit Court of the United States for the Western District of Kentucky, in an effort to enjoin the city from issuing bonds and spending money for the purpose of constructing a municipal water plant, and in the bill filed in the case it alleges that it is a corporation, with power conferred upon it to supply the defendant city and its inhabitants with water "*for the fixed period of twenty-five years from the date of its incorporation:*" it alleges that the grant to it was "*extended during the whole period of its corporate existence, a period of twenty-five years from the 1st of June, 1889:*" and that by the contract created by the ordinance of June 3d, 1889, as well as by the contracts existing between the city and the earlier company the Water Works Company "acquired and now has conferred upon and vested in it the sole and exclusive right, franchise and privilege *during the period of twenty-five years from and after June 1st, 1889*, to maintain, complete and operate water works in the City of Owensboro," etc. Again it alleges in this bill that the said contract conferred upon it the exclusive privilege of furnishing water through the hydrants to the said city *for twenty-five years from the first of June, 1889;* that it has in all things complied with the requirements of the ordinance of 1889 and "that it is ready, willing and able to continue to carry out its said contract and *to continue to perform and do all the things of it required therein until the expiration of said contract on June 1st, 1914.*" Yet again it alleges that the city did by the ordinance aforesaid (of 1889), make and enter into a valid and binding contract with this complainant, wherein and whereby an obligation was created on the part of this complainant to lay pipes, conduits and hydrants in and along the streets and *to furnish for the period of twenty-five years from the first of*

June, 1889, water for public and private purposes, etc., and it solemnly avers that the purpose of the city to establish a municipal water works would result in a violation of this contract, which is within the protection of Section 1, Article 10 of the Constitution of the United States, which prohibits the passage of any law impairing the obligation of contracts.

This elaborate bill filed by the Water Company concludes with the prayer for an injunction, restraining the city "*from constructing, equipping, operating or maintaining a system of water works in said city at any time until after the 1st day of June, 1914.*"

This bill is sworn to by the president of the Water Works Company and significantly enough is signed by the same counsel who sign the bill in the pending case.

But the Water Company, continuing of the same mind as to the meaning of the grant under consideration, in a petition filed in the Circuit Court of Daviess County, Kentucky, almost a year later, on the 27th day of May, 1904, in a case in which the Company was seeking to collect rentals for hydrants, again alleged that by the grant of 1889 the franchise of the Company was "extended during the whole period of its corporate existence, *a period of twenty-five years from and after the 1st of June, 1889*," and that this same ordinance "conferred upon and vested in it the sole and exclusive right, franchise and privilege during *the period of twenty-five years from and after June 1, 1889*, to maintain, complete and operate water works in the city of Owensboro," etc.

In this petition plaintiff specifically sets up the ordinances to which we have referred, calling upon the Water Company to construct extensions, and which were accepted by the Company, and adds two others of the same purport, one dated May 15, 1899, and one July 25, 1900; alleges that in each of these the city requested the company to extend the lines and place hydrants "*for the*

unexpired term of the franchise of this plaintiff," and that within sixty days from the passage of said ordinances it filed its acceptance of them with the clerk of the city.

It is difficult to imagine an interpretation of a contract by the parties to it more specific or controlling than is to be found in the declarations in these court proceedings, made deliberately and under the advice of counsel.

In the presence of this record I cannot doubt that it was understood and intended in the beginning by the untechnical men of affairs who composed the city council and by the company that this grant was a limited one, extending for not to exceed twenty-five years from June 1st, 1889, and that this conviction continued in the minds of all the parties concerned in it, finding frequent expression in the conduct of business between them for full fifteen years, certainly until 1904, when the company is found claiming in the courts that the grant expired on June 1, 1914, and therefore I cannot assent to the conclusion that it is in effect a perpetual grant of the right to use the streets of the city, convinced as I am that such result cannot be reached without doing violence to the rule referred to, so firmly established by this court, which has been penetratingly condensed into the expression "Show me what men have done under a contract and I will tell you what it means." And, I may add, without running also counter to the decision of this court in *Tennessee* v. *Whitworth*, 117 U. S. 129, in which it is declared that in construing contracts springing from statutes the words employed are, if possible, to be given the same meaning they had in the minds of the parties to the contract when the statute was enacted.

But, turning now from the interpretation placed upon this ordinance by the parties to it, and confining our attention strictly to the language used in making the grant, let us ask ourselves whether it can reasonably be said, upon the facts presented by this record, that a franchise

in effect perpetual was granted in the streets of the city "in plain terms," "in express terms," without "ambiguity," as is required by the first of the rules for the construction of such grants, which we have seen is so fully approved by this court.

If the pertinent parts of the grant, of the charter of the company and of the Kentucky statute be written together, we shall have this paragraph:

The City of Owensboro grants to the company the right to maintain and operate a water works plant during the existence of that corporation, which existence is declared in its charter to commence on June 1st, 1889, and to terminate twenty-five years thereafter, subject to such extensions as the law provides, and is also limited by the state statute, under which it was created, to a duration of twenty-five years, with the privilege of renewal for a like period if a three-quarters vote of its stockholders "shall be in favor of such renewal."

I cannot doubt that others than skilled lawyers (and we cannot assume that all of the members of the city council were skilled lawyers) reading such a paragraph as this would understand that the existence of the life of the Water Works Company, and so of the grant, was for the declared twenty-five year period between the "commencement of the life" of the corporation and the time when it must "terminate." To give it any other meaning is to magnify the subordinate provision for a possible extension of the life of the corporation so as to make that control the definite, specific, clearly expressed limitation of the charter. But specific should always control general provisions in a contract where they conflict—definite and clearly expressed limitations should dominate indefinite and discretionary privileges. To declare this grant perpetually renewable is to make its duration dependent upon the discretion of the grantee corporation, to be exercised twenty-five years after the grant was made, and

it is not difficult to conceive of circumstances under which the required three-fourths of the stockholders of the company would not favor an extension of its corporate life,—if, for instance, its business were a failing one because of competition with a city owned plant, or if the stockholders differed in opinion as to the wisdom of making a possible sale of its property. This is a result which the court should accept only under sheer coercion—I can designate it by no milder term—of the "plain" "express" and "unambiguous" provision in the grant, and very certainly it is a result which should not be derived from ingenious construction of a narrow and optional clause in the charter of the grantee (not in the grant) which was probably inserted for the purpose of providing for the contingency of a new grant to the company, to be made at the expiration of the one for twenty-five years, rather than in an attempt to automatically make an extension of that grant. *When to this it is added that the provision for extending the life of the corporation is not to be found anywhere in the ordinance making the grant, which the councilmen had before them, but only in the charter of the corporation and in the statute of the State, which they probably never saw,* I not only cannot bring myself to assent to the conclusion that, resolving, as we must, every doubt in favor of the public, a franchise in effect perpetual in the streets of the city was given to the Water Works Company "in plain," "in express" and in "unambiguous" terms, but, on the contrary, I am very clear that the language used in making this grant limits it, as we have seen that all of the parties thought that it limited it, to the term of twenty-five years.

This conclusion has been arrived at without the application of narrow distinctions to the words used in the charter of the Water Company and in the statute of Kentucky. But sufficient to turn the case, if it be thought a close one, might very well be found in significant distinctions with

respect to the words used in the provision of the charter of the company, on which the opinion of the majority of the court turns, viz: That the twenty-five year limitation so clearly expressed is "subject to such extensions of its term of existence as by law provided."

These distinctions are, first, that the state law did not provide for "extensions" of the corporate existence. The most that can be said of the law is that it provided a method by which the stockholders of the company—not the law—might, in their discretion "renew" the charter for an additional term after the expiration of the twenty-five year period which the law provided for. The second distinction is that the authority to "renew" the corporate existence of the company, given by the statute, becomes in the charter, as written by the company, "extensions . . . by law provided," which gives to the corporation the advantage which many courts and writers have found in the distinction between the right of "extension" and the right of "renewal" of a contract, the latter indicating an intention to resort to a new grant for the future, while the former contemplates "a prolongation, a lengthening out" of a grant previously made. This distinction is perhaps too subtle to serve the ends of substantial justice in practical affairs, but apparently the authors of the charter which we are considering thought it a refinement which it was worth their while to lay hold upon. *Whalen* v. *Manley*, 68 W. Va. 328; *Leavitt* v. *Maykel*, 203 Mass. 506, and authorities cited.

The District Court finds its conclusive authority for holding the grant to be in effect a perpetual one in *City of Owensboro* v. *Cumberland Telephone & Telegraph Co.*, 230 U. S. 58. An inspection of the ordinance there considered shows that there was no attempt whatever in terms to limit the duration of the grant; that no reference was made in the ordinance to the life of the corporation to which the grant was made, and that by express terms the grant

is declared not to be exclusive and to be subject to alteration and amendment. While it is true that the members of this court differed as to the effect of the provision for alteration and amendment of the ordinance, yet the effect of these distinctions when grouped together is such, it seems to me, as to render the decision in that case wholly inapplicable to an ordinance such as we are considering here.

It may be that the settled conviction which I have that no legislator, congressman, or councilman would knowingly consent to grant perpetual rights in public streets to a private corporation has so darkened my understanding that I cannot properly appreciate the point of view of my associates and the reasons advanced in support of it, but, however this may be, the reasons stated in this opinion convince me that the grant under discussion was not in effect a perpetual grant, but was for the period of twenty-five years, which expired on the first day of June, 1914.

MR. JUSTICE BRANDEIS concurs in this opinion.

MR. JUSTICE DAY concurs in this dissent, upon the ground that, applying the well settled rule that grants of the character here in question are to be given strict construction, and doubts as to their meaning resolved in favor of the public, and ambiguities are to be resolved in like manner, it is by no means clear that the City intended to grant to the Water Company a franchise for its then corporate life of twenty-five years and for subsequent renewals thereof as the stockholders might determine; and he is of the opinion that the franchise expired at the end of the twenty-five year period for which its charter provided when the grant was made.

NEW YORK CENTRAL RAILROAD COMPANY *v.* WHITE.

ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

No. 320. Argued February 29, March 1, 1916; restored to docket for reargument November 13, 1916; reargued February 1, 1917.—Decided March 6, 1917.

Employment in guarding tools and materials intended for use in the construction of a new railroad station and new tracks which when finished will be used in interstate commerce, has no such direct relation to interstate transportation as will afford basis for applying the Federal Employers' Liability Act in case of accident and death. *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152.

He who assails a statute as unconstitutional must show that his right is infringed by it; where, however, a statute so regulates the correlative rights of two classes—as employers and employees—that if void as to one it must be void as to the other, complaint of a party belonging to one class may require an examination of the statute in both aspects.

The New York Workmen's Compensation Law, Laws 1913, c. 816; Laws 1914, chaps. 41, 316, provides an exclusive system to govern the liabilities of employers and the rights of employees, and their dependents, in respect of compensation for disabling injuries and death caused by accident (not due to the willful intent or the intoxication of the employee) in certain employments, classed as hazardous; the duty of employers to compensate is made absolute; the compensation which employers must pay and employees (or their dependents, in death cases,) must accept in satisfaction, is measured by a prescribed scale, based on loss of earning power, gauged by the previous wage, and the nature and duration of the disability or, in case of death, the dependency of the beneficiaries; the amounts fixed are apparently moderate and reasonable and the means of collection, through administrative proceedings subject to judicial review of law questions, are apparently economical, expeditious and fair; employers are required to furnish security against future liabilities; and the act is prospective.

Held: (1) That neither (a) in rendering the employer liable irrespective of the doctrines of negligence, contributory negligence, assumption of risk and negligence of fellow servants, nor (b) in depriving the employee, or his dependents, of the higher damages which, in some cases, might be recovered under those doctrines, can the act be said to violate due process.

(2) That viewed from the standpoint of natural justice, the system provided by the act in lieu of former rules is neither arbitrary nor unreasonable.

(3) That the exclusion of farm laborers and domestic servants from the scheme of the act may not be judicially declared an arbitrary classification, violating the equal protection of the law.

The common-law rules respecting the rights and liabilities of employer and employee in accident cases, viz., negligence, assumption of risk, contributory negligence, fellow-servant doctrine, as rules defining legal duty and guiding future conduct, may be altered by state legislation, and even set aside entirely—at least if some reasonably just substitute be provided.

Since the matter of compensation for disability or death incurred in the course of hazardous employments is of direct interest to the public as a matter affecting the common welfare, the liberty of employer and employee to agree upon such compensation as part of the terms of employment is subject to be restricted by the state police power.

The denial by a State of trial by jury is not inconsistent with due process of law, within the meaning of the Fourteenth Amendment.

The making of a deposit of cash and securities in obedience to the New York Workmen's Compensation Act, accompanied by an express reservation of all contentions respecting the invalidity of the act, does not estop the depositor from questioning its constitutionality.

Under the power to establish a compulsory Workmen's Compensation System, the State may require employers to furnish satisfactory proof of financial ability to pay compensation in future and may require them to deposit reasonable amounts of securities to insure such payments.

Section 50 of the New York Workmen's Compensation Law requires the employer to secure payment of compensation either by state insurance, or by insurance by an authorized corporation or association, or by furnishing satisfactory proof to the state commission of his financial ability to pay, in which case the commission may, in its discretion, require him to deposit securities of a kind prescribed by the state insurance law, in an amount to be determined by the commission.

Held: (1) That in passing on these provisions the court will presume

that the method of self-insurance will be open to all employers, on reasonable terms within the power of the State to impose.

(2) That, viewed as optional alternatives, the other modes of insurance are free from constitutional objections as regards employers.

(3) That such an option is not inconsistent with the constitutional rights of employees, there being no ground to presume that any of the methods of security would prove inadequate to safeguard their interests.

169 App. Div. 903; 216 N. Y. 653, affirmed.

THE case is stated in the opinion.

Mr. Frank V. Whiting and *Mr. Robert E. Whalen*, with whom *Mr. H. Leroy Austin* and *Mr. William L. Visscher* were on the briefs, for plaintiff in error.

Mr. E. Clarence Aiken, with whom *Mr. Egburt E. Woodbury*, Attorney General of the State of New York, and *Mr. Harold J. Hinman* were on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

A proceeding was commenced by defendant in error before the Workmen's Compensation Commission of the State of New York, established by the Workmen's Compensation Law of that State,[1] to recover compensation from the New York Central & Hudson River Railroad Company for the death of her husband, Jacob White, who lost his life September 2, 1914, through an accidental injury arising out of and in the course of his employment under that company. The Commission awarded compensation in accordance with the terms of the law; its award was affirmed, without opinion, by the Appellate

[1] Chap. 816, Laws 1913, as reënacted and amended by c. 41, Laws 1914, and amended by c. 316, Laws 1914.

Division of the Supreme Court for the Third Judicial Department, whose order was affirmed by the Court of Appeals, without opinion. 169 App. Div. 903; 216 N. Y. 653. Federal questions having been saved, the present writ of error was sued out by the New York Central Railroad Company, successor, through a consolidation of corporations, to the rights and liabilities of the employing company. The writ was directed to the Appellate Division, to which the record and proceedings had been remitted by the Court of Appeals. *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 200.

The errors specified are based upon these contentions: (1) That the liability, if any, of the railroad company for the death of Jacob White is defined and limited exclusively by the provisions of the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65; and (2) that to award compensation to defendant in error under the provisions of the Workmen's Compensation Law would deprive plaintiff in error of its property without due process of law, and deny to it the equal protection of the laws, in contravention of the Fourteenth Amendment.

The first point assumes that the deceased was employed in interstate commerce at the time he received the fatal injuries. According to the record, he was a night watchman, charged with the duty of guarding tools and materials intended to be used in the construction of a new station and new tracks upon a line of interstate railroad. The Commission found, upon evidence fully warranting the finding, that he was on duty at the time, and at a place not outside of the limits prescribed for the performance of his duties; that he was not engaged in interstate commerce; and that the injury received by him and resulting in his death was an accidental injury arising out of and in the course of his employment.

The admitted fact that the new station and tracks were

designed for use, when finished, in interstate commerce does not bring the case within the federal act. The test is, "Was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 558. Decedent's work bore no direct relation to interstate transportation, and had to do solely with construction work, which is clearly distinguishable, as was pointed out in *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152. And see *Chicago, Burlington & Quincy R. R. Co.* v. *Harrington*, 241 U. S. 177, 180; *Raymond* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, this day decided, *ante*, 43. The first point, therefore, is without basis in fact.

We turn to the constitutional question. The Workmen's Compensation Law of New York establishes 42 groups of hazardous employments, defines "employee" as a person engaged in one of these employments upon the premises or at the plant or in the course of his employment away from the plant of his employer, but excluding farm laborers and domestic servants; defines "employment" as including employment only in a trade, business, or occupation carried on by the employer for pecuniary gain, "injury" and "personal injury" as meaning only accidental injuries arising out of and in the course of employment, and such disease or infection as naturally and unavoidably may result therefrom; and requires every employer subject to its provisions to pay or provide compensation according to a prescribed schedule for the disability or death of his employee resulting from an accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where it results solely

from the intoxication of the injured employee while on duty, in which cases neither the injured employee nor any dependent shall receive compensation. By § 11 the prescribed liability is made exclusive, except that, if an employer fail to secure the payment of compensation as provided in § 50, an injured employee, or his legal representative in case death results from the injury, may at his option elect to claim compensation under the act or to maintain an action in the courts for damages, and in such an action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the risk of his employment, or that the injury was due to contributory negligence. Compensation under the act is not regulated by the measure of damages applied in negligence suits, but in addition to providing medical, surgical, or other like treatment, it is based solely on loss of earning power, being graduated according to the average weekly wages of the injured employee and the character and duration of the disability, whether partial or total, temporary or permanent; while in case the injury causes death the compensation is known as a death benefit, and includes funeral expenses not exceeding one hundred dollars, payments to the surviving wife (or dependent husband) during widowhood (or dependent widowerhood) of a percentage of the average wages of the deceased, and if there be a surviving child or children under the age of eighteen years an additional percentage of such wages for each child until that age is reached. There are provisions invalidating agreements by employees to waive the right to compensation, prohibiting any assignment, release, or commutation of claims for compensation or benefits except as provided by the act, exempting them from the claims of creditors, and requiring that the compensation and benefits shall be paid only to employees or their dependents.

Provision is made for the establishment of a Workmen's Compensation Commission [1] with administrative and judicial functions, including authority to pass upon claims to compensation on notice to the parties interested. The award or decision of the commission is made subject to an appeal, on questions of law only, to the Appellate Division of the Supreme Court for the Third Department, with an ultimate appeal to the Court of Appeals in cases where such an appeal would lie in civil actions. A fund is created, known as "the state insurance fund," for the purpose of insuring employers against liability under the law and assuring to the persons entitled the compensation thereby provided. The fund is made up primarily of premiums received from employers, at rates fixed by the commission in view of the hazards of the different classes of employment, and the premiums are to be based upon the total payroll and number of employees in each class at the lowest rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve. Elaborate provisions are laid down for the administration of this fund. By § 50, each employer is required to secure compensation to his employees in one of the following ways: (1) by insuring and keeping insured the payment of such compensation in the state fund; or (2) through any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the State; or (3) "By furnishing satisfactory proof to the commission of his financial ability to pay such compensation for himself, in which case the commission may, in its discretion, require the deposit with the commission of securities of the kind prescribed in section thirteen of the insurance law, in an amount to be determined by the commission, to secure his

[1] By Chap. 674, Laws 1915, §§ 2 and 8, this Commission was abolished and its functions were conferred upon the newly created Industrial Commission.

liability to pay the compensation provided in this chapter." If an employer fails to comply with this section he is made liable to a penalty in an amount equal to the *pro rata* premium that would have been payable for insurance in the state fund during the period of non-compliance; besides which, his injured employees or their dependents are at liberty to maintain an action for damages in the courts, as prescribed by § 11.

In a previous year, the legislature enacted a compulsory compensation law applicable to a limited number of specially hazardous employments, and requiring the employer to pay compensation without regard to fault. Laws 1910, Chap. 674. This was held by the Court of Appeals in *Ives* v. *South Buffalo Ry. Co.*, 201 N. Y. 271, to be invalid because in conflict with the due process of law provisions of the state constitution and of the Fourteenth Amendment. Thereafter, and in the year 1913, a constitutional amendment was adopted, effective January 1, 1914, declaring:

"Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all

other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount for such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

In December, 1913, the legislature enacted the law now under consideration (Laws 1913, c. 816), and in 1914 reënacted it (Laws 1914, c. 41) to take effect as to payment of compensation on July 1 in that year. The act was sustained by the Court of Appeals as not inconsistent with the Fourteenth Amendment in *Matter of Jensen* v. *Southern Pacific Co.*, 215 N. Y. 514; and that decision was followed in the case at bar.

The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity. The adverse considerations urged or suggested in this case and in kindred cases submitted at the same time are: (a) that the employer's property is taken without due process of law, because he is subjected to a liability for compensation without regard to any neglect or default on his part or on the part of any other person for whom he is responsible, and in spite of the fact that the injury may be solely attributable to the fault of the employee; (b) that the employee's rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer's fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act; and (c) that both employer and employee are deprived of their liberty to acquire property by being prevented from making such

agreement as they choose respecting the terms of the employment.

In support of the legislation, it is said that the whole common-law doctrine of employer's liability for negligence, with its defenses of contributory negligence, fellow-servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay required for such ascertainment amount in effect to a defeat of justice; that under the present system the injured workman is left to bear the greater part of industrial accident loss, which because of his limited income he is unable to sustain, so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity; and that litigation is unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees.

In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer, and cannot succeed without showing that its rights as such are infringed (*Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576;) yet, as pointed out by the Court of Appeals in the *Jensen Case*, 215 N. Y. 526, the exemption from further liability is an essential part of the scheme, so that the statute if invalid as against the employee is invalid as against the employer.

The close relation of the rules governing responsibility as between employer and employee to the fundamental rights

of liberty and property is of course recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. *Munn* v. *Illinois*, 94 U. S. 113, 134; *Hurtado* v. *California*, 110 U. S. 516, 532; *Martin* v. *Pittsburg & Lake Erie R. R. Co.*, 203 U. S. 284, 294; *Second Employers' Liability Cases*, 223 U. S. 1, 50; *Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67, 76. The common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; safety appliance acts being a familiar instance. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281, 295; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 39, 43.

The fault may be that of the employer himself, or—most frequently—that of another for whose conduct he is made responsible according to the maxim *respondeat superior*. In the latter case the employer may be entirely blameless, may have exercised the utmost human foresight to safeguard the employee; yet, if the *alter ego* while acting within the scope of his duties be negligent—in disobedience, it may be, of the employer's positive and specific command—the employer is answerable for the consequences. It cannot be that the rule embodied in the maxim is unalterable by legislation.

The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow work-

man's negligence is one of the natural and ordinary risks of the occupation, assumed by the employee and presumably taken into account in the fixing of his wages. The earliest reported cases are *Murray* v. *South Carolina R. R. Co.* (1841), 1 McMull. (S. C.) 385, 398; *Farwell* v. *Boston & Worcester R. R. Corp.* (1842), 4 Metc. 49, 57; *Hutchinson* v. *York, Newcastle & Berwick Ry. Co.* (1850), 5 Exch. 343, 351, 19 L. J. Exch. 296, 299, 14 Jur. 837, 840; *Wigmore* v. *Jay* (1850), 5 Exch. 354, 19 L. J. Exch. 300, 14 Jur. 838, 841; *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. H. L. Cas. 266, 284, 295. And see *Randall* v. *Baltimore & Ohio R. R. Co.*, 109 U. S. 478, 483; *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642, 647. The doctrine has prevailed generally throughout the United States, but with material differences in different jurisdictions respecting who should be deemed a fellow servant and who a vice-principal or *alter ego* of the master, turning sometimes upon refined distinctions as to grades and departments in the employment. See *Knutter* v. *N. Y. & N. J. Telephone Co.*, 67 N. J. L. 646, 650–653. It needs no argument to show that such a rule is subject to modification or abrogation by a State upon proper occasion.

The same may be said with respect to the general doctrine of assumption of risk. By the common law the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks and those due to the employer's negligence he does not assume until made aware of them, or until they become so obvious that an ordinarily prudent man would observe and appreciate them, in either of which cases he does assume them, if he continue in the employment without obtaining from the employer an assurance that the matter will be remedied; but if he receive such an assurance, then, pending performance of the promise, the employee does not in ordinary cases assume the special risk. *Seaboard Air Line Ry.* v. *Horton*, 233

U. S. 492, 504; 239 U. S. 595, 599. Plainly, these rules, as guides of conduct and tests of liability, are subject to change in the exercise of the sovereign authority of the State.

So, also, with respect to contributory negligence. Aside from injuries intentionally self-inflicted, for which the statute under consideration affords no compensation, it is plain that the rules of law upon the subject, in their bearing upon the employer's responsibility, are subject to legislative change; for contributory negligence, again, involves a default in some duty resting on the employee, and his duties are subject to modification.

It may be added, by way of reminder, that the entire matter of liability for death caused by wrongful act, both within and without the relation of employer and employee, is a modern statutory innovation, in which the States differ as to who may sue, for whose benefit, and the measure of damages.

But it is not necessary to extend the discussion. This court repeatedly has upheld the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee. *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205, 208; *Minneapolis & St. Louis Ry. Co.* v. *Herrick*, 127 U. S. 210; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593, 598; *Tullis* v. *Lake Erie & Western R. R. Co.*, 175 U. S. 348; *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36, 53; *Chicago, Indianapolis & Louisville Ry. Co.* v. *Hackett*, 228 U. S. 559; *Wilmington Star Mining Co.* v. *Fulton*, 205 U. S. 60, 73; *Missouri Pacific Ry. Co.* v. *Castle*, 224 U. S. 541, 544. A corresponding power on the part of Congress, when legislating within its appropriate sphere, was sustained in *Second Employers' Liability Cases*, 223 U. S. 1. And see *El Paso & Northeastern Ry. Co.* v. *Gutierrez*, 215 U. S. 87, 97; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 619.

It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a State might, without violence to the constitutional guaranty of "due process of law," suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. Considering the vast industrial organization of the State of New York, for instance, with hundreds of thousands of plants and millions of wage-earners, each employer on the one hand having embarked his capital, and each employee on the other having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. And just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing

the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale. The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety. We have said enough to demonstrate that, in such an adjustment, the particular rules of the common law affecting the subject-matter are not placed by the Fourteenth Amendment beyond the reach of the law making power of the State; and thus we are brought to the question whether the method of compensation that is established as a substitute transcends the limits of permissible state action.

We will consider, first, the scheme of compensation, deferring for the present the question of the manner in which the employer is required to secure payment.

Briefly, the statute imposes liability upon the employer to make compensation for disability or death of the employee resulting from accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause except where the injury or death is occasioned by the employee's willful intention to produce it, or where the injury results solely from his intoxication while on duty; it graduates the compensation for disability according to a prescribed scale based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability; and measures the death benefits according to the dependency of the surviving wife, husband, or infant children. Perhaps we should add that it has no retrospective effect, and applies only to cases arising some months after its passage.

Of course, we cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to dis-

abling or fatal personal injuries received in the course of hazardous employment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services, and for these is to receive wages, and ordinarily nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, if any there be, and of necessity bearing the entire losses. In the nature of things, there is more or less of a probability that the employee may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support; or that he may sustain an injury not mortal but resulting in his total or partial disablement, temporary or permanent, with corresponding impairment of earning capacity. The physical suffering must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power; a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the business, and, however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale,

by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which in all ordinary cases of accidental injury he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case but in all cases assuming any loss beyond the prescribed scale.

Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common-law liability of the carrier, of the inn-keeper, of him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. *St. Louis & San Francisco Ry. Co.* v. *Mathews*, 165 U. S. 1, 22; *Chicago, Rock Island and Pacific Ry. Co.* v. *Zernecke*, 183 U. S. 582, 586.

We have referred to the maxim *respondeat superior*. In a well-known English case, *Hall* v. *Smith*, 2 Bing. 156, 160, this maxim was said by Best, C. J., to be "bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it." And this view has been adopted in New York. *Cardot* v. *Barney*, 63 N. Y. 281, 287. The provision for compulsory compensation, in the act under consideration,

cannot be deemed to be an arbitrary and unreasonable application of the principle, so as to amount to a deprivation of the employer's property without due process of law. The pecuniary loss resulting from the employee's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote—the primary cause, as it may be deemed—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as co-adventurers, with personal injury to the employee as a probable and foreseen result. In ignoring any possible negligence of the employee producing or contributing to the injury, the lawmaker reasonably may have been influenced by the belief that in modern industry the utmost diligence in the employer's service is in some degree inconsistent with adequate care on the part of the employee for his own safety; that the more intently he devotes himself to the work, the less he can take precautions for his own security. And it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected, and to the community, whether the proximate cause be culpable or innocent. Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.

This, of course, is not to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable. In this case, no criticism is made on the ground that the compensation pre-

scribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.

But, it is said, the statute strikes at the fundamentals of constitutional freedom of contract; and we are referred to two recent declarations by this court. The first is this: "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." *Coppage* v. *Kansas*, 236 U. S. 1, 14. And this is the other: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax* v. *Raich*, 239 U. S. 33, 41.

It is not our purpose to qualify or weaken either of these declarations in the least. And we recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the State. In our opinion it is fairly supportable upon that ground. And for this reason: The subject-matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. "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." *Holden* v. *Hardy*, 169 U. S. 366, 397. It cannot be doubted that the State may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be "natural and inalienable"; and the authority to prohibit contracts made in derogation of a lawfully established policy of the State respecting compensation for accidental death or disabling personal injury is equally clear. *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 571; *Second Employers' Liability Cases*, 223 U. S. 1, 52.

We have not overlooked the criticism that the act imposes no rule of conduct upon the employer with respect to the conditions of labor in the various industries embraced within its terms, prescribes no duty with regard to where the workmen shall work, the character of the machinery, tools, or appliances, the rules or regulations to be established, or the safety devices to be maintained. This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations. *Sherlock* v. *Alling*, 93 U. S. 99, 103; *Missouri Pacific Ry. Co.* v. *Castle*, 224 U. S. 541, 545.

No question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity to be heard required by the Fourteenth

Amendment. The denial of a trial by jury is not inconsistent with "due process." *Walker* v. *Sauvinet*, 92 U. S. 90; *Frank* v. *Mangum*, 237 U. S. 309, 340.

The objection under the "equal protection" clause is not pressed. The only apparent basis for it is in exclusion of farm laborers and domestic servants from the scheme. But, manifestly, this cannot be judicially declared to be an arbitrary classification, since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar. *Missouri, Kansas & Texas Ry. Co.* v. *Cade*, 233 U. S. 642, 650, and cases there cited.

We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the Fourteenth Amendment, and are brought to consider, next, the manner in which the employer is required to secure payment of the compensation. By § 50, this may be done in one of three ways: (a) state insurance, (b) insurance with an authorized insurance corporation or association, or (c) by a deposit of securities. The record shows that the predecessor of plaintiff in error chose the third method, and, with the sanction of the commission, deposited securities to the amount of $300,000, under § 50, and $30,000 in cash as a deposit to secure prompt and convenient payment, under § 25, with an agreement to make a further deposit if required. This was accompanied with a reservation of all contentions as to the invalidity of the act, and had not the effect of preventing plaintiff in error from raising the questions we have discussed.

The system of compulsory compensation having been found to be within the power of the State, it is within the limits of permissible regulation, in aid of the system, to require the employer to furnish satisfactory proof of his financial ability to pay the compensation, and to deposit a reasonable amount of securities for that purpose. The third clause of § 50 has not been, and presumably will

not be, construed so as to give an unbridled discretion to the commission; nor is it to be presumed that solvent employers will be prevented from becoming self-insurers on reasonable terms. No question is made but that the terms imposed upon this railroad company were reasonable in view of the magnitude of its operations, the number of its employees, and the amount of its payroll (about $50,000,000 annually); hence no criticism of the practical effect of the third clause is suggested.

This being so, it is obvious that this case presents no question as to whether the State might, consistently with the Fourteenth Amendment, compel employers to effect insurance according to either of the plans mentioned in the first and second clauses. There is no such compulsion, since self-insurance under the third clause presumably is open to all employers on reasonable terms that it is within the power of the State to impose. Regarded as optional arrangements, for acceptance or rejection by employers unwilling to comply with that clause, the plans of insurance are unexceptionable from the constitutional standpoint. Manifestly, the employee is not injuriously affected in a constitutional sense by the provisions giving to the employer an option to secure payment of the compensation in either of the modes prescribed, for there is no presumption that either will prove inadequate to safeguard the employee's interests.

Judgment affirmed.

HAWKINS *v.* BLEAKLY, AUDITOR OF THE STATE OF IOWA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

No. 35. Submitted January 24, 1916; restored to docket for reargument November 13, 1916; reargued December 20, 1916.—Decided March 6, 1917.

As an incident to the establishment of an elective Workmen's Compensation System which (by admission in this case,) is free from constitutional objection, it is not violative of due process for a State to withdraw the common-law defenses of assumption of risk, contributory negligence and negligence of fellow servants from those employers who voluntarily reject the system so established. *New York Central R. R. Co.* v. *White*, *ante*, 188.

In such case, also, the State may constitutionally provide that, in an action against an employer who has rejected the Compensation Act, the injury shall be presumed to have resulted directly from his negligence and that the burden of rebutting the presumption shall rest upon him.

The provisions in § 3 of the Iowa Workmen's Compensation Law, Laws of Iowa, 35 G. A., c. 147; Iowa Code Supp., 1913, § 2477m, requiring employees who reject the act to state by affidavit who, if anyone, requested or suggested that course, and providing that where an employer or his agent has made such request or suggestion, the employee shall be conclusively presumed to have been unduly influenced and his rejection of the act shall be void. *Held*, permissible regulation in aid of the general scheme of the act.

A Workmen's Compensation Act, which, prescribing the measure of compensation and the circumstances under which it is to be made, establishes a method of applying the measure to the facts of each case by due hearings before an administrative tribunal, whose action upon all fundamental and jurisdictional questions is subject to judicial review, is not open to objection upon the ground that it clothes the administrative body with an arbitrary and unbridled discretion in violation of due process of law.

Trial by jury is not one of the rights secured by the Fourteenth Amendment.

Iowa was not part of the Northwest Territory, nor subject to the Ordinance of July 13, 1787, enacted for the government of that Territory (1 Stat. 51).

The act establishing Iowa Territory (June 12, 1838, c. 96, 5 Stat. 235) was but a regulation of territory belonging to the United States, and such provision as it adopted from the Ordinance of 1787 respecting the right of trial by jury, though declared to be unalterable without common consent, was but a part of that regulation, was subject to repeal, and was superseded by the state constitution when Iowa was admitted into the Union "on an equal footing with the original States in all respects whatsoever."

Iowa is as much at liberty as any other State to abolish or limit the right of trial by jury, or to provide for a waiver of that right, as is done by the Workmen's Compensation Act, *supra*.

The Iowa Workmen's Compensation Act, *supra*, is held not to deprive the employer of equal protection of the laws in allowing him the common-law defenses of assumption of risk, contributory negligence and negligence of fellow servants only when he has accepted the act and the employee has not, while it withdraws them if employer and employee both, or employer alone, have rejected it.

220 Fed. Rep. 378, affirmed.

THE case is stated in the opinion.

Mr. Robert Ryan, with whom *Mr. James P. Hewitt*, *Mr. R. Ryan* and *Mr. F. G. Ryan* were on the brief, for appellant.

Mr. Henry E. Sampson, Assistant Attorney General of the State of Iowa, with whom *Mr. George Cosson*, Attorney General of the State of Iowa, and *Mr. John T. Clarkson* were on the briefs, for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is a suit in equity, brought by appellant in the United States District Court, to restrain the enforcement of an act of the General Assembly of the State of Iowa, approved April 18, 1913, relating to employers' liability

and workmen's compensation; it being c. 147 of Laws of Iowa, 35 G. A.; embraced in Iowa Code, Supp. of 1913, § 2477m. The bill sets forth that complainant is an employer of laborers within the meaning of the act, but has rejected its provisions, alleges that the statute is in contravention of the federal and state constitutions, etc., etc. A motion to dismiss was sustained by the District Court (220 Fed. Rep. 378), and the case comes here by direct appeal, because of the constitutional question, under § 238, Jud. Code.

Since the decision below, the Supreme Court of Iowa, in an able and exhaustive opinion, has sustained the act against all constitutional objections, at the same time construing some of its provisions. *Hunter* v. *Colfax Consolidated Coal Co.*, 154 N. W. Rep. 1037; 157 N. W. Rep. 145. Hence no objection under the state constitution is here pressed, and we of course accept the construction placed upon the act by the state court of last resort.

As to private employers, it is an elective workmen's compensation law, having the same general features found in the recent legislation of many of the States, sustained by their courts. See *Opinion of Justices*, 209 Massachusetts, 607; *Young* v. *Duncan*, 218 Massachusetts, 346; *Borgnis* v. *Falk Co.*, 147 Wisconsin, 327; *State, ex rel. Yaple*, v. *Creamer*, 85 Ohio St. 349; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571; *Sexton* v. *Newark Dist. Tel. Co.*, 84 N. J. L. 85; 86 N. J. L. 701; *Deibeikis* v. *Link-Belt Co.*, 261 Illinois, 454; *Crooks* v. *Tazewell Coal Co.*, 263 Illinois, 343; *Victor Chemical Works* v. *Industrial Board*, 274 Illinois, 11; *Mathison* v. *Minneapolis Street Ry. Co.*, 126 Minnesota, 286; *Shade* v. *Cement Co.*, 92 Kansas, 146; 93 Kansas, 257; *Sayles* v. *Foley* (R. I.), 96 Atl. Rep. 340; *Greene* v. *Caldwell*, 170 Kentucky, 571; *Middleton* v. *Texas Power & Light Co.* (Tex.), 185 S. W. Rep. 556. The main purpose of the act is to establish, in all employments except those of household servants, farm laborers, and casual employees,

a system of compensation according to a prescribed schedule for all employees sustaining injuries arising out of and in the course of the employment and producing temporary or permanent disability, total or partial, and, in case of death resulting from such injuries, a contribution towards the support of those dependent upon the earnings of the employee; the compensation in either case to be paid by the employer in lieu of other liability, and acceptance of the terms of the act being presumed unless employer or employee gives notice of an election to reject them. To this main purpose no constitutional objection is raised, the attack being confined to particular provisions of the law.

Some of appellant's objections are based upon the ground that the employer is subjected to a species of duress in order to compel him to accept the compensation features of the act, since it is provided that an employer rejecting these features shall not escape liability for personal injury sustained by an employee arising out of and in the usual course of the employment because the employee assumed the risks of the employment, or because of the employee's negligence unless this was willful and with intent to cause the injury or was the result of intoxication, or because the injury was caused by the negligence of a co-employee. But it is clear, as we have pointed out in *New York Central R. R. Co.* v. *White*, decided this day, *ante*, 188, that the employer has no vested right to have these so-called common-law defenses perpetuated for his benefit, and that the Fourteenth Amendment does not prevent a State from establishing a system of workmen's compensation without the consent of the employer, incidentally abolishing the defenses referred to.

The same may be said as to the provision that in an action against an employer who has rejected the act it shall be presumed that the injury was the direct result of his negligence, and that he must assume the burden of

proof to rebut the presumption of negligence. In addition, we may repeat that the establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the state governments, and that a provision of this character, not unreasonable in itself and not conclusive of the rights of the party, does not constitute a denial of due process of law. *Mobile, Jackson & Kansas City R. R. Co.* v. *Turnipseed*, 219 U. S. 35, 42.

Objection is made to the provision in § 3, that where an employee elects to reject the act he shall state in an affidavit who, if anybody, requested or suggested that he should do so, and if it be found that the employer or his agent made such a request or suggestion, the employee shall be conclusively presumed to have been unduly influenced, and his rejection of the act shall be void. Passing the point that appellant is an employer, and will not be heard to raise constitutional objections that are good only from the standpoint of employees (*Hatch* v. *Reardon*, 204 U. S. 152, 160; *Rosenthal* v. *New York*, 226 U. S. 260, 271; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576; *Hendrick* v. *Maryland*, 235 U. S. 610, 621;) it is sufficient to say that the criticised provision evidently is intended to safeguard the employee from all influences that might be exerted by the employer to bring about his dissent from the compensation features of the act. The lawmaker no doubt entertained the view that the act was more beneficial to employees than the common-law rules of employer's liability, and that it was highly improbable an employee would reject the new arrangement of his own free will. The provision is a permissible regulation in aid of the general scheme of the act.

It is said that there is a denial of due process in that part of the act which provides for the adjustment of the compensation where the employer accepts its provisions. In case of disagreement between an employer and an

injured employee, either party may notify the Industrial Commissioner, who thereupon shall call for the formation of an arbitration committee consisting of three persons, with himself as chairman. The committee is to make such inquiries and investigations as it shall deem necessary, and its report is to be filed with the Industrial Commissioner. If a claim for review is filed, the commissioner, and not the committee, is to hear the parties, may hear evidence in regard to pertinent matters, and may revise the decision of the committee in whole or in part, or refer the matter back to the committee for further findings of fact. And any party in interest may present the order or decision of the commissioner, or the decision of an arbitration committee from which no claim for review has been filed, to the district court of the county in which the injury occurred, whereupon the court shall render a decree in accordance therewith, having the same effect as if it were rendered in a suit heard and determined by the court, except that there shall be no appeal upon questions of fact or where the decree is based upon an order or decision of the commissioner which has not been presented to the court within ten days after the notice of the filing thereof by the commissioner. With respect to these provisions, the Supreme Court of Iowa held (154 N. W. Rep. 1064): "Appeal is provided from the decree enforcing the award on which all save pure questions of fact may be reviewed. . . . We hold that though the act does not in terms provide for judicial review, except by said appeal, the statute does not take from the court all jurisdiction in the premises. . . . We are in no doubt that the very structure of the law of the land, and the inherent power of the courts, would enable them to interfere, if what we have defined to be the jurisdiction conferred upon the arbitration committee were by it exceeded—could inquire whether the act was being enforced against one who had rejected it, whether

the claiming employé was an employé, whether he was injured at all, whether his injury was one arising out of such employment, whether it was due to intoxication of the servant, or self-inflicted or, acceptance being conceded, into whether an award different from the statute schedules had been made, into whether the award were tainted with fraud on part of the prevailing party, or of the arbitration committee, and into whether that body attempted judicial functions, in violation of or not granted by the act." Thus it will be seen that the act prescribes the measure of compensation and the circumstances under which it is to be made, and establishes administrative machinery for applying the statutory measure to the facts of each particular case; provides for a hearing before an administrative tribunal, and for judicial review upon all fundamental and jurisdictional questions. This disposes of the contention that the administrative body is clothed with an arbitrary and unbridled discretion, inconsistent with a proper conception of due process of law. *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 545.

Objection is made that the act dispenses with trial by jury. But it is settled that this is not embraced in the rights secured by the Fourteenth Amendment. *Walker* v. *Sauvinet*, 92 U. S. 90; *Frank* v. *Mangum*, 237 U. S. 309, 340; *New York Central R. R. Co.* v. *White*, *ante*, 188.

It is elaborately argued that, aside from the Fourteenth Amendment, the inhabitants of the State of Iowa are entitled to this right, because it was guaranteed by the Ordinance of July 13, 1787, for the government of the Northwest Territory, 1 Stat. 51, in these terms: "The inhabitants of the said territory, shall always be entitled to the benefits of . . . the trial by jury." The argument is rested, first, upon the ground that Iowa was a part of the Northwest Territory. This is manifestly untenable, since that Territory was bounded on the west by the Mississippi River, and Iowa was not a part of it, but of

the Louisiana Purchase. But, secondly, it is contended that the guaranties contained in the Ordinance were extended to Iowa by the Act of Congress approved June 12, 1838, establishing a territorial government (c. 96, § 12, 5 Stat. 235, 239), and by the acts for the admission of the State into the Union. Acts of March 3, 1845, chaps. 48 and 76, 5 Stat. 742, 789; Act of August 4, 1846, c. 82, 9 Stat. 52; Act of December 28, 1846, c. 1, 9 Stat. 117; 1 Poor, Chart. & Const., 331, 534, 535, 551. This is easily disposed of. The Act of 1838 was no more than a regulation of territory belonging to the United States, subject to repeal like any such regulation; and the act for admitting the State, so far from perpetuating any particular institution previously established, admitted it "on an equal footing with the original States in all respects whatsoever." The regulation, although embracing provisions of the Ordinance declared to be unalterable unless by common consent, had no further force in Iowa after its admission as a State and the adoption of a state constitution, than other acts of Congress for the government of the Territory. All were superseded by the state constitution. *Permoli* v. *First Municipality*, 3 How. 589, 610; *Coyle* v. *Oklahoma*, 221 U. S. 559, 567, 570; *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S. 390, 401. The State of Iowa, therefore, is as much at liberty as any other State to abolish or limit the right of trial by jury; or to provide for a waiver of that right, as it has done by the act under consideration.

Section 5 is singled out for criticism, as denying to employers the equal protection of the laws. It reads: "Where the employer and employé elect to reject the terms, conditions and provisions of this act, the liability of the employer shall be the same as though the employé had not rejected the terms, conditions and provisions thereof." As we have shown, if the employer rejects the act he remains liable for personal injury sustained by an

employee, arising out of and in the usual course of the employment, and is not to escape by showing that he had exercised reasonable care in selecting competent employees in the business, or that the employee had assumed the risk, or that the injury was caused by the negligence of a co-employee, or even by showing that the plaintiff was negligent, unless such negligence was willful and with intent to cause the injury or was the result of intoxication on the part of the injured party. This is the result whether the employee on his part accepts or rejects the act. But where the employee rejects it and the employer accepts it, then, by § 3b, "the employer shall have the right to plead and rely upon any and all defenses including those at common law, and the rules and defenses of contributory negligence, assumption of risk and fellow-servant shall apply and be available to the employer as by statute authorized unless otherwise provided in this act;" with a proviso not material to the present point. We cannot say that there is here an arbitrary classification within the inhibition of the "equal protection" clause of the Fourteenth Amendment. All employers are treated alike, and so are all employees; and if there be some difference as between employer and employee respecting the inducements that are held out for accepting the compensation features of the act, it goes no further than to say that if neither party is willing to accept them the employer's liability shall not be subject to either of the several defenses referred to. As already shown, the abolition of such defenses is within the power of the State, and the legislation cannot be condemned when that power has been qualifiedly exercised, without unreasonable discrimination.

Section 42 of the act provides: "Every employer, subject to the provisions of this act, shall insure his liability thereunder in some corporation, association or organization approved by the state department of insurance.

. . . And if such employer refuses, or neglects to comply with this section, he shall be liable in case of injury to any workman in his employ under part one (1) of this act." The Supreme Court of Iowa, in the *Hunter Case*, said of § 42, 154 N. W. Rep. 1056: "This clearly shows that no employer is compelled to insure unless he has accepted, and thus become subject to, the act"; proceeding, however, to discuss the case further upon the hypothesis that all employers named in the act were compelled to maintain insurance. In view of the construction adopted, it is unnecessary for us to pass upon the question of compulsory insurance in this case, appellant not having accepted the act.

Other contentions are advanced, but they are without merit and call for no particular mention.

Decree affirmed.

MOUNTAIN TIMBER COMPANY *v.* STATE OF WASHINGTON.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 13. Argued March 1, 2, 1916; restored to docket for reargument November 13, 1916; reargued January 30, 1917.—Decided March 6, 1917.

The Washington Workmen's Compensation Act, as originally enacted, Laws 1911, c. 74, establishes a state fund for the compensation of workmen injured, and the dependents of workmen killed, in employments classed as hazardous; abolishes, except in a few specified cases, the action at law by employee against employer for damages due to negligence, and deprives the courts of jurisdiction over such controversies. It is obligatory upon both employers and employees. The fund is made the sole source of compensation, and is supplied by assessments upon each employer of definite percentages of his total

pay-roll. It classifies industries in groups, and aims to adjust the percentage for each group, according to hazard, declaring this the most accurate and equitable method and promising future readjustments by the legislature of both classification and percentages to fit experience. The contributions of each group form a separate account or sub-fund, applicable to no other demands for compensation than those arising in the industries composing that group. Contributions, after the first, are not to exceed what is necessary to meet actual losses in the group for which they are exacted. The act expressly saves all actions and causes existing when it took effect, as between employers and employees, some months after its passage.

Held: (1) The act not being valid against employers if not valid as against employees, an employer may question its constitutionality in both aspects.

(2) Viewed from the standpoint of employees, the act is the same in principle as the act sustained in *New York Central R. R. Co.* v. *White*, *ante*, 188.

(3) The act is not objectionable upon the ground that, in violation of the Seventh Amendment, it does away with trial by jury in the federal courts, since it does not undertake to interfere with that mode of trial in respect of private rights of action which are preserved, but abolishes for the future all right of recovery as between employer and employee in the cases which it covers, leaving nothing for trial by jury either in the state or in the federal courts.

(4) Taking effect *in futuro* and expressly preserving intervening causes of action, the act disturbs no vested rights.

(5) In requiring employers to make payments to the state fund for the compensation of injured employees and the dependents of those killed, without regard to fault, the act does not deprive employers of their property, or of their liberty to acquire it, in violation of the Fourteenth Amendment, provided the compensation be not excessive and unreasonable, and provided the burden be fairly distributed among the employers included in the industries affected.

(6) In the absence of any showing to the contrary, the compensation provided by the act may be regarded as not unreasonable; this is not to say, however, that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable; any question of that kind may be met when it arises.

(7) As for the scheme for distributing the burden among employers, the method of applying percentages to pay-rolls, in view of the legislative declaration of its accuracy and fairness, cannot be deemed arbitrary if the percentages be fair; and although in this act the percentages seem high, it is plain that, as to each group of industries,

the assessments, after the initial payments, will be limited to the amounts necessary to meet the losses arising in and chargeable to that group.

(8) The declarations of the act should be accepted as further evidence of an intelligent effort to limit the burden to the requirements of each industry.

(9) Since the question whether a state law deprives of a right secured by the Constitution depends not upon how the law is characterized but upon its practical operation and effect, and since the Constitution does not require a separate exercise of the state powers of regulation and taxation, the crucial question is whether this legislation, be it regarded as an exercise of the power of regulation, or a combination of regulation and taxation, clearly appears to be not a fair and reasonable exertion of governmental power but so extravagant or arbitrary as to constitute abuse of power.

A State in the exercise of its power to pass such legislation as reasonably is deemed necessary to promote the health, safety and general welfare of its people, may regulate the carrying on of all those industrial occupations that frequently and inevitably produce personal injuries and disability with consequent loss of earning power among employees, and occasional loss of life of those upon whom others are dependent for support, and may require that these human losses be charged against the industry, either directly, or by publicly administering the compensation and distributing the cost among the industries affected by means of a reasonable system of occupation taxes.

In the absence of any particular showing of erroneous classification, the evident purpose of an act to classify various occupations according to the respective hazard of each is sufficient answer to any contention that the act improperly distributes the burdens among the several industries.

One who is engaged in the business of logging timber, operating a logging railroad, and operating a saw-mill with power-driven machinery, is not in a position to question the validity of a classification of other businesses as hazardous.

The provision in § 4 of the Washington Workmen's Compensation Law making it a misdemeanor for any employer to deduct any part of the premium from the wages or earnings of his employees will not be construed, in the absence of any constraining state construction, so broadly as to prohibit employers and employees, in agreeing upon terms of employment, from taking into consideration the fact that the employer is a contributor to the state fund and the resulting effect of the act upon the rights of the parties.

Quære: Whether, if so construed, the act would not be objectionable as an unconstitutional interference with the freedom of contract.

Whether the constitutional guaranty of republican form of government (Art. IV, § 4) has been violated, is not a judicial question, but a political question addressed to Congress.

75 Washington, 581, affirmed.

THE case is stated in the opinion.

Mr. F. Markoe Rivinus and *Mr. Theodore W. Reath*, with whom *Mr. Edmund C. Strode* and *Mr. Coy Burnett* were on the briefs, for plaintiff in error:

The act is sought to be supported upon the grounds that the present system thrusts the burden upon those who are economically weakest, makes recoveries difficult, exposes employers to excessive verdicts, wastes the insurance which it provides for employees, produces antagonism between employer and employee, and subjects society to economic loss. The theory of the law, as of its German prototype, is a theory of economic improvement at the expense of the employer. It does not create or conserve rights of members of society as individuals. No alteration is intended in the contractual relations between employer and employee in the way of regulating the physical performance of the duties which the relations involve, by prescribing rules of conduct and fixing liability for non-observance. The object is rather to use the relationship created by the contracts of the parties to aid as a basis for raising between them a new and independent contract of insurance to serve this economic policy.

The law of tort, including employers' liability statutes, pertains to the redress of private wrongs. The damages recoverable are intended to be commensurate with and to reimburse the employee for the injury suffered. But the obligations of workmen's compensation accrue from contingencies not within the control of the parties and thus have no relation to their conduct; the compensation is

not intended to be commensurate with the injury but is based upon some percentage of the employee's wages.

The objects of this legislation may suffice for the legislative power of Germany, but are not a legislative basis accordant with constitutional restraints. There is grave danger in good intentions; Webster's Speeches, National ed., 1903, p. 207; and foreign experience shows that from "accident" through "occupational diseases" and their "*sequelæ*," this system leads to the insurance of sickness and of unemployment, and ultimately to old-age pensions, until no duty of thrift or foresight is left to the workman or employer. The policy points clean beyond the relation of master and servant to the inclusion of all misfortune.

The Fourteenth Amendment was adopted to preclude such philanthropic interference with the liberty of a self-reliant race. If the centralized advantages of communism or socialism are deemed preferable, the Constitution provides a method of amendment resulting in certainty of right. The idea, so often suggested, that somehow constitutional restraints stand as a barrier to modern progress is based on a one-sided view. The choice is not a choice of the supposed advantages of socialism and the defects of individualism but of the advantages and defects considered together of these two great conceptions. But that choice may not be made or sanctioned by this court for the nation. The question here is, has the Constitution limited the state legislatures so as to preclude this legislation and the socialistic conception of governmental function upon which it is based? We shall not be able to answer by any considerations of mere economic policy.

In the present instance the legislature lays the ground for this so-called exercise of the police power by a finding that substantially all of the industrial operations in the State are "extra hazardous." By no intelligible definition or understanding of the words "extra hazardous" can this finding be true. All occupations are in some degree haz-

ardous. Life is hazardous. Demonstrably many of the industries named in the law are not extra hazardous as compared with agricultural or domestic occupations. Statistically, agriculture, for example, proves one of the most hazardous of all occupations, more hazardous than railroading. Yet farming is omitted from the act. The legislature cannot say that which is either obviously impossible or demonstrably untrue, and having said it be above judicial review and constitutional restraint. *Lochner* v. *New York*, 198 U. S. 45; *Muller* v. *Oregon*, 208 U. S. 420. There can be no permanence and stability in the fundamental concepts of government if the courts may abandon the attempt to define the limits of police power as impossible and then justify, upon legislative fiat, a law against constitutional objection as an exercise of that power. In *Lochner* v. *New York*, *supra*, this court realized and faced its difficult duty in this regard. That was a difficult case owing to a conflict of evidence as to hazard. But the principle of the case, that legislative fiat cannot make hazard if none exists, is changeless and established by all authority in this court. The Washington law, in substantially all the callings of industrial life, by such a fiat, attempts to deprive the employer and employee of liberty of contract by requiring the employer to insure his employee against industrial accident and the employee to surrender his other rights. The law includes bakeries under "working in food stuffs," also "creameries"—in short, substantially all industrial occupations.

Compensation laws are based on a socialistic, economic theory. That theory has no relation to hazard. The farm-hand or domestic servant who breaks his arm at work is from the economic view-point as much entitled to compensation and state support as the industrial worker. And such was the German and English experience, where the compensation scheme was of necessity finally extended to all employments irrespective of hazard. The essay on

hazard which constitutes the introduction of the Washington law is for the purpose of meeting constitutional objection to a socialistic scheme; but hazard as a ground of the law is embarrassing in the execution of the economic policy. For we find hazard put forward in justification of the law, but stretched beyond judicial recognition. Hazard is put forward to meet constitutional objection; while the conflicting economic theory, which must disregard hazard, is put forward to justify the law under the police power.

The law cannot be justified as special taxation upon employers to compensate employees for injuries incurred in employment. In this aspect the taxing power is invoked to execute an economic theory rather than to raise revenue. See Cooley on Taxation, p. 1125. And so the problem is not changed, for the law must still be a legitimate exercise of the police power. The problem of restraints, then, is not simplified by reference to the taxing power; it is further complicated by consideration of a superadded set of restraints,—those appropriate to the taxing power.

Taxation must always be according to constitutional restraints. Economic theory cannot alone justify its exercise. Economic advantage may inhere in or result from a particular tax scheme but this is incidental, and not the constitutional justification of the scheme. If economic advantage would justify the taking of property for some purpose benign in itself, we should see the end of constitutional restraints upon the taxing power. The power to levy taxes must be exercised in furtherance of some public purpose. *Savings & Loan Association* v. *Topeka*, 20 Wall. 655.

The purpose of this law is not public. The object is to impose the ordinary risks of the employees' industrial life upon the employer alone. The considerations of policy advanced in support of this legislaton could not

confine its scope to the risks of industrial life. Every casualty which might cause distress, such as sickness, unemployment or old age, would equally justify and (as history has shown) require a state grant of the employer's money. *Chicago* v. *Sturges*, 222 U. S. 313, distinguished.

The cases supporting special assessments depend on compensatory benefits. *Hammett* v. *Philadelphia*, 65 Pa. St. 146, 157. Substitution of liability in all cases for liability in tort for negligence is not such a benefit. The purpose of the law is not confined to the poor and the indigent, and hence is not for the maintenance of public charity. *Weismer* v. *Village of Douglas*, 64 N. Y. 91; *Ohio & Mississippi Ry. Co.* v. *Lackey*, 78 Illinois, 55; *Ives* v. *South Buffalo Ry.*, 201 N. Y. 271, 320.

The act takes the employer's property without legal reason, invades his and his employee's right of private contract in a matter with which the public has no concern, by introducing a term of industrial insurance, and is not due process or equal protection required by the Fourteenth Amendment. *Bank* v. *Okley*, 4 Wheat. 244; Webster's argument in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 581; *Oregon Railroad & Navigation Co.* v. *Fairchild*, 224 U. S. 510, 524, 525.

St. Louis & San Francisco Ry. Co. v. *Mathews*, 165 U. S. 1; *Heeg* v. *Licht*, 80 N. Y. 579; *Rylands* v. *Fletcher*, L. R., 3 H. L. 330; *Actiesselskabet Ingrid* v. *Central R. Co. of New Jersey*, 216 Fed. Rep. 72, and similar cases involved laws concerning injuries resulting from dangerous agencies; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, a voluntary compensation law; *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, a law forbidding contracts against public policy; *Chicago, Rock Island & Pacific Ry. Co.* v. *Zernecke*, 183 U. S. 582, and *Noble State Bank* v. *Haskell*, 219 U. S. 104, business affected by public interest.

The "prevailing morality" referred to by Mr. Justice

Holmes in the *Haskell Case* does not mean the transient opinion of a majority. Such a construction of the word "prevailing" "would justify any legislation, if only supported by a sufficient popular demand." *Ives* v. *South Buffalo Ry., supra*, p. 319. Mr. Justice Holmes used the word "prevailing" in the sense of predominant for all time and was alluding, in general terms, to moral precepts which are axiomatic. *Jensen* v. *Southern Pacific Co.*, 215 N. Y. 514, was an erroneous interpretation of the decision of this court in the *Haskell Case, supra*, the New York court failing to distinguish between private business and business, like banking, which is of direct public concern. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186, relates to carriers, and *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281, to a law creating a substantive duty of care. *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36, is no authority for the arbitrary classification of substantially all industrial businesses under one head as extra hazardous.

Mr. W. V. Tanner, Attorney General of the State of Washington, for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

This was an action brought by the State against plaintiff in error, a corporation engaged in the business of logging timber and operating a logging railroad and a sawmill having power-driven machinery, all in the State of Washington, to recover under c. 74 of the Laws of 1911, known as the Workmen's Compensation Act, certain premiums based upon a percentage of the estimated pay-roll of the workmen employed by plaintiff in error during the three months beginning October 1, 1911. Plaintiff in error by demurrer raised objections to the act based upon the Constitution of the United States.

The Supreme Court of Washington overruled them, and affirmed a judgment in favor of the State, 75 Washington, 581, following its previous decision in *State, ex rel. Davis-Smith Co.* v. *Clausen*, 65 Washington, 156; and the case comes here under § 237, Judicial Code.

The act establishes a state fund for the compensation of workmen injured in hazardous employment, abolishes, except in a few specified cases, the action at law by employee against employer to recover damages on the ground of negligence, and deprives the courts of jurisdiction over such controversies. It is obligatory upon both employers and employees in the hazardous employments, and the state fund is maintained by compulsory contributions from employers in such industries, and is made the sole source of compensation for injured employees and for the dependents of those whose injuries result in death. We will recite its provisions to an extent sufficient to show the character of the legislation.

The first section contains a declaration of policy, reciting that the common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions, and in practice proves to be economically unwise and unfair; that the remedy of the workman has been uncertain, slow and inadequate; that injuries in such employments, formerly occasional, have become frequent and inevitable; and that the welfare of the State depends upon its industries, and even more upon the welfare of its wage-workers. "The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this

act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

The second section, declaring that while there is a hazard in all employment, certain employments are recognized as being inherently constantly dangerous, enumerates those intended to be embraced within the term "extra hazardous," including factories, mills and workshops where machinery is used, printing, electrotyping, photo-engraving and stereotyping plants where machinery is used; foundries, blast furnaces, mines, wells, gas works, water works, reduction works, breweries, elevators, wharves, docks, dredges, smelters, powder works; logging, lumbering, and shipbuilding operations; logging, street and interurban railroads; steamboats, railroads, and a number of others; at the same time declaring that if there be or arise any extra hazardous occupation not enumerated, it shall come under the act, and its rate of contribution to the accident fund shall be fixed by the Department created by the act upon the basis of the relation which the risk involved bears to the risks classified, until the rate shall be fixed by legislation. The third section contains a definition of terms, and, among them, "Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant, or, he being in the course of his employment, away from the plant of his employer;" with a proviso giving to a workman injured while away from the plant through the negligence or wrong of another not in the same employ, or, if death result from the injury, to his widow, children, or dependents, an election whether to take under the act or to seek a remedy against the third party. "Injury"

is defined as an injury resulting from some fortuitous event, as distinguished from the contraction of disease.

Section 4 contains a schedule of contribution, reciting that industry should bear the greater portion of the burden of the cost of its accidents, and requiring each employer prior to January 15th of each year to pay into the state treasury, in accordance with the schedule, a sum equal to a percentage of his total pay-roll for the year, "the same being deemed the most accurate method of equitable distribution of burden in proportion to relative hazard." The application of the act as between employers and workmen is made to date from the first day of October, 1911, the payment for that year to be made prior to that date and upon the basis of the pay-roll of the last preceding three months of operation. At the end of each year an adjustment of accounts is to be made upon the basis of the actual pay-roll. The schedule divides the various occupations into groups, and imposes various percentages upon the different groups, the lowest being 1½%, in the case of the textile industries, creameries, printing establishments, etc., and the highest being 10%, in the case of powder works. The same section establishes 47 different classes of industry, and declares:

"For the purpose of such payments accounts shall be kept with each industry in accordance with the classification herein provided and no class shall be liable for the depletion of the accident fund from accidents happening in any other class. Each class shall meet and be liable for the accidents occurring in such class. There shall be collected from each class as an initial payment into the accident fund as above specified on or before the 1st day of October, 1911, one-fourth of the premium of the next succeeding year, and one-twelfth thereof at the close of each month after December, 1911: Provided, Any class having sufficient funds credited to its account at the end of the first three months or any month thereafter, to meet

the requirements of the accident fund, that class shall not be called upon for such month. In case of accidents occurring in such class after lapsed payment or payments said class shall pay the said lapsed or deferred payments commencing at the first lapsed payment, as may be necessary to meet such requirements of the accident fund. The fund thereby created shall be termed the 'accident fund' which shall be devoted exclusively to the purpose specified for it in this act. *In that the intent is that the fund created under this section shall ultimately become neither more nor less than self-supporting, exclusive of the expense of administration, the rates in this section named are subject to future adjustment by the legislature, and the classifications to rearrangement following any relative increase or decrease of hazard shown by experience.*[1] . . . If, after this act shall have come into operation, it is shown by experience under the act, because of poor or careless management, any establishment or work is unduly dangerous in comparison with other like establishments or works, the department may advance its classification of risks and premium rates in proportion to the undue hazard. In accordance with the same principle, any such increase in classification or premium rate, shall be subject to restoration to the schedule rate. . . . If, at the end of any

[1] By Sess. Laws 1915, c. 188, p. 674, 677, § 4 was amended so as to substitute in the place of the clause italicised the following: "In that the intent is that the fund created under this section shall ultimately become neither more nor less than self-supporting, exclusive of the expense of administration, the rates named in this section are subject to future adjustment by the industrial insurance department, in accordance with any relative increase or decrease in hazard shown by experience, and if in the judgment of the industrial insurance department the moneys paid into the fund of any class or classes shall be insufficient to properly and sufficiently distribute the burden of expense of accidents occurring therein, the department may divide, rearrange or consolidate such class or classes, making such adjustment or transfer of funds as it may deem proper."

year, it shall be seen that the contribution to the accident fund by any class of industry shall be less than the drain upon the fund on account of that class, the deficiency shall be made good to the fund on the 1st day of February of the following year by the employers of that class in proportion to their respective payments for the past year."

Section 5 contains a schedule of the compensation to be awarded out of the accident fund to each injured workman, or to his family or dependents in case of his death, and declares that except as in the act otherwise provided such payment shall be in lieu of any and all rights of action against any person whomsoever. Where death results from the injury, the compensation includes the expenses of burial, not exceeding $75 in any case, a monthly payment of $20 for the widow or invalid widower, to cease at remarriage, and $5 per month for each child under the age of 16 years until that age is reached, but not exceeding $35 in all, with a lump sum of $240 to a widow upon her remarriage; if the workman leaves no wife or husband, but a child or children under the age of 16 years, there is to be a monthly payment of $10 to each child until that age is reached, but not exceeding a total of $35 per month; if there be no widow, widower, or child under the age of 16 years, other dependent relatives are to receive monthly payments equal to 50% of the average monthly support actually received by such dependent from the workman during the twelve months next preceding his injury, but not exceeding a total of $20 per month. For permanent total disability of a workman, he is to receive if unmarried $20, or, if married, $25 per month, with $5 per month additional for each child under the age of 16 years, but not exceeding $35 per month in all. (Section 7 provides that the monthly payment, in case of death or permanent total disability, may be converted into a lump sum payment, not in any case exceeding $4,000, according to the expect-

ancy of life.) For temporary total disability there is a somewhat different scale, compensation to cease when earning power is restored. For permanent partial disability the workman is to receive compensation in a lump sum equal to the extent of the injury, but not exceeding $1,500.

By § 6, if injury or death results to a workman from his deliberate intention to produce it, neither he nor his widow, child, or dependents shall receive any payment out of the fund. If injury or death results to a workman from the deliberate intention of the employer to produce it, the workman or his widow, child, or dependent shall have the privilege to take under the act, and also have a cause of action against the employer for any excess of damage over the amount receivable under the act.

By § 19 provision is made for the adoption of the act by the joint election of any employer and his employees engaged in works not extra hazardous. By § 21 the Industrial Insurance Department is created, consisting of three commissioners. By § 20 a judicial review is given in the nature of an appeal to the Superior Court from any decision of the Department upon questions of fact or of the proper application of the act, but not upon matters resting in the discretion of the Department. Other sections provide for matters of detail, and § 11 renders void any agreement by employer or workman to waive the benefit of the act.

From this recital it will be clear that the fundamental purpose of the act is to abolish private rights of action for damages to employees in the hazardous industries (and in any other industry at the option of employer and employees), and to substitute a system of compensation to injured workmen and their dependents out of a public fund established and maintained by contributions required to be made by the employers in proportion to the hazard of each class of occupation.

While plaintiff in error is an employer, and cannot succeed without showing that its constitutional rights as employer are infringed (*Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576), yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the *quid pro quo* for the burdens imposed upon him, so that if the act is not valid as against employees it is not valid as against employers.

However, so far as the interests of employees and their dependents are concerned, this act is not distinguishable in any point raising a constitutional difficulty from the New York Workmen's Compensation Act, sustained in *New York Central R. R. Co.* v. *White*, decided this day, *ante*, 188. It is true that in the Washington Act the state fund is the sole source from which the compensation shall be paid, whereas the New York Act gives to the employer an option to secure the compensation either through state insurance, insurance with an authorized insurance corporation, or by a deposit of securities with the state commission. But we find here no ground for a distinction unfavorable to the Washington law.

So far as employers are concerned, however, there is a marked difference between the two laws, because of the enforced contributions to the state fund that are characteristic of the Washington Act, and it is upon this feature that the principal stress of the argument for plaintiff in error is laid.

Two of the constitutional objections may be disposed of briefly. It is urged that the law violates § 4 of Article IV of the Constitution of the United States, guaranteeing to every State in the Union a republican form of government. As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress and not to the courts. *Luther* v. *Borden*, 7 How. 1, 39, 42; *Pacific*

States Telephone & Telegraph Co. v. *Oregon*, 223 U. S. 118; *Kiernan* v. *Portland, Oregon*, 223 U. S. 151; *Marshall* v. *Dye*, 231 U. S. 250, 256; *Davis* v. *Ohio*, 241 U. S. 565.

The Seventh Amendment, with its provision for preserving the right of trial by jury, is invoked. It is conceded that this has no reference to proceedings in the state courts (*Minneapolis &. St. Louis R. R. Co.* v. *Bombolis*, 241 U. S. 211, 217), but it is urged that the question is material for the reason that if the act be constitutional it must be followed in the federal courts in cases that are within its provisions. So far as private rights of action are preserved, this is no doubt true; but with respect to those we find nothing in the act that excludes a trial by jury. As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury.

The only serious question is that which is raised under the "due process of law" and "equal protection" clauses of the Fourteenth Amendment. It is contended that since the act unconditionally requires employers in the enumerated occupations to make payments to a fund for the benefit of employees, without regard to any wrongful act of the employer, he is deprived of his property, and of his liberty to acquire property, without compensation and without due process of law. It is pointed out that the occupations covered include many that are private in their character, as well as others that are subject to regulation as public employments, and it is argued that with respect to private occupations (including those of plaintiff in error) a compulsory compensation act does not concern the interests of the public generally, but only the particular interests of the employees, and is unduly oppressive upon employers and arbitrarily interferes with and restricts the management of private business operations.

The statute, although approved March 14, 1911, took effect as between employers and workmen on October 1

in that year, actions pending and causes of action existing on September 30 being expressly saved. It therefore disturbed no vested rights, its effect being confined to regulating the relation of employer and employee in the hazardous occupations *in futuro*.

If the legislation could be regarded merely as substituting one form of employer's liability for another, the points raised against it would be answered sufficiently by our opinion in *New York Central R. R. Co.* v. *White*, *supra*, where it is pointed out that the common-law rule confining the employer's liability to cases of negligence on his part or on the part of others for whose conduct he is made answerable, the immunity from responsibility to an employee for the negligence of a fellow employee, and the defenses of contributory negligence and assumed risk, are rules of law that are not beyond alteration by legislation in the public interest; that the employer has no vested interest in them nor any constitutional right to insist that they shall remain unchanged for his benefit; and that the States are not prevented by the Fourteenth Amendment, while relieving employers from liability for damages measured by common-law standards and payable in cases where they or others for whose conduct they are answerable are found to be at fault, from requiring them to contribute reasonable amounts and according to a reasonable and definite scale by way of compensation for the loss of earning power arising from accidental injuries to their employees, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall, that is, upon particular injured employees and their dependents.

But the Washington law goes further, in that the enforced contributions of the employer are to be made whether injuries have befallen his own employees or not, so that however prudently one may manage his business, even to the point of immunity to his employees from acci-

dental injury or death, he nevertheless is required to make periodical contributions to a fund for making compensation to the injured employees of his perhaps negligent competitors.

In the present case the Supreme Court of Washington (75 Washington, 581, 583), sustained the law as a legitimate exercise of the police power, referring at the same time to its previous decision in the *Clausen Case*, 65 Washington, 156, 203, 207, which was rested principally upon that power, but also (pp. 203, 207), sustained the charges imposed upon employers engaged in the specified industries as possessing the character of a license tax upon the occupation, partaking of the dual nature of a tax for revenue and a tax for purposes of regulation. We are not here concerned with any mere question of construction, nor with any distinction between the police and the taxing powers. The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operation and effect. *Henderson* v. *Mayor of New York*, 92 U. S. 259, 268; *Stockard* v. *Morgan*, 185 U. S. 27, 36; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, 227; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 28, 30; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146, 162; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 362. And the Federal Constitution does not require a separate exercise by the States of their powers of regulation and of taxation. *Gundling* v. *Chicago*, 177 U. S. 183, 189.

Whether this legislation be regarded as a mere exercise of the power of regulation, or as a combination of regulation and taxation, the crucial inquiry under the Fourteenth Amendment is whether it clearly appears to be not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power. All reasonable presumptions are in favor of

its validity, and the burden of proof and argument is upon those who seek to overthrow it. *Erie R. R. Co.* v. *Williams*, 233 U. S. 685, 699. In the present case it will be proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment, rather than of private and particular interest, so as to furnish a just occasion for such interference with personal liberty and the right of acquiring property as necessarily must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other hand, so burdensome as to be manifestly oppressive. And (3) whether the burden is fairly distributed, having regard to the causes that give rise to the need for the legislation.

As to the first point: The authority of the States to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people, carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration. *Lawton* v. *Steele*, 152 U. S. 133, 136. "The police power of a State is as broad and plenary as its taxing power." *Kidd* v. *Pearson*, 128 U. S. 1, 26. In *Barbier* v. *Connolly*, 113 U. S. 27, 31, the court, by Mr. Justice Field, said: "Neither the [fourteenth] amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—

for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." It seems to us that the considerations to which we have adverted in *New York Central R. R. Co.* v. *White, supra,* as showing that the Workmen's Compensation Law of New York is not to be deemed arbitrary and unreasonable from the standpoint of natural justice, are sufficient to support the State of Washington in concluding that the matter of compensation for accidental injuries with resulting loss of life or earning capacity of men employed in hazardous occupations is of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through state agencies. Certainly the operation of industrial establishments that in the ordinary course of things frequently and inevitably produce disabling or mortal injuries to the human beings employed is not a matter of wholly private concern. It hardly would be questioned that the State might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the widows and orphans of those killed. Does direct compensation stand on a less secure ground? A

familiar exercise of state power is the grant of pensions to disabled soldiers and to the widows and dependents of those killed in war. Such legislation usually is justified as fulfilling a moral obligation or as tending to encourage the performance of the public duty of defense. But is the State powerless to compensate, with pensions or otherwise, those who are disabled, or the dependents of those whose lives are lost, in the industrial occupations that are so necessary to develop the resources and add to the wealth and prosperity of the State? A machine as well as a bullet may produce a wound, and the disabling effect may be the same. In a recent case, the Supreme Court of Washington said: "Under our statute the workman is the soldier of organized industry accepting a kind of pension in exchange for absolute insurance on his master's premises." *Stertz* v. *Industrial Insurance Commission*, 91 Washington, 588, 606. It is said that the compensation or pension under this law is not confined to those who are left without means of support. This is true. But is the State powerless to succor the wounded except they be reduced to the last extremity? Is it debarred from compensating an injured man until his own resources are first exhausted? This would be to discriminate against the thrifty and in favor of the improvident. The power and discretion of the State are not thus circumscribed by the Fourteenth Amendment.

Secondly, is the tax or imposition so clearly excessive as to be a deprivation of liberty or property without due process of law? If not warranted by any just occasion, the least imposition is oppressive. But that point is covered by what has been said. Taking the law, therefore, to be justified by the public nature of the object, whether as a tax or as a regulation, the question whether the charges are excessive remains. Upon this point no particular contention is made that the compensation allowed is unduly large; and it is evident that unless it be

so the corresponding burden upon the industry cannot be regarded as excessive if the State is at liberty to impose the entire burden upon the industry. With respect to the scale of compensation, we repeat what we have said in *New York Central R. R. Co.* v. *White*, that in sustaining the law we do not intend to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable, and that any question of that kind may be met when it arises.

Upon the third question—the distribution of the burden—there is no criticism upon the act in its details. As we have seen, its fourth section prescribes the schedule of contribution, dividing the various occupations into groups, and imposing various percentages evidently intended to be proportioned to the hazard of the occupations in the respective groups. Certainly the application of a proper percentage to the pay-roll of the industry cannot be deemed an arbitrary adjustment, in view of the legislative declaration that it is "deemed the most accurate method of equitable distribution of burden in proportion to relative hazard." It is a matter of common knowledge that in the practice of insurers the pay-roll frequently is adopted as the basis for computing the premium. The percentages seem to be high; but when these are taken in connection with the provisions requiring accounts to be kept with each industry in accordance with the classification, and declaring that no class shall be liable for the depletion of the accident fund from accidents happening in any other class, and that any class having sufficient funds to its credit at the end of the first three months or any month thereafter is not to be called upon, it is plain that, after the initial payment, which may be regarded as a temporary reserve, the assessments will be limited to the amounts necessary to meet actual losses. As further rebutting the suggestion that the imposition is exorbitant or arbitrary, we should accept the declaration of intent that

the fund shall ultimately become neither more nor less than self-supporting, and that the rates are subject to future adjustment by the legislature and the classifications to rearrangement according to experience, as plain evidence of an intelligent effort to limit the burden to the requirements of each industry.

We may conveniently answer at this point the objection that the act goes too far in classifying as hazardous large numbers of occupations that are not in their nature hazardous. It might be sufficient to say that this is no concern of plaintiff in error, since it is not contended that its businesses of logging timber, operating a logging railroad, and operating a sawmill with power-driven machinery, or either of them, are non-hazardous. *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544. But further, the question whether any of the industries enumerated in § 4 is non-hazardous will be proved by experience, and the provisions of the act themselves give sufficient assurance that if in any industry there be no accident there will be no assessment, unless for expenses of administration. It is true that, while the section as originally enacted provided for advancing the classification of risks and premium rates in a particular establishment shown by experience to be unduly dangerous because of poor or careless management, there was no corresponding provision for reducing a particular industry shown by experience to be included in a class which imposed upon it too high a rate. This was remedied by the amendment of 1915, quoted in the margin, above, which, however, cannot affect the decision of the present case. But in the absence of any particular showing of erroneous classification—and there is none—the evident purpose of the original act to classify the various occupations according to the respective hazard of each is sufficient answer to any contention of improper distribution of the burden amongst the industries themselves.

There remains, therefore, only the contention that it is inconsistent with the due process and equal protection clauses of the Fourteenth Amendment to impose the entire cost of accident loss upon the industries in which the losses arise. But if, as the legislature of Washington has declared in the first section of the act, injuries in such employments have become frequent and inevitable, and if, as we have held in *New York Central R. R. Co.* v. *White,* the State is at liberty, notwithstanding the Fourteenth Amendment, to disregard questions of fault in arranging a system of compensation for such injuries, we are unable to discern any ground in natural justice or fundamental right that prevents the State from imposing the entire burden upon the industries that occasion the losses. The act in effect puts these hazardous occupations in the category of dangerous agencies, and requires that the losses shall be reckoned as a part of the cost of the industry, just like the pay-roll, the repair account, or any other item of cost. The plan of assessment insurance is closely followed, and none more just has been suggested as a means of distributing the risk and burden of losses that inevitably must occur, in spite of any care that may be taken to prevent them.

We are clearly of the opinion that a State, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability with consequent loss of earning power among the men and women employed, and, occasionally, loss of life of those who have wives and children or other relations dependent upon them for support, and may require that these human losses shall be charged against the industry, either directly, as is done in the case of the act sustained in *New York Central R. R. Co.* v. *White, supra,* or by publicly adminis-

tering the compensation and distributing the cost among the industries affected by means of a reasonable system of occupation taxes. The act cannot be deemed oppressive to any class of occupation, provided the scale of compensation is reasonable, unless the loss of human life and limb is found in experience to be so great that if charged to the industry it leaves no sufficient margin for reasonable profits. But certainly, if any industry involves so great a human wastage as to leave no fair profit beyond it, the State is at liberty, in the interest of the safety and welfare of its people, to prohibit such an industry altogether.

To the criticism that carefully managed plants are in effect required to contribute to make good the losses arising through the negligence of their competitors, it is sufficient to say that the act recognizes that no management, however careful, can afford immunity from personal injuries to employees in the hazardous occupations, and prescribes that negligence is not to be determinative of the question of the responsibility of the employer or the industry. Taking the fact that accidental injuries are inevitable, in connection with the impossibility of foreseeing when, or in what particular plant or industry they will occur, we deem that the State acted within its power in declaring that no employer should conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed, irrespective of the particular plant in which the accident might happen to occur. In short, it cannot be deemed arbitrary or unreasonable for the State, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupation taxes limited to the actual losses occurring in the respective classes of occupation.

The idea of special excise taxes for regulation and rev-

enue proportioned to the special injury attributable to the activities taxed is not novel. In *Noble State Bank* v. *Haskell*, 219 U. S. 104, this court sustained an Oklahoma statute which levied upon every bank existing under the laws of the State an assessment of a percentage of the bank's average deposits, for the purpose of creating a guaranty fund to make good the losses of depositors in insolvent banks. There, as here, the collection and distribution of the fund were made a matter of public administration, and the fund was created not by general taxation but by a special imposition in the nature of an occupation tax upon all banks existing under the laws of the State. In *Hendrick* v. *Maryland*, 235 U. S. 610, 622, and *Kane* v. *New Jersey*, 242 U. S. 160, 169, we sustained laws, of a kind now familiar, imposing license fees upon motor vehicles, graduated according to horse power, so as to secure compensation for the use of improved roadways from a class of users for whose needs they are essential and whose operations over them are peculiarly injurious. And see *Charlotte, Columbia & Augusta R. R. Co.* v. *Gibbes*, 142 U. S. 386, 394–5, and cases cited. Many of the States have laws protecting the sheep industry by imposing a tax upon dogs in order to create a fund for the remuneration of sheep-owners for losses suffered by the killing of their sheep by dogs. And the tax is imposed upon all dog-owners, without regard to the question whether their particular dogs are responsible for the loss of sheep. Statutes of this character have been sustained by the state courts against attacks based on constitutional grounds. *Morey* v. *Brown*, 42 N. H. 373, 375; *Tenney, Chairman*, v. *Lenz*, 16 Wisconsin, 566; *Mitchell* v. *Williams*, 27 Indiana, 62; *Van Horn* v. *People*, 46 Michigan, 183, 185, 186; *Longyear* v. *Buck*, 83 Michigan, 236, 240; *Cole* v. *Hall, Collector*, 103 Illinois, 30; *Holst* v. *Roe*, 39 Ohio St. 340, 344; *McGlone, Sheriff*, v. *Womack*, 129 Kentucky, 274, 283 *et seq.*

We are unable to find that the act, in its general features, is in conflict with the Fourteenth Amendment. Numerous objections are urged, founded upon matters of detail, but they call for no particular mention, either because they are plainly devoid of merit, are covered by what we have said, or are not such as may be raised by plaintiff in error.

Perhaps a word should be said respecting a clause in § 4 which reads as follows: "It shall be unlawful for the employer to deduct or obtain (*sic*) any part of the premium required by this section to be by him paid from the wages or earnings of his workmen or any of them, and the making or attempt to make any such deductions shall be a gross misdemeanor." If this were to be construed so broadly as to prohibit employers and employees, in agreeing upon wages and other terms of employment, from taking into consideration the fact that the employer was a contributor to the state fund, and the resulting effect of the act upon the rights of the parties, it would be open to serious question whether as thus construed it did not interfere to an unconstitutional extent with their freedom of contract. So far as we are aware the clause has not been so construed, and on familiar principles we will not assume in advance that a construction will be adopted such as to bring the law into conflict with the Federal Constitution. *Bachtel* v. *Wilson*, 204 U. S. 36, 40; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 546.

Judgment affirmed.

THE CHIEF JUSTICE, MR. JUSTICE MCKENNA, MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS dissent.

HORN *v.* MITCHELL, UNITED STATES MARSHAL FOR THE DISTRICT OF MASSACHUSETTS.

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

No. 679. Argued January 11, 12, 1917.—Decided March 6, 1917.

A judgment of the District Court refusing the writ of *habeas corpus* is appealable directly to this court under § 238 of the Judicial Code if the petition raises constitutional or treaty questions.

A judgment of the Circuit Court of Appeals affirming a judgment of the District Court refusing *habeas corpus* is not appealable to this court under § 241 of the Judicial Code on the ground that constitutional and treaty questions are involved, since no pecuniary value is in controversy.

The provision made by Rev. Stats., § 764, as amended by the Act of March 3, 1885, c. 353, 23 Stat. 437, for review in this court of the appellate judgments of the Circuit Courts in *habeas corpus* cases, was necessarily repealed by the Judiciary Act of March 3, 1891 (see §§ 4, 5, 6 and 14), and § 289 of the Judicial Code abolishing the Circuit Courts.

Appeal to review 232 Fed. Rep. 819, dismissed.

THE case is stated in the opinion.

Mr. Joseph F. O'Connell and *Mr. Daniel T. O'Connell*, with whom *Mr. James E. O'Connell* was on the briefs, for appellant.

Mr. Assistant Attorney General Warren for appellee.

Memorandum opinion by MR. JUSTICE PITNEY, by direction of the court.

Appellant, being in the custody of the United States Marshal for the District of Massachusetts, under an

indictment found in that district for a violation of the Act of May 30, 1908, c. 234, 35 Stat. 554, now §§ 232–235 of the Criminal Code, c. 321, 35 Stat. 1088, 1134, in unlawfully transporting explosives from New York through Massachusetts to Vanceboro, Maine, petitioned the District Court for a writ of *habeas corpus* upon the ground that the order of commitment was in violation of his rights under the Constitution and laws of the United States and existing treaties between the United States and the German Empire and the Kingdom of Prussia, for that (among other reasons) appellant is an officer of the army of the German Empire; that a state of war, recognized by the President of the United States in an official proclamation, exists between Great Britain and Germany; that appellant is accused of destroying a part of the international bridge in the Township of McAdam, Province of New Brunswick, and Dominion of Canada; that the charge of carrying explosives illegally upon which he is held in custody is, if true, inseparably connected with the destruction of that bridge; and that "he is a subject and citizen of the Empire of Germany and domiciled therein and is being held in custody for the aforesaid act which was done under his right, title, authority, privilege, protection and exemption claimed under his commission as said officer."

After a hearing, the District Court refused the writ of *habeas corpus* and dismissed the petition, 223 Fed. Rep. 549, and an appeal to the Circuit Court of Appeals for the First Circuit resulted in an affirmance of the judgment, 232 Fed. Rep. 819. An appeal from the judgment of affirmance to this court was then allowed.

There is a motion to dismiss the appeal, and this must be granted. Assuming, as we do, that the petition for *habeas corpus* raised questions involving the application of the Constitution of the United States or the construction of a treaty made under its authority, appellant might

have taken a direct appeal from the District Court to this court under § 238, Jud. Code, Act of March 3, 1911, c. 231, 36 Stat. 1087, 1157. *Frank* v. *Mangum*, 237 U. S. 309; *Kelly* v. *Griffin*, 241 U. S. 6; *Bingham* v. *Bradley*, 241 U. S. 511. Having appealed to the Circuit Court of Appeals, he cannot bring his case here except under some provision of law allowing an appeal from that court to this. Appeals of this character are regulated by § 241, Jud. Code, 36 Stat. 1157, and are confined to cases "where the matter in controversy shall exceed one thousand dollars, besides costs." It long has been settled that the jurisdiction conferred by Congress upon any court of the United States in a case where the matter in controversy exceeds a certain sum of money, does not include cases where the rights of the parties are incapable of being valued in money, and therefore excludes *habeas corpus* cases. *Kurtz* v. *Moffitt*, 115 U. S. 487, 498; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58; *Cross* v. *Burke*, 146 U. S. 82, 88; *Whitney* v. *Dick*, 202 U. S. 132, 135; *Healy* v. *Backus*, 241 U. S. 655.

Appellant seeks to sustain his appeal under §§ 763 and 764 of the Revised Statutes.[1] They gave a right of

---

[1] Sec. 763. From the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of *habeas corpus* or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard:

1. In the case of any person alleged to be restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States.

2. In the case of any prisoner who, being a subject or citizen of a foreign state, and domiciled therein, is committed or confined, or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof.

appeal from the District Court to the Circuit Court in two classes of *habeas corpus* cases, and an appeal from the Circuit Court to this court in cases of a class that includes the present case. Section 764 was amended by Act of March 3, 1885, c. 353, 23 Stat. 437, by extending the right of appeal from the Circuit Courts to this court so as to include the remaining cases described in the preceding section. But by § 4 of the Act of March 3, 1891, establishing Circuit Courts of Appeals (c. 517, 26 Stat. 827), all appellate jurisdiction was taken from the Circuit Courts, and by §§ 5 and 6 it was distributed between this court and the Circuit Courts of Appeals. By § 14, all acts and parts of acts relating to appeals or writs of error, inconsistent with the provisions for review in §§ 5 and 6, were repealed. Section 5 preserved a direct appeal from the District Court to this court in cases involving the construction or application of the Constitution of the United States, or the validity or construction of any treaty made under its authority. In *Cross* v. *Burke*, 146 U. S. 82, 88, it was pointed out that the effect of this was that appeals from the decrees of the Circuit Court on *habeas corpus* could no longer be taken to this court except in cases of the class mentioned in the fifth section of that act. And it was so held in *In re Lennon*, 150 U. S. 393, 399.

Even were it otherwise, an appeal from the Circuit Court to this court was not the same as an appeal from the Circuit Court of Appeals to this court. And the abolishment of the Circuit Courts by § 289, Jud. Code, removed the last vestige of authority for an appeal to this court under § 764, Rev. Stats.

Appeal dismissed.

Sec. 764. From the final decision of such circuit court an appeal may be taken to the Supreme Court in the cases described in the last clause of the preceding section.

GRAYS HARBOR LOGGING COMPANY ET AL. *v.* COATS-FORDNEY LOGGING COMPANY.[1]

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 132. Argued January 23, 1917.—Decided March 6, 1917.

In a proceeding to condemn land for a private railway, based on Washington Constitution, Art. I, § 16, and Laws 1913, c. 133, p. 412; Rem. & Ball. Ann. Code, §§ 5857–1, *et seq.*, and governed as to procedure by Rem. & Ball. Ann. Code, §§ 921–931, the Superior Court of Washington, after a hearing on the question of necessity, entered an order of condemnation and set down the cause for a jury trial to determine damages, etc.; thereupon condemnees took the case to the Supreme Court of the State by certiorari, alleging, *inter alia*, that the Law of 1913 violates the Federal Constitution; the Supreme Court entered judgment affirming the action of the Superior Court and remitting the cause thereto for further proceedings. *Held*, that the judgment of the Supreme Court of Washington was interlocutory and therefore not reviewable in this court under § 237 of the Judicial Code. *Wheeling and Belmont Bridge Co.* v. *Wheeling Bridge Co.*, 138 U. S. 287, questioned, if not overruled.

Although a federal question involved in state court proceedings be settled by interlocutory judgment, so that the decision becomes binding on the state tribunals as the law of the case before a final judgment occurs, this court is none the less free to determine the question when the final judgment is brought here by writ of error.

Writ of error to review 82 Washington, 503, dismissed.

THE case is stated in the opinion.

Mr. W. H. Abel, with whom *Mr. A. M. Abel* was on the briefs, for plaintiffs in error.

[1] The docket title of this case is: *State of Washington ex rel. Grays Harbor Logging Company and W. E. Boeing* v. *Superior Court of Washington for Chehalis County, Mason Irwin, Judge Thereof, and Coats-Fordney Logging Company.*

Mr. William M. Smith, with whom *Mr. Alexander Britton, Mr. Evans Browne* and *Mr. F. W. Clements* were on the briefs, for defendants in error.

Mr. Justice Pitney delivered the opinion of the court.

The Coats-Fordney Logging Company, defendant in error, instituted a proceeding by petition in the Superior Court of the State of Washington for Chehalis County against Grays Harbor Logging Company and W. E. Boeing, wherein it sought to condemn and take certain of their lands situate in that county for the purpose of constructing and maintaining a logging railroad as a private way of necessity in order to bring its lumber to market. The proceeding was based upon the following provisions of the constitution and statutes of the State:

Section 16 of Article 1 of the constitution declares: "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, . . ." Under this constitutional provision the legislature passed an act (Sess. Laws 1913, c. 133, p. 412; Rem. & Ball. Ann. Code, §§ 5857–1, *et seq.*,) which provides that lands for the construction and maintenance of a private way of necessity may be acquired by condemnation, including within the term "private way of necessity" a right of way over or

through the land of another for means of ingress or egress and the construction and maintenance of roads, logging roads, tramways, etc., upon which timber, stone, minerals or other valuable materials and products may be transported and carried. The procedure is to be the same as provided for condemnation of private property by railroad companies. This refers us to Rem. & Ball. Ann. Code, §§ 921–931 (5637–5645), whereby it is provided, in substance (§ 921) that any corporation authorized by law to appropriate land for a right of way may present to the Superior Court of the county in which the land is situate a petition describing the property sought to be appropriated, setting forth the names of the owners and parties interested, and the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money; (§ 922) a notice of the petition stating the time and place where it will be presented to the court is to be served upon each person named therein as owner or otherwise interested; (§ 925) at the hearing, if the court be satisfied by competent proof that the contemplated use for which the land is sought to be appropriated is really a public use, or is for a private use for a private way of necessity and that the public interest requires the prosecution of such enterprise, and that the land sought to be appropriated is necessary for the purpose, the court may make an order directing the sheriff to summon a jury; (§ 926) at the trial the jury shall ascertain, determine, and award the amount of damages to be paid to the owners and other persons interested, and upon the verdict judgment shall be entered for the amount thus awarded; (§ 927) at the time of rendering judgment for damages, if the damages awarded be then paid, or, if not, then upon their payment, the court shall also enter a judgment or decree of appropriation, thereby vesting the legal title to the land in the corporation seeking to appropriate it;

(§ 929) upon the entry of judgment upon the verdict of a jury and award of damages the petitioner may make payment of the damages and costs of the proceeding to the parties entitled to the same by depositing the same with the clerk of the Superior Court, to be paid out under the direction of the court, and upon making such payment the petitioner shall be released from further liability, unless upon appeal the owner or other party interested shall recover a greater amount; (§ 931) "Either party may appeal from the judgment for damages entered in the superior court to the supreme court of the state within thirty days after the entry of judgment as aforesaid, and such appeal shall bring before the supreme court the propriety and justness of the amount of damages in respect to the parties to the appeal."

Plaintiffs in error opposed the petition for condemnation upon the ground, among others, that the Act of 1913 was contrary to the Constitution of the United States, and that petitioner sought to take their property for a private use and therefore without due process of law, in violation of that Constitution. After hearing testimony upon the question of necessity, the Superior Court entered an order of condemnation, and by the same order set the cause down for trial before a jury for the purpose of determining and assessing the damages and compensation. At this point, and before the cause could be brought to trial before a jury, plaintiffs in error applied for and obtained from the Supreme Court of the State a writ of certiorari for the purpose of reviewing the question of the constitutionality of the act and the right of petitioner to condemn their property for its right of way. The Supreme Court sustained the proceedings, 82 Washington, 503, and entered a judgment affirming the judgment of the Superior Court, and remitting the cause to that court for further proceedings. A writ of error was then sued out from this court under § 237, Jud. Code.

Defendants in error move to dismiss the writ of error on the ground that the judgment of the state court is not final. To this plaintiffs in error respond by saying that under the state practice the judgment of the Superior Court establishing the right of petitioner to acquire the property or right of way sought is final; that while an appeal will not lie from such a judgment to the Supreme Court, this is because the statutory provision for an appeal in condemnation cases is limited to the question of the amount of damages, and a general statute providing for appeals has been held not applicable to eminent domain proceedings, *Western American Co.* v. *St. Ann Co.*, 22 Washington, 158; that because an appeal will not lie the Supreme Court has held that a writ of certiorari or review will issue to bring before that court for determination the questions of use and necessity, *Seattle & Montana R. R. Co.* v. *Bellingham Bay & Eastern R. R. Co.*, 29 Washington, 491; and that by repeated decisions of that court it has been settled that after an order adjudging necessity has been made and a trial had to determine the amount of damages an appeal taken therefrom raises no question as to the right to condemn, but is confined to the propriety and justness of the amount of damages; *Fruitland Irrigation Co.* v. *Smith*, 54 Washington, 185; *Calispel Diking District* v. *McLeish*, 63 Washington, 331; *Seattle, Port Angeles & Lake Crescent Ry.* v. *Land*, 81 Washington, 206, 209; *State ex rel. Davis* v. *Superior Court*, 82 Washington, 31, 34. In this state of the local practice it is argued that the judgment that has been entered should be regarded as finally disposing of a distinct and definite branch of the case, and therefore subject to our review as a final judgment; leaving the ascertainment of the compensation and damages to be dealt with as a separate branch of the case. *Wheeling & Belmont Bridge* v. *Wheeling Bridge Co.*, 138 U. S. 287, 290, is cited in support of this contention, and certainly seems to lend color to it. But, notwithstanding

the decision in that case, we cannot regard a condemnation proceeding taken under the authority of the constitution of Washington and the Act of 1913 as severable into two distinct branches. The constitution forbids that the property be taken without compensation first made or ascertained and paid into court for the owner, and of course in case of controversy compensation cannot be made to the owner until the amount of it has been ascertained. It follows that the judgment entered by the Superior Court to the effect that petitioner was entitled to condemn and appropriate the land in question for its right of way must be construed as being subject to a condition that the proper compensation be first ascertained and paid.

As we read the decisions of the Supreme Court of the State, such judgments are not interpreted in any other sense; they are not described as final, nor as independent judgments. In two cases the term "order" and even "preliminary order" has been employed with respect to such judgments (*State ex rel. Pagett* v. *Superior Court*, 46 Washington, 35, 36; *Seattle, Port Angeles & Lake Crescent Ry.* v. *Land*, 81 Washington, 206, 209), and they are held reviewable by certiorari and not by appeal, not because they are final, or are independent of the subsequent proceedings ascertaining the damages, but because in Washington proceedings by appeal are statutory, and no statute has been enacted giving an appeal from the order or judgment determining the questions of use and necessity; by reason of which, the writ of certiorari is employed as a means of exercising the constitutional power of review.

The judgment, therefore, seems to us to be interlocutory, and the case to be within the authority of *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 341; *Southern Railway Co.* v. *Postal Telegraph-Cable Co.*, 179 U. S. 641, 643; and *United States* v. *Beatty*, 232 U. S. 463, 466.

When the litigation in the state courts is brought to a

conclusion, the case may be brought here upon the federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the Supreme Court, 82 Washington, 503, as laying down the law of the case, this court will not be thus bound. *United States* v. *Denver & Rio Grande R. R. Co.*, 191 U. S. 84, 93; *Messenger* v. *Anderson*, 225 U. S. 436, 444; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 418.

The judgment brought up by the present writ of error not being a final judgment, within the meaning of § 237, Jud. Code, the writ must be

Dismissed.

ROME RAILWAY & LIGHT COMPANY *v.* FLOYD COUNTY, GEORGIA, ET AL.

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

No. 547. Argued January 25, 1917.—Decided March 6, 1917.

A street railway company in Georgia, under special acts of the legislature, claimed a perpetual and unconditional franchise right to operate over certain county bridges irrespective of the county's consent. The claim being disputed by the county, the company entered into and fully acted upon certain written agreements with the county purporting to be grants by the county to the company of the right to lay, maintain and operate tracks over the bridges upon certain conditions, including payment to the county for the use of the bridges, the county being governed in the transactions by a statute which limited its power to the granting of temporary uses and privileges subject at all times to revocation. *Held*, partly on the authority of *City Electric Ry. Co.* v. *Floyd County*, 115 Georgia, 655, that whatever may have been the rights of the company origi-

nally, the effect of the compromise agreements, and their execution, was to substitute a temporary grant subject at all times to revocation.

By act of the Georgia legislature (August 15, 1914, Laws 1914, p. 271), Floyd County was authorized to reconstruct the old bridges in Rome, Georgia, requiring, in so doing, the removal of street railway tracks; to grant franchises to operate over new bridges and fix the terms thereof including, as a condition precedent, that the grantee pay one-third of the cost of construction. The act, however, provides that "any corporation now having a franchise shall have the right to use any new bridge upon complying with the reasonable conditions imposed by the" county authorities and the terms of the act. *Held*, that a company which had in effect surrendered its franchise right to use the old bridges in exchange for a temporary grant revocable at the will of the county authorities, could not enjoin them from proceeding under the act to rebuild the bridges and charge the company one-third of the cost as a condition precedent to its use of the new structures.

228 Fed. Rep. 775, affirmed.

THE case is stated in the opinion.

Mr. John C. Doolan, with whom *Mr. Linton A. Dean*, *Mr. J. Ed. Dean*, *Mr. Edmund F. Trabue* and *Mr. Attilla Cox, Jr.*, were on the briefs, for appellant.

Mr. George E. Maddox, with whom *Mr. Joel Branham* and *Mr. Mark B. Eubanks* were on the briefs, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Within the limits of Rome, Georgia, since 1881, three public bridges have crossed the Etowah and Oostanaula Rivers. Appellant is successor to the Rome Street Rail-Road Company incorporated in 1884 by special act and empowered to construct and operate railroads in that city, also in certain neighboring towns, and, with consent of the Floyd County Board of Commissioners of Roads and

Revenues, for five miles along public roads. Ga. Laws, 1884–5, p. 191, *Id.* p. 235. Authority was given to use horses, electricity, underground cables driven by steam, "or any other appliance that may hereafter be invented or used as motive power." The company began to run horse drawn cars over the city streets and across Howard Street or Second Avenue Bridge as early as 1885; and this mode of operation continued until 1892 or 1893.

The Howard Street Bridge having been destroyed in April, 1886, the county erected a new one upon the same site; thereafter it refused to permit the car company to lay tracks or operate over this without payment therefor and brought suit to enjoin any attempt so to do. In *County of Floyd* v. *Rome Street Railroad Co.*, 77 Georgia, 614, 617 (October Term, 1886), the state Supreme Court held: "The only question made by the record, therefore, is, whether the legislature has authorized the street railroad company to appropriate this bridge to its use in the manner claimed by it, without the county's consent, and without making it compensation. . . . The bridge forms a continuation of the streets of the city across the river and is a part of the same. . . . The legislature, unless restricted by the State constitution, may, even without the consent of a municipality, and without allowing it compensation, authorize railroads to be laid in its highways. . . . But even had the consent of the county of Floyd been required to this use of the bridge by the street railroad company, that assent was given, and when the condition on which it was accorded was accepted and acted upon by the company, it became a binding contract until the license was revoked by the only authority having power to revoke it. . . . The precise point insisted upon by counsel for the county is, that where any part of a public street or highway is washed out or otherwise destroyed by any means, and the damage is repaired by a new structure upon the portion thus destroyed

or rendered unfit for use, this gives the county a right to exact additional compensation from a railroad company which, previously to the injury, used the street or public highway with the assent of the municipality, where the railroad company proposes to make the same use of the street or highway after it has been repaired. We certainly know of no case which has carried the right of compensation for its use to this extent, and think that its recognition and enforcement by the courts would work great injury to the prosperity of the community."

An amendment to its charter, September 21, 1887 (Ga. Laws, 1887, p. 148), empowered the company to use dummy steam engines on the bridges subject to such regulations as the Board of Commissioners might prescribe from time to time. Extensions were also specially authorized with consent of the Board as to public roads and town authorities as to streets. Another amendment, November 12, 1889 (Ga. Laws, 1889, p. 696), prohibited the use of dummy engines or steam power on the bridges without unanimous consent of all the Commissioners declared by public resolution in an official meeting, and it provided, "that the Board of Commissioners of Roads and Revenues of Floyd county shall not have the right to grant any vested or contract rights to said Rome Street Railroad Company, or any other persons on or over said bridges, but may, in their discretion, grant temporary uses and privileges to said railroad company over said bridges, subject at all times to be revoked by said commissioners."

February 25, 1892, Floyd County, through its Board of Commissioners, and the Rome Street Railroad Company by formal writing agreed that, "Said party of the first part grants to the said party of the second part the right to lay and maintain a single track on one side of the County Bridges, at Rome, to-wit, . . . with the right to place electric wires and appliances and to run

electric cars across said bridges upon the consideration and conditions herein named"—among them payment of $100.00 annually for use of each bridge, and commencing to build electric lines within ninety days. Later, in 1892 or 1893, the car lines were equipped electrically and extended over and beyond all of the bridges, and since that time have been continuously operated. February 3, 1896, it was stipulated by the county and the City Electric Railway Company, a successor to the Rome Street Railroad Company and appellant's predecessor, "that said party of the first part grants to the said party of the second part the right to use its electric wires and appliances and to run electric cars across the Floyd County Bridges. . . . Said company shall pay annually to said party of the first part the sum of $200.00 for the use of said bridges in consideration of the grant herein named."

In *City Electric Railway Company* v. *Floyd County*, 115 Ga. 655, 657 (March Term, 1902), the state Supreme Court sustained the agreement of February 25, 1892. It said: "If the railroad company originally had the right, under the power granted to it by the legislature, as we are inclined to think it had, to construct and operate its electric lines over the bridges in question, without the consent of the county and without paying anything whatever therefor, it lost this right when the dispute between it and the county was compromised and settled by the execution of this contract. If there had been no controversy between the parties as to their respective rights in the matter, and the county had simply charged the railroad company one hundred dollars per annum for the use of each of the bridges, and the company had simply agreed to pay this sum annually, the contract entered into might have been, as contended by the plaintiff in error, a *nudum pactum*, and, therefore, not binding upon the company. But this was not the case; the parties asserted conflicting claims,

depending upon a question of law, and these claims were compromised and settled by the contract now under consideration."

An Act of the Georgia Legislature, approved August 15, 1914 (Ga. Laws, 1914, p. 271), provides:

That all right, title and interest in the Rome bridges together with complete jurisdiction and control over them shall be vested in Floyd County to be exercised by its authorities. All permits and franchises theretofore granted by State, county or city to any street railroad company to lay tracks or operate cars over any one of the bridges are revoked and repealed "so far as the same applies to any future bridges hereafter constructed under this or any other law, unless the said companies will conform to the reasonable terms and conditions required by the county authorities"; and Floyd County is authorized to condemn and remove existing bridges and construct new ones. The street railway company upon notice shall remove its tracks as may be required by the county authorities; the latter are given exclusive right and jurisdiction to grant franchises to operate over new bridges and to prescribe terms for such grants; and they are authorized to require as a condition precedent that any grantee shall pay to the county "one-third of the actual cost of the building of said bridges . . . but any corporation now having a franchise shall have the right to use any new bridge upon complying with the reasonable conditions imposed by the board of commissioners and the terms of this Act." The validity of any part of the act shall be contested only by injunction proceedings before the work of tearing down and removing the bridges is begun.

The Commissioners of Floyd County gave public notice, May 3, 1915, that on June 16th they would begin the work of tearing down old and rebuilding new bridges at an estimated total cost of $260,000.00. Ten days later

they passed resolutions wherein, after referring to the Act of August 15, 1914, and reciting their determination to remove the old bridges and erect others, they declared that appellant would be required to pay one-third of the actual cost of removing the old bridges and erecting new ones, "which sum shall be paid to the County Treasurer before said Company shall be allowed to place any tracks, wires, equipment or operate any cars on and over" the new structures.

By its original bill, filed May 26, 1915, in the United States District Court, appellant sought to enjoin defendants from undertaking to enforce the Act of 1914 according to their declared purpose upon the ground (a) that such action would deprive it of property without due process of law and of the equal protection of the laws, and impair the obligation of contracts with the State, contrary to the Constitution of the United States; (b) that when properly construed the Act of 1914 does not authorize defendants to require appellant to pay one-third of the cost of removing old bridges and constructing others, such charge being permitted only in the absence of a then existing franchise to cross the former.

Being of opinion that nothing in acts of the legislature, ordinances or resolutions gave appellant "any such vested interests, or such right to occupy and use these bridges" as it claimed, upon motion, the trial judge dismissed the bill. The judgment is correct and must be affirmed.

It is unnecessary now definitely to determine what rights were conferred by the Act of 1884. Under the agreements of 1892 and 1896 between appellant's predecessors and the Board of Commissioners the former accepted a temporary grant subject at all times to revocation—all the latter was empowered to make by the Act of 1889. This, we think, is clearly true and it is also but the logical result of what the Supreme Court of Georgia held in *City Electric Ry. Co.* v. *Floyd County, supra.* And

see *West End & Atlanta Street R. R. Co.* v. *Atlanta Street R. R. Co.*, 49 Georgia, 151, 158.

Considering the entire Act of 1914 we are unable to conclude that the legislature did not intend to authorize the county authorities to require appellant to pay "a sum equal to one-third of the actual cost of the building of said bridges" before being allowed to use the same.

Affirmed.

PHILADELPHIA & READING RAILWAY COMPANY *v.* McKIBBIN.

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

No. 136. Argued January 25, 1917.—Decided March 6, 1917.

In the absence of consent, a corporation of one State may not be summoned in another, in an action *in personam*, unless it is doing business in the State where it is served in such manner and to such extent as to warrant the inference that it is present there.

The process must be served on some authorized agent of the corporation.

The questions whether the corporation was doing business and whether the person served was its authorized agent being vital to the jurisdiction, either, if duly raised, is subject to be reviewed directly by this court, as to findings of fact as well as legal conclusions, upon certificate from the District Court under § 238 of the Judicial Code.

A railroad corporation not owning or operating any part of its railway, or holding other property, within a State, may not be said to be doing business there merely because cars shipped by it, loaded with the goods of its shippers, pass into that State, and are returned therefrom, over the line of a connecting carrier (each carrier receiving only its proportionate share of the freight charged for the interstate haul,) or because the connecting carrier, within the State, sells coupon tickets and displays the other carrier's name at its station and in the telephone directory, to promote travel and public convenience.

The fact that corporations subsidiary to another are doing business in a

State does not warrant finding that the other is present there, doing business.

Whether a corporation doing business in a State may be served there on a cause of action arising in another State and unrelated to the business in the first—not decided.

An arrangement by counsel, designed merely to facilitate an attempted service of summons on the president of a corporation while passing through a State and engaged on his private affairs, does not estop the corporation from contesting the jurisdiction upon the ground that it was not doing business in the State.

THE case is stated in the opinion.

Mr. Pierre M. Brown for plaintiff in error.

Mr. Joseph A. Shay, with whom *Mr. L. B. McKelvey* was on the briefs, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the State the process will be valid only if served upon some authorized agent. *St. Louis Southwestern Ry. Co.* v. *Alexander,* 227 U. S. 218, 226. Whether the corporation was doing business within the State and whether the person served was an authorizied agent are questions vital to the jurisdiction of the court. A decision of the lower court on either question if duly challenged is subject to review in this court; and the review extends to findings of fact as well as to conclusions of law. *Herndon-Carter Co.* v. *Norris, Son & Co.,* 224 U. S. 496; *Wetmore* v. *Rymer,* 169 U. S. 115. The main question presented here is whether

the plaintiff in error—defendant below—was doing business in New York.

The Philadelphia and Reading Railway Company, a Pennsylvania corporation, operated a railroad in that State and in New Jersey. McKibbin, a citizen and resident of New York, was a brakeman in one of its New Jersey freight yards. For injuries sustained there, he brought this action in the United States District Court for the Southern District of New York. The summons was served on defendant's president, while he was passing through New York engaged exclusively on personal matters unconnected with the company's affairs. The defendant appeared specially in the cause for the sole purpose of moving to set aside the service of the summons; and invoked the provisions of the Federal Constitution guaranteeing due process of law. The motion was denied "upon the sole ground that upon the facts stated in the affidavits said defendant is doing business within the State of New York, so as to be subject to service of process within said state." Under a right reserved in the order, the objection to the jurisdiction was renewed in the answer; and insisted upon at the trial before the jury. The motion to dismiss was again heard upon the affidavits originally presented; and was denied. Exceptions were duly taken. A verdict was rendered for the plaintiff; judgment entered thereon; and the case brought here on writ of error; the question of jurisdiction being certified in conformity to § 238 of the Judicial Code.

The affidavits established the following facts: No part of the Philadelphia & Reading's railroad is situated within the State of New York. It has no dock or freight or passenger ticket office or any other office or any agent or property therein. Like other railroads distant from New York, it sends into that State over connecting carriers loaded freight cars, shipped by other persons, which cars are in course of time returned. The carriage within that

State is performed wholly by such connecting carriers, which receive that portion of the entire compensation paid by the shipper therefor; and the Philadelphia & Reading receives only that portion of the compensation payable for the haul over its own line. The Central Railroad of New Jersey is such a connecting carrier; and has a ferry terminal at the foot of W. 23rd St., New York City It issues there the customary coupon tickets over its own and connecting lines, including the Philadelphia & Reading and the Baltimore & Ohio. The whole ticket, in each case, is issued by the Central Railroad of New Jersey; and each coupon so recites. In these tickets there is a separate coupon for the journey over each of the connecting railroads; and the coupon for the journey over each such railroad bears also its name. Each coupon is declared thereon to be "void if detached." The Philadelphia & Reading receives in ultimate accounting between the carriers that portion of the fare which is paid for the journey over its own line. Passengers for points on the Philadelphia & Reading or on the Baltimore & Ohio, or beyond, may reach these railroads over the Central Railroad of New Jersey. At various places in and on this ferry terminal are signs bearing the name "Philadelphia & Reading," "P. & R." or "Reading"—and also like signs of the "Baltimore & Ohio," or "B. & O." In the New York telephone directory there are inserted the words "Phila. & Reading Ry., ft. W. 23rd St. Chelsea 6550." These signs on the terminal, this insertion in the telephone directory, and the information given in response to enquiries at the ticket office or over the telephone are all designed to facilitate and encourage travel and for the convenience of the public. Neither the Philadelphia & Reading nor the Baltimore & Ohio has any office or any employee at the terminal. The Philadelphia & Reading did not direct the insertion of its name in the telephone book. Chelsea 6550 is the number of the trunk line of the Central Rail-

road of New Jersey; and that company pays the whole expense of the telephone service.

An affidavit filed on plaintiff's behalf states that the names of the Philadelphia & Reading Coal & Iron Co. and of the Philadelphia & Reading Trans. Line, Towing Dept., appear in the telephone directory as at 143 Liberty Street, telephone number 5672 Cortlandt; and upon information and belief alleges that these are subsidiary companies of the Philadelphia & Reading and "tow the cars of said Company from the Jersey points to the City of New York."

The finding that the defendant was doing business within the State of New York is disproved by the facts thus established. The defendant transacts no business there; nor is any business transacted there on its behalf, except in the sale of coupon tickets. Obviously the sale by a local carrier of through tickets does not involve a doing of business within the State by each of the connecting carriers. If it did, nearly every railroad company in the country would be "doing business" in every State. Even hiring an office, the employment by a foreign railroad of a "district freight and passenger agent . . . to solicit and procure passengers and freight to be transported over the defendant's line," and having under his direction "several clerks and various traveling passenger and freight agents" was held not to constitute "doing business within the State." *Green* v. *Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530. Nor would the fact, if established by competent evidence, that "subsidiary companies" did business within the State, warrant a finding that the defendant did business there. *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364. As the defendant did no business in New York, we need not consider its other contention, that it could not be sued there on a cause of action arising in New Jersey and in no way connected with the business alleged to be

done in New York. On this proposition we express no opinion.

On behalf of the plaintiff it was also urged that an arrangement between counsel by which service of the summons had been facilitated operated as a waiver of all objections to the jurisdiction of the court. We find this contention to be unfounded.

The judgment of the District Court is reversed and the cause remanded to that court with directions to dismiss it for want of jurisdiction.

Reversed.

PENNINGTON *v.* FOURTH NATIONAL BANK OF CINCINNATI, OHIO.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 147. Argued January 26, 1917.—Decided March 6, 1917.

The power of the States to seize tangible and intangible property and apply it to satisfy the obligations of absent owners is not obstructed by the Federal Constitution.

The power is the same whether the obligation sought to be enforced be admitted or contested, liquidated or unliquidated, inchoate or mature.

The only essentials to its exercise are the presence of the *res*, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard.

Where these essentials exist, a decree for alimony will be valid under the same circumstances and to the same extent as a judgment on a debt, i. e., valid as a charge upon the property seized. So *held*, where the property was the divorced husband's bank account.

Property not subject to attachment at law may be reached in equity; an injunction entered at the commencement of proceedings for divorce and alimony may operate as a seizure, in the nature of a garnishment, of defendant's account in bank.

92 Ohio St., 517, affirmed.

THE case is stated in the opinion.

Mr. Guy W. Mallon for plaintiff in error.

Mr. W. S. Little, with whom *Mr. C. B. Wilby* was on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Mrs. Pennington obtained in a state court of Ohio a decree of divorce which is admitted to be valid. In the same proceeding she sought alimony; and in order to ensure its payment joined as a defendant the Fourth National Bank of Cincinnati in which her husband had a deposit account. When the suit was filed the court entered a preliminary order enjoining the bank from paying out any part of the deposit. Under later orders of the court the bank made payments from it to the wife. Finally it was perpetually enjoined from making any payment to the husband and ordered to pay the balance to the wife, which it did. The husband then presented to the bank a check for the full amount of the deposit, asserting that the court's orders deprived him of his property without due process of law, in violation of the Fourteenth Amendment, and were void, since he was a non-resident of Ohio, had not been personally served with process within the State, had not voluntarily appeared in the suit, and had been served by publication only, all of which the bank knew. Payment of the check was refused. Thereupon Pennington brought, in another state court of Ohio, an independent action against the bank for the amount. Judgment being rendered for the bank, he took the case by writ of error to the Court of Appeals for Hamilton County, and from there to the Supreme Court of Ohio. Both these courts affirmed the judgment below. Then the case was

brought to this court for review, Pennington still claiming that his constitutional rights had been violated.

The Fourteenth Amendment did not, in guaranteeing due process of law, abridge the jurisdiction which a State possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a non-resident—of which bank deposits are an example—is property within the State. *Chicago, Rock Island & Pacific Ry. Co.* v. *Sturm*, 174 U. S. 710. It is, indeed, the species of property which courts of the several States have most frequently applied in satisfaction of the obligations of absent debtors. *Harris* v. *Balk*, 198 U. S. 215. Substituted service on a non-resident by publication furnishes no legal basis for a judgment *in personam*. *Pennoyer* v. *Neff*, 95 U. S. 714. But garnishment or foreign attachment is a proceeding *quasi in rem*. *Freeman* v. *Alderson*, 119 U. S. 185, 187. The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power.

It is asserted that these settled principles of law cannot be applied to enforce the obligation of an absent husband to pay alimony, without violating the constitutional guaranty of due process of law. The main ground for the contention is this: In ordinary garnishment proceedings the obligation enforced is a debt existing at the commencement of the action, whereas the obligation to pay alimony arises only as a result of the suit. The distinction is, in this connection, without legal significance. The power of the State to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort.

It is likewise immaterial that the claim is at the commencement of the suit inchoate, to be perfected only by time or the action of the court. The only essentials to the exercise of the State's power are presence of the *res* within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt—that is, it will be valid not *in personam*, but as a charge to be satisfied out of the property seized.[1]

The objection that this proceeding was void, because there was no seizure of the *res* at the commencement of the suit, is also unfounded. The injunction which issued against the bank was as effective a seizure as the customary garnishment or taking on trustee process. Such equitable process is frequently resorted to in order to reach and apply property which cannot be attached at law.[2]

Affirmed.

---

[1] Enforcement of allowance of alimony from property of absent defendant seized at the commencement of the suit by attachment or similar process. *Hanscom* v. *Hanscom*, 6 Colo. App. 97; *Thurston* v. *Thurston*, 58 Minn. 279; *Wood* v. *Price*, 79 N. J. Eq. 1, 9–10. See *Bailey* v. *Bailey*, 127 N. Car. 474; *Twing* v. *O'Meara*, 59 Iowa, 326, 331. Cf. *Bunnell* v. *Bunnell*, 25 Fed. Rep. 214, 218.

The wife's inchoate right to alimony makes her a creditor of the husband under the statutes against fraudulent conveyances. *Livermore* v. *Boutelle*, 11 Gray, 217, 220; *Thurston* v. *Thurston*, 58 Minn. 279; *Murray* v. *Murray*, 115 Cal. 266, 274; *Hinds* v. *Hinds*, 80 Ala. 225, 227.

[2] An injunction issued against a resident debtor of a non-resident defendant is a sufficient seizure of the defendant's property to give jurisdiction. *Bragg* v. *Gaynor*, 85 Wis. 468, 487. See *Murray* v. *Murray*, 115 Cal. 266, 276. See *Tyler* v. *Judges of the Court of Registration*, 175 Mass. 71, 77.

PEASE *v.* RATHBUN-JONES ENGINEERING COMPANY.

PEASE ET AL. *v.* RATHBUN-JONES ENGINEERING COMPANY.

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

Nos. 360, 419. Submitted January 8, 1917.—Decided March 6, 1917.

Objection going to the form of the District Court's decree, if not taken on a first appeal to the Circuit Court of Appeals, may be deemed waived on a second.

A decree of the District Court that plaintiff "do have and recover" a stated sum, with provisions establishing a lien and for foreclosure, was affirmed by the Circuit Court of Appeals with directions that "such execution and further proceedings be had as according to right and justice, and the laws of the United States, ought to be had." *Held*, that a decree of the District Court directing foreclosure sale, and that execution issue for any deficiency, was consistent with, and did not exceed, the affirmance.

The amount of deficiency being fixed by the sale, the insertion of the amount in the execution was but a clerical act.

Under Rev. Stats. of Texas, Art. 1206, a suit against a corporation is not abated by its dissolution pending appeal.

Federal courts sitting in equity may render summary judgment against sureties on appeal bonds.

Such practice does not invade the constitutional right of trial by jury; nor is it objectionable upon the ground that the legal remedy, by action on the bond, is adequate.

While it is the proper and usual practice in such cases to give notice to the surety,—*Quære*, Whether notice is always essential?

Objections that a summary judgment on an appeal bond was not preceded by notice and deprived the sureties of the right of trial by jury are waived by invoking the trial court's decision of the merits upon an undisputed state of facts.

Quære: Whether Rule 29 of this court—Rule 13, 5th C. C. A.—intends that the sureties on a supersedeas bond shall not be bound to

pay deficiency decrees in foreclosure cases, but shall pay only the costs and damages resulting from the delay caused by the appeal?

A money decree against a corporation and its sureties on a supersedeas bond, followed by levy, was satisfied by a payment made by one of the sureties "as trustee for himself and the other stockholders" of the corporation. The record not showing that the surety paid as such, in satisfaction of his own liability, *Held*, that the sureties had no standing to complain of the decree, since satisfaction, by the principal obligor, ended their liability.

228 Fed. Rep. 273, affirmed.

THE case is stated in the opinion.

Mr. Perry J. Lewis and *Mr. Frank H. Booth* for petitioners.

Mr. Carlos Bee for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Pease and Heye were sureties on a supersedeas bond given on appeal to the United States Circuit Court of Appeals in a suit to foreclose a vendor's lien. The District Court for the Southern District of Texas had entered a decree against the People's Light Company, declaring that Rathbun-Jones Engineering Co. "do have and recover" $6,804.90 with interest; establishing a lien on certain personal property; and directing that it be sold to satisfy the judgment, if the same be not paid within sixty days. The appellate court affirmed the decree. 218 Fed. Rep. 167. The mandate directed that the defendant and the sureties "pay the costs of this cause in this Court, for which execution may be issued out of said District Court," and "commanded that such execution and further proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had." Thereupon the District Court, apparently without notice having been given specifically to sureties, entered its

"decree on mandate." This decree ordered "that said mandate be made the judgment of this Court"; that a sale be made as herein provided "to satisfy said judgment" and that "in the event said property does not sell for sufficient amount to satisfy said judgment, interest and costs, the clerk of this Court issue execution against the defendant and against the sureties on the appeal bond, . . . for any deficiency that may remain."

The sale was had. Pease being the highest bidder, purchased all the property for a sum which, when applied upon the judgment, left a large deficiency. Immediately after the sale and before execution issued, Pease and Heye's administratrix (he having died pending the appeal) filed, in the District Court, a motion that execution be stayed and that so much of the "decree on mandate" as directed its issue be set aside. On the same day a similar motion was filed by the trustee in liquidation of the People's Light Company (it having been dissolved pending the appeal). Both motions were presented by the counsel who had theretofore acted for the defendant. The authority of the court to issue the execution was attacked on several grounds. Both motions alleged that the original decree contained no provision for such execution and that it could not be enlarged on return of the mandate, because the term had expired at which it was entered. They alleged that the order for execution was illegal because the People's Light Company had been dissolved and Heye had died, pending the appeal. They asserted that the "decree on mandate" so far as it directed the issuance of the execution was "wrongful and illegal," because it "was entered by the court without pleading, without notice and without hearing, against, to or of these petitioners," and "deprived them of their property without due process of law." The motion on behalf of the sureties alleged also that they had been deprived of their constitutional right to "trial by jury in actions at common

law." The prayers for relief were rested, also, on still broader grounds, which involved directly the whole merits of the controversy. It was alleged that "the bond did not secure, . . . the payment of the amount of said judgment or any deficiency that might remain after the application of the proceeds of the sale of said property, but operated only as indemnity against damages and costs by reason of said appeal"—and that the costs on said appeal had been paid. The motions, which were fully heard upon evidence introduced by the petitioners, were denied. An appeal was taken by all the petitioners from this denial; and by Pease alone from the "decree on mandate." Both the decrees were affirmed on appeal; and a rehearing was refused. 228 Fed. Rep. 273. Thereupon petitions to this court for certiorari to the Circuit Court of Appeals were filed and granted.

After issue of the execution Pease instituted still another proceeding—a suit to restrain its enforcement. But when the injunction was denied by the District Court, the marshal made levy and Pease "as Trustee for himself and the other stockholders of the People's Light Company" paid to the clerk of court the balance due on the judgment. An appeal from the denial of the injunction was dismissed by the Circuit Court of Appeals; but review of that decree is not sought here.

The petitioners still contend on various grounds that the proceedings below are void for lack of due process of law, or should be set aside for error.

First. It is contended that the "decree on mandate" was void so far as it ordered execution to issue for any deficiency; because that direction was not contained in the original decree or in the mandate of the Circuit Court of Appeals. We are referred to cases holding that the lower court must enforce the decree as affirmed without substantial enlargement or alteration. But the original decree ordered that the plaintiff "do have and recover" $6,804.90.

This is the customary language used in personal judgments which are without further direction enforceable by general execution. If the defendant desired to insist that, because the suit was a foreclosure proceeding, the decree in this form was not proper, the objection should have been taken on the first appeal, and not having been so taken must be considered as waived. The "decree on mandate" obeyed the command of the mandate "that such execution and further proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had." The amount of the deficiency was fixed by the sale; the insertion of the amount in the execution was but a clerical act.

Second. It is contended that all suits pending against the People's Light Company abated upon its dissolution. As we read the Texas statute (Rev. Stats. 1911, Art. 1206), such a consequence is carefully avoided. It is there provided that upon dissolution the president and directors shall be trustees of the creditors and stockholders of the corporation "with full power to settle its affairs," and with power "in the name of such corporation . . . to collect all debts, compromise controversies, maintain or defend judicial proceedings." This general language makes no distinction between pending and subsequent "judicial proceedings," which the trustees are empowered to maintain and defend in the corporation's name; and there seems no reason why such a distinction should be read into the statute. There is also the further provision in the section that "the existence of every corporation may be continued for three years after its dissolution from whatever cause, for the purpose of enabling those charged with the duty to settle upon its affairs." The People's Light Company which takes this appeal and gives bond for its successful prosecution is hardly in a position to assert that it is non-existent and incapable of maintaining and defending pending suits.

Third. It is contended that the District Court had no power under the Constitution to render a summary judgment against the sureties upon affirmance of the decree appealed from, and that resort should have been had to an action at law. The method pursued has been introduced by statute into the practice of many States, including Texas. Rev. Civ. Stats., Art. 1627.[1] Pursuant to the requirements of the Conformity Act (Rev. Stats., § 914), this practice is followed by the federal courts in actions at law. *Hiriart* v. *Ballon*, 9 Pet. 156; *Gordon* v. *Third National Bank*, 56 Fed. Rep. 790; *Egan* v. *Chicago Great Western Ry. Co.*, 163 Fed. Rep. 344. The constitutional right of trial by jury presents no obstacle to this method of proceeding, since by becoming a surety the party submits himself "to be governed by the fixed rules which regulate the practice of the court." *Hiriart* v. *Ballon*, 9 Pet. 156, 167. Although the adoption of state procedure is not obligatory upon the federal courts when sitting in equity, they have frequently rendered summary judgment against sureties on appeal bonds.[2] Some of the District Courts by

[1] Summary judgment was entered on appeal bonds in the following cases: *White* v. *Prigmore*, 29 Ark. 208; *Meredith* v. *Santa Clara Mining Assn.*, 60 Cal. 617; *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388 (Illinois); *Jewett* v. *Shoemaker*, 124 Iowa, 561; *Greer* v. *McCarter*, 5 Kans. 17; *Holmes* v. *Steamer Belle Air*, 5 La. Ann. 523; *Chappee* v. *Thomas*, 5 Mich. 53; *Davidson* v. *Farrell*, 8 Minn. 258; *Beall* v. *New Mexico*, 16 Wall. 535 (New Mexico); *Clerk's Office* v. *Huffsteller*, 67 N. Car. 449; *Charman* v. *McLane*, 1 Oreg. 339; *Whiteside's Admr.* v. *Hickman*, 2 Yerg. (Tenn.) 358; *Allen* v. *Catlin*, 9 Wash. 603.

[2] Cases where equity courts gave summary judgment against the sureties on appeal bonds: *Woodworth* v. *N. W. Mut. Life Ins. Co.*, 185 U. S. 354; *Smith* v. *Gaines*, 93 U. S. 341; *Richards* v. *Harrison*, 218 Fed. Rep. 134 (D. C. S. D. Iowa); *Fidelity & Deposit Co.* v. *Expanded Metal Co.*, 183 Fed. Rep. 568 (3rd C. C. A.), affirming *Expanded Metal Co.* v. *Bradford*, 177 Fed. Rep. 604; *Perry* v. *Tacoma Mill Co.*, 152 Fed. Rep. 115 (9th C. C. A.); *Empire State, etc., Developing Co.* v. *Hanley*, 136 Fed. Rep. 99 (9th C. C. A.); *Brown* v. *N. W. Mut. Life Ins. Co.*, 119 Fed. Rep. 148 (8th C. C. A.).

formal rule of court require the bond to contain an express agreement that the court may, upon notice to the sureties, proceed summarily against them in the original action or suit. See Rule 91, Ariz. Dist. Court Rules, adopted March 5, 1912; Rule 90, Wash. Dist. Court Rules, 1905. But this is not a general provision; nor is it a necessary one. For, as this court has said, sureties become quasi-parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgment may be rendered on their bonds. *Babbitt* v. *Finn*, 101 U. S. 7, 15. The objection that a court of equity has no jurisdiction because there is an adequate remedy at law on the bond is not well taken. A court of equity, having jurisdiction of the principal case, will completely dispose of its incidents and put an end to further litigation. Applying this principle equity courts, upon the dissolution of an injunction, commonly render a summary decree on injunction bonds.[1]

Fourth. It is contended that notice was not given to the surety of the motion for summary judgment. It is a proper and usual practice to give such notice; but it may be questioned whether notice is always essential. See *United Surety Co.* v. *American Fruit Product Co.*, 238 U. S. 140; *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388.[2]

[1] Cases where it was held that courts of equity might render summary judgment on injunction bonds: *Russell* v. *Farley*, 105 U. S. 433, 445; *Lea* v. *Deakin*, 13 Fed. Rep. 514 (C. C. N. D. Ill.); *Lehman* v. *M'Quown*, 31 Fed. Rep. 138 (C. C. Colo.); *Coosaw Mining Co.* v. *Farmers' Mining Co.*, 51 Fed. Rep. 107 (C. C. S. C.); *Tyler Mining Co.* v. *Last Chance Mining Co.*, 90 Fed. Rep. 15 (9th C. C. A.); *Cimiotti Unhairing Co.* v. *American Fur Refining Co.*, 158 Fed. Rep. 171 (C. C. N. J.). A few of the Districts have a rule of court providing that damages upon dissolution of an injunction "may be assessed in the same proceeding, either by the court or by reference to a master and judgment entered in the same action against the sureties on the bond." See Ark., West. D. Rule XVI, as amended to Feb. 27, 1908; Ark., East D. Rule XIV, as amended to Oct. 1, 1915.

[2] Cases showing the usual practice of giving to the sureties notice of

Furthermore, the last two objections, if originally well taken, were waived or cured by the subsequent proceedings. For the motions filed later invoked a decision by the court upon the question of the sureties' liability on the evidence presented by them; and no relevant fact was in dispute. There was no issue to submit to a jury, even if the sureties had been otherwise entitled thereto. After thus voluntarily submitting their cause and encountering an adverse decision on the merits, it is too late to question the jurisdiction or power of the court. *St. Louis & San Francisco Ry. Co.* v. *McBride*, 141 U. S. 127; *Western Life Indemnity Co.* v. *Rupp*, 235 U. S. 261, 273.

Fifth. It is further contended that the District Court erred in entering judgment against the surety for the deficiency, instead of merely for the costs and any damages to the plaintiff resulting from the delay incident to the unsuccessful appeal. This objection raises a more serious question. The supersedeas bond was in the common form, conditioned that the appellant shall "prosecute its appeal to effect and answer all damages and costs, if it fails to make its plea good." It has long been settled that a bond in that form binds the surety, upon affirmance of a judgment or decree for the mere payment of money, to pay the amount of the judgment or decree. *Catlett* v. *Brodie*, 9 Wheat. 553. Rule 29 of this court—Rule 13, 5th C. C. A.—makes provision for a difference with respect to the bond, between a judgment or decree for money not otherwise secured, and cases "where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages." It is not

---

the motion: *Empire State, etc., Developing Co.* v. *Hanley*, 136 Fed. Rep. 99; *Gordon* v. *Third National Bank*, 56 Fed. Rep. 790. Cf. *Leslie* v. *Brown*, 90 Fed. Rep. 171. Cases in state courts holding that notice to the surety is not requisite: *Rogers* v. *Brooks*, 31 Ark. 194; *Meredith* v. *Santa Clara Mining Assn.*, 60 Cal. 617; *Jewett* v. *Shoemaker*, 124 Iowa, 561; *Portland Trust Co.* v. *Havely*, 36 Oreg. 234, 245.

clear whether the purpose of the rule, in case of secured judgments or decrees, was merely to limit the amount of the penalty, or was also to affect the nature of the liability, so that the sureties would be liable to answer only for the costs, and damages actually resulting from the delay.

We are, however, relieved from deciding this question; because the record discloses that after the issue of the execution complained of Pease paid the amount due "as Trustee for himself and the other stockholders of the People's Light Company." In other words, the record does not show that Pease paid the amount as surety in satisfaction of the deficiency judgment against himself. The payment by him may have been made "as trustee," because before that time the corporation had been dissolved. If this payment was made on behalf of the corporation, obviously Pease could get no benefit from a reversal of the decree; and as the decree has been satisfied by the principal obligor the sureties are in no danger of further proceeding against themselves. On the facts appearing of record the decree is, therefore,

Affirmed.

SWIFT & COMPANY *v.* HOCKING VALLEY RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 376. Argued December 5, 1916.—Decided March 6, 1917.

A railroad company, under a written agreement reserving a small annual rental and terminable on 30 days' notice, allowed a packing company the use, for warehouse purposes, of land belonging to the railroad and adjacent to one of its sidings, including a switch con-

nected with its main line. The agreement provided that the licensee should not interfere with the tracks of the railroad company, and that the switch track should be at all times under the railroad company's control; also, it reserved to the latter a right to enter at all times "for the purpose of repairing or maintaining the track thereon, or switching or removing cars thereover." The switch track was used by cars moving goods of the licensee in interstate commerce between the warehouse and the main line. *Held*, that under this arrangement the switch track was not to be regarded as a private track, but as a track of the railroad company.

The court cannot be controlled by an agreement of counsel on a subsidiary question of law.

The court cannot decide fictitious cases.

A stipulation of counsel, made only for the purpose of reviewing a judgment rendered on demurrer to the petition, and declaring a proposition which, tested by the petition, is erroneous in fact and in law, will be treated by this court as a nullity.

The fact that effect was given to such a stipulation by the state courts below does not conclude this court.

Where the shipper lets his private cars to the carrier in consideration of mileage charged on both outgoing and return journeys, allowing the carrier to freight them on the return if the shipper does not, and the freight charged upon all goods hauled is the same as for goods hauled in cars owned by the carrier, the cars of the shipper are in the service of the carrier while standing loaded with goods consigned to the shipper on a switch track of the carrier at the shipper's warehouse.

In such case, the "transportation," within the meaning of the Act to Regulate Commerce, has not ended, and demurrage for detention of the cars by their owner may reasonably be exacted by the carrier, in accordance with its rules and rates duly published and filed.

93 Ohio St. 143, affirmed.

THE case is stated in the opinion.

Mr. M. Hampton Todd and *Mr. William L. Day* for plaintiff in error.

Mr. C. M. Horn, with whom *Mr. James H. Hoyt* was on the briefs, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The National Convention of Railway Commissioners, an association comprising the commissioners of the several States, adopted in November, 1909, a Uniform Demurrage Code. Its action was based upon extensive investigations and thorough discussion, participated in by the railroad commissioners, commercial organizations, representatives of railroads and individual shippers from all parts of the country. On December 18, 1909, the Interstate Commerce Commission endorsed the rules so adopted and recommended "that they be made effective on interstate transportation throughout the country." *In re Demurrage Investigation*, 19 I. C. C. 496.

These rules provide that after two days' free time "cars held for or by consignors or consignees for loading" or unloading shall, (with certain exceptions not here material) pay a demurrage charge of $1 per car per day. Private cars are specifically included by the following note:

NOTE.—Private cars while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

(Empty private cars are in railroad service from the time they are placed by the carrier for loading or tendered for loading on the orders of a shipper. Private cars under lading are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service, are in railroad service from the time they are placed by the industry upon designated interchange tracks, and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if

returned under load, railroad service is not at an end until the lading is duly removed.)

In 1910 the Hocking Valley Railway Company, an interstate carrier, inserted in its freight tariff duly filed and published as required by the Act to Regulate Commerce, the demurrage rules and charges, including that relating to private cars quoted above. Thereafter, Swift & Company, Chicago meat packers, established on the line of that railroad at Athens, Ohio, a warehouse to which it made, from time to time, shipments in private cars. These cars, which were placed on the switch used in connection with the warehouse, were not unloaded within the forty-eight hours' free time allowed by the tariff; and demurrage charges were assessed by the Railway Company. Payment being refused, this action was brought in the Court of Common Pleas of Cuyahoga County, Ohio, to recover the amount. The amended petition alleged, among other things, that the demurrage rules and charges had been "approved by the Interstate Commerce Commission, by a decision rendered by said Commission on the 14th day of November, 1910, in the case of Proctor and Gamble Company against Cincinnati, Hamilton & Dayton Railway Company et al., which decision is reported in the 19th volume of the Interstate Commerce Commission Reports, pages 556 to 560, inclusive thereof, and which decision, approving said car demurrage rules and charges, is hereby referred to and made a part hereof, as though the same were fully written out at length herein."

Swift & Company demurred; and defended on the single ground that the cars in question were its private cars standing on its "private track"; contended that the demurrage rule which required payment of charges under such circumstances was an arbitrary imposition; that it was unlawful and void; and that it was subject to collateral attack, even though included in a tariff duly filed and published under the Act to Regulate Commerce. Two

days after the case had been heard on demurrer in the Court of Common Pleas, counsel filed a stipulation as follows:

"For the purpose only of reviewing the judgment of the Common Pleas Court on defendant's demurrer to the amended petition, it is stipulated by the parties hereto that the track on which the cars in question were placed was the private track of Swift and Company."

The next day judgment was rendered for the Railway Company. It was affirmed both by the Court of Appeals of Cuyahoga County and by the Supreme Court of Ohio. 93 Ohio St. 143.

The Supreme Court of Ohio assumed the track in question to be a "private track" as stipulated by the parties, and declared that "demurrage rules relating to private cars employed in interstate commerce and the charges assessable thereunder are matters properly included in the tariff or schedule required to be filed and published. This tariff containing the demurrage rule having been filed and published according to law, was binding alike on carrier and shipper, and so long as it was in force was to be treated as though it were a statute. . . . This rule having been approved by a federal tribunal, acting within the scope of its authority, its decision must be followed by the courts of this state and be given full force and effect."

The case was then brought to this court on writ of error. The errors assigned were, in substance, that the demurrage rule was repugnant to the Act to Regulate Commerce and that the decisions below deprived Swift & Company of its property without the due process of law guaranteed by the Fourteenth Amendment.

Prior to the bringing of this action the Interstate Commerce Commission had held in *Procter & Gamble Co.* v. *Cincinnati, Hamilton & Dayton Ry. Co.*, 19 I. C. C. 556, that carriers were "within their lawful rights in establish-

ing and maintaining" the above rule for demurrage charges on private cars. The Commerce Court approved the finding. *Procter & Gamble Co.* v. *United States*, 188 Fed. Rep. 221, 227. An effort to secure a review of these decisions by this court failed. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282.

We do not find it necessary to decide whether the ruling of the Supreme Court of Ohio was correct; or whether the rule concerning demurrage charges on private cars is in all respects valid; or whether a shipper who has delivered private cars to a carrier knowing such rule to be in force is in a position to question its validity in an action for charges accruing thereunder. For the record discloses, contrary to the statement in the stipulation, that the track in question was *not* a "private track."

The facts which determine the character of the switch and the relation to it of carrier and shipper were carefully set forth in the amended petition and the "License" annexed, copied in the margin.[1] Under it Swift & Com-

[1] EXHIBIT "B."—*License.*—Memorandum of agreement, made this twenty-second day of March, A. D. 1911, by and between the Hocking Valley Railway Company, a corporation existing under the laws of the State of Ohio, hereinafter known as the "Railway Company," party of the first part, and Swift & Company, a corporation whose principal place of business is in Chicago, County of Cook, State of Illinois, hereinafter known as the "Licensee," party of the second part, Witnesseth:

Whereas, the Licensee, at its own request, desires to occupy a tract of ground belonging to the Railway Company at Athens, Ohio, for the purpose of maintaining thereon a warehouse and office in connection with its business at that point, together with all the improvements and appurtenances thereto, in such a manner as not in any way to interfere with the premises, buildings, structures, tracks or business of said Railway Company, upon the following described premises, to wit:

The Northeast part of outlot No. 112 and the Northwest part of outlot No. 113, in the Village of Athens, Ohio, fronting 175 feet on the South side of State Street, immediately West of the premises occupied

pany occupied a part of the Railway Company's premises for its warehouse and office and enjoyed the rights in the switch from its main lines. The "License" recites, among other things, the Licensee's desire "to occupy a tract of

---

by the Standard Oil Company, said tract extending Southward from said street to the North side of the Railway Company's siding, known as the "Bank Track" as will more clearly appear shaded in yellow on blue print hereto attached and made a part hereof, for a period of five (5) years, beginning on the 1st day of November, 1910, at a rental of Thirty ($30.00) Dollars per annum, payable annually in advance on the following terms and conditions, to-wit:

First. This agreement shall not be assigned by the Licensee without the written consent of the Railway Company being first obtained, and in case the said Licensee shall permit its interests to be seized or sold under legal process, this agreement shall thereupon become null and void.

Second. The switch of the Railway Company hereby let and connected with its main line, shall at all times be under control of the Railway Company.

Third. The Railway Company shall have the right at all times to enter upon the premises hereby let, for the purpose of repairing or maintaining the track thereon, or switching or removing cars thereover.

Fourth. Either party hereto may terminate this agreement at any time, after giving to the other party thirty (30) days' notice in writing, and at or before the termination of said thirty (30) days said Licensee shall at its own expense remove all said improvements from said premises, without causing damage of any kind to the property of the Railway Company. Upon its failure to do so within said time the Railway Company may make such removal at the sole cost of the Licensee.

Fifth. The Licensee shall pay all taxes assessed upon improvements upon said premises or said premises by reason thereof and will at all times hereafter indemnify and save harmless the Railway Company, its successors and assigns, from and against all loss, costs, charges and accidents whatsoever, which it may suffer, sustain or in any wise be subjected to, on account of injuries accruing to its property, or loss or damage to the property of any other person or corporation, arising out of, resulting from or in any manner caused by the construction, erection, maintenance, presence or use of said improvements installed or existing under this agreement, and said Railway Company shall not be liable in any way for any loss or damage to said improvements or to any property belonging to or in the possession or control of said Li-

ground belonging to the Railway Company . . . for the purpose of maintaining thereon a warehouse and office . . . in such a manner as not in any way to interfere with the . . . tracks . . . of said Railway Company . . . "; that the premises lie on "the North side of the Railway Company's siding, known as the 'Bank Track' . . . "; that "the switch of the Railway Company hereby let and connected with its main line, shall at all times be under control of the Railway Company"; and that "the Railway Company shall have the right at all times to enter upon the premises hereby let, for the purpose of repairing or maintaining the track thereon, or switching or removing cars thereover." A rental of $30 per annum is provided for; but the license is terminable on 30 days' notice.

These facts were admitted by the demurrer. Upon

---

censee on or about said premises, resulting from the operation of and use of its railway, engines, cars or machinery, or by reason of fire or sparks therefrom, or any other casualty arising from the use and operation of its railway, and shall be held forever free and harmless by said Licensee from any such liability.

Sixth. The Licensee shall consign all products shipped to it, intended to be placed on the siding hereby let, where the rates and services are equal, via the line or lines of the Railway Company, and shall give said Railway Company the long hauls thereof.

Seventh. The Licensee hereby accepts the License herein made with the above specified terms and conditions, and agrees that any failure or default on its part as to either of the same, may be held and considered a forfeiture and surrender of this License by it.

In Witness Whereof, the parties hereto have caused this instrument to be executed in duplicate, on the day and year first above written.

THE HOCKING VALLEY RAILROAD COMPANY,
(Signed) By W. L. MATTOON, *Real Estate Agent.*
SWIFT & COMPANY,
(Signed) By L. B. SWIFT.
Witness:
(Signed) E. OSLER HUGHES.
Witness:
(Signed) D. E. HARTWELL.

them the case was heard by the Court of Common Pleas; and upon them the case must be decided in this court, unaffected by stipulation of counsel made "for the purpose only of reviewing the judgment of the Common Pleas Court." The construction and effect of a written instrument is a question of law. *Dillon* v. *Barnard*, 21 Wall. 430, 437. Clearly the track in question was not a private track of the shipper but a track of the carrier—like the spur passed upon in *National Refining Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 237 Fed. Rep. 347, affirming 226 Fed. Rep. 357.

If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law.[1] If the stipulation is to be treated as an attempt to agree "for the purpose only of reviewing the judgment" below that what are the facts shall be assumed not to be facts, a moot or fictitious case is presented. "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. . . . No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard." *California* v. *San Pablo & Tulare R. R. Co.*, 149 U. S. 308, 314. See *Mills* v. *Green*, 159 U. S. 651, 654. The fact that effect was given to the stipulation by the appellate courts of Ohio does not conclude this court. See *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405, 410. We treat the stipulation, therefore, as a nullity.

---

[1] *San Francisco Lumber Co.* v. *Bibb*, 139 Cal. 325; *Owen* v. *Herzihoff*, 2 Cal. App. 622; *Aubuchon* v. *Bender*, 44 Mo. 560; *Prescott* v. *Brooks*, 94 N. W. Rep. 88, 94 (N. D.); *Holms* v. *Johnson*, 59 Tenn. 155. See also *Breeze* v. *Haley*, 11 Colo. 351, 362; *Lyon* v. *The Robert Garrett Lumber Co.*, 77 Kans. 823, 827; *Wells* v. *Covenant Mutual Benefit Assn.*, 126 Mo. 630, 639.

Consignors or consignees of freight shipped in private cars pay the same rates for transportation as if the commodities had been shipped in the cars owned by the carriers; but the owners or lessees of private cars are paid or allowed by the carriers (east of the Mississippi River) a sum equal to three-fourths of a cent per mile for refrigerator or tank cars and three-fifths of a cent per mile for other cars. The cars are returned by the railroads to the owners without extra charge. The mileage allowance is paid for the return trip as well as on the journey to destination with load. And if the private car owner does not furnish a load for the return journey the carriers have the right to load the cars. *Re Demurrage Charges on Tank Cars*, 13 I. C. C. 378, 379.

Swift & Company's cars were, therefore, though privately owned, still in railroad service while under lading. The cars while on the switch were on track owned by the Railway Company. The "transportation" within the meaning of the Act to Regulate Commerce had not ended. It cannot be said that a charge for detention of a private car and use of a railroad track under such circumstance is unreasonable. Even before the adoption of the Uniform Demurrage Code such a charge had been upheld by the Interstate Commerce Commission. *Cudahy Packing Co.* v. *Chicago & Northwestern Ry. Co.*, 12 I. C. C. 446. Defendant's argument was based wholly upon the assumption that the switch was a "private track"; and the propriety of such a charge for cars detained on a public track seems not to have been questioned.

Affirmed.

Mr. Justice McKenna, Mr. Justice Van Devanter and Mr. Justice McReynolds dissent.

LIE, MASTER OF THE NORWEGIAN STEAMSHIP "SELJA," &c. *v.* SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, CLAIMANT OF THE AMERICAN STEAMSHIP "BEAVER," &c.

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

No. 110. Argued December 21, 1916.—Decided March 6, 1917.

When a steam vessel proceeding in a fog hears apparently forward of her beam the fog signal of another vessel whose position is not ascertained, the duty to stop the engines, if the circumstances admit, is imperative, under Article 16 of the International Regulations for preventing collisions at sea, adopted by the Act of August 19, 1890, 26 Stat. 320, and effective July 1, 1897, 29 Stat. 885.

A negligent breach of this statutory duty, contributing directly to cause a collision, is not excusable upon the ground that the vessel was navigated in accordance with what would have been good seamanship had not the duty been imposed.

When a collision is attributable to the palpable negligence of both masters, the negligence of each continuing to operate as an efficient cause until the moment when the accident occurs, the doctrine of major and minor fault does not apply.

219 Fed. Rep. 134, affirmed.

THE case is stated in the opinion.

Mr. Edmund B. McClanahan, with whom *Mr. S. Hasket Derby* and *Mr. L. Russell Alden* were on the briefs, for petitioner.

Mr. J. Parker Kirlin for respondent.

MR. JUSTICE CLARKE delivered the opinion of the court.

On his own behalf and on behalf of the owners, officers and crew of the Norwegian steamship "Selja," the peti-

tioner, Olaf Lie, her master, instituted this suit in admiralty against the American steamship "Beaver" to recover for the loss of the "Selja," her equipment and the personal effects of her officers and crew, which was occasioned by the collision of the two ships on the afternoon of November 22, 1910, near Point Reyes, on the California coast. For the purposes of trial this case was consolidated with an intervening libel by the owners of the cargo of the "Selja" and with an independent suit by her charterers to recover for loss of freight.

When approaching San Francisco, the end of her voyage from Yokohama, the "Selja," a freight carrying steamship, collided in a fog with the "Beaver," a passenger and freight carrying steamer then on a voyage from San Francisco to Portland, Oregon, and was so damaged that she sunk, a total loss, in about fifteen minutes.

From one o'clock in the morning of November 22nd, the "Selja" had been running in a fog which, for a considerable time before the collision, was so thick that it was possible to see only about twice her length—about 800 feet.

The master of each ship makes the characteristic claim that at the moment of collision he had his engines working full speed astern, and each claims that his vessel was without headway when the two came together. It is beyond controversy, however, that the "Beaver" was running at a rate of speed much too high for prudent navigation in the then prevailing fog until her master heard the whistle of the "Selja" about three minutes before the accident, and it is beyond controversy also that this negligent speed contributed directly to cause the collision. The two lower courts agree that the "Beaver" was culpably negligent but they also find that the master of the "Selja" was likewise negligent in the navigation of his ship in a manner which contributed directly to bring about the accident, and therefore, while allowing

recovery by the owners and underwriters of the cargo, by the charterers of the "Selja" and by her other officers and crew, they decreed that, apportioning the damages suffered by the owner and master of the "Selja" and by the owner of the "Beaver," under the usual rule of cross liabilities, there could be no recovery by the master, Lie, personally, or by the owners of the "Selja," and it is from this denial of the right to recover by Lie and by the owners of the "Selja" and from the order as to the payment of costs that this appeal is prosecuted.

The petitioner claimed in the courts below and in this court still claims, that if the master of the "Selja" was negligent at all, which is denied, his negligence was of such a character and had so spent its effect long before the accident, that in the most unfavorable view that can be taken of it was a remote and not a proximate cause of the collision and that, therefore, the "Beaver" being palpably negligent, he has a lawful right to recover.

The master of the "Selja" admits that he heard, what ultimately proved to be the warning fog whistle of the "Beaver," at three o'clock, and therefore the ships must be considered as within the danger zone from that time forward, and the decision of the case turns upon what was done by the two vessels during the sixteen minutes which elapsed between three o'clock and the moment of collision.

There is all of the customary conflict between the stories told by the officers of the respective vessels, but we think that a correct and just decision of the case may be arrived at by accepting the statements of the master of the "Selja," as they appear in various parts of the record.

His narrative of what occurred during the fateful sixteen minutes after three o'clock may be condensed into the following:

At three o'clock I was running at half speed (six knots an hour) and very shortly after that I heard for the first

time "a whistle about right ahead"—"dead ahead"—which proved to be the whistle of the "Beaver." "It sounded faint, but distinct," and I could then see only about two lengths of my ship (about 800 feet). The sea was calm, with a long westerly swell, there were no noises on the ship to interfere with my hearing the whistle, which blew at intervals of 56 or 57 seconds and for five seconds each time. When I first heard the whistle it sounded far away, and "it just came into my mind that it might be one of the fog horns off the Golden Gate," at Point Bonita, about twenty miles away. After I heard the whistle the third time I commenced to time it and continued to do so until five minutes past three o'clock, when I concluded that it was the whistle of an approaching steamer, and I reduced speed from half speed (six knots) to slow speed (three knots an hour) because "I considered that six knots was not moderate enough under the circumstances." I did not stop my engines when I first heard the whistle or when I concluded that it was that of an approaching steamer "because the sound was located as good as it could be located in the fog and showed absolutely no danger of a collision." (This statement is twice repeated in the testimony.) "I was familiar with the international rule which requires a steamer to stop in a fog." During the entire fifteen minutes before the accident I heard the whistle of the "Beaver" blow every 56 or 57 seconds and for five seconds at a time, and the "Selja" blew one single blast between each two blasts of the "Beaver's" whistle—I "answered his whistle" from three o'clock until the collision. My engines were reduced to slow speed at five minutes after three o'clock, and they were kept at this speed—three knots an hour—until 3.10 o'clock when they were stopped. At 3.13 my ship still had steerage way upon her and at 3.14 she was not quite at a standstill, but was still moving a little through the water and I intended to answer the "Beaver's" next whistle with

two blasts of my whistle, which would have meant that my boat was stopped and had no way upon her. I did not tell my third officer to blow the two whistles as I intended to do "because the 'Beaver' loomed in sight and I saw her blow three whistles." I mean "I saw steam come out of his whistle and I heard it, of course, at the same time." "She loomed in sight and the three whistles were almost at the same time." When I saw and heard the three whistles from the "Beaver" I told my third officer to blow three whistles, and I rang "full speed astern" on my engine at the same time. I noticed that the "Beaver" was coming fast by the way she cut the water. I was watching the "Beaver" carefully and I thought probably she would pass wide of me, her starboard side was widening all the time and I was watching her. I first saw the "Beaver" approaching at about 3.15. She was then about 900 feet away and about a minute after, the collision came.

The foregoing statements of fact are as favorable to the petitioner as he can possibly deserve. They leave out of account a number of statements claimed to have been made by him; to the master of the "Beaver" immediately after the accident; to the agent of the company which had the "Selja" under charter on the day after the accident, and to the United States inspector of steam vessels on the second day after the accident, all of which are in serious conflict with, and are much less favorable to, his claim than the summary we have given.

In the year 1889 representatives of over thirty of the maritime nations of the world met in convention at Washington for the purpose of discussing the international code of rules to prevent collisions at sea, and of suggesting such changes and modifications as experience had shown to be necessary. The recommendations of this convention were adopted by Act of Congress of August 19, 1890 (26 Stat. 320), became effective by proclamation of the

President (29 Stat. 885), on the first day of July, 1897, and have been operative ever since.

Of these rules the following is applicable to the case we are considering:

"Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

The most cursory reader of this rule must see that while the first paragraph of it gives to the navigator discretion as to what shall be "moderate speed" in a fog, the command of the second paragraph is imperative that he shall stop his engines when the conditions described confront him. The difficulty of locating the direction or source from which sounds proceed in a fog, renders it not necessary to dwell upon the purpose and obvious wisdom of this second paragraph of the rule.

Mr. Justice Brown, an experienced admiralty lawyer, but repeated the expression of many cases, which finds new illustration in the mistake in this case made by the master, Lie, in determining the location and the distance of the "Beaver," when he said, in *The Umbria*, 166 U. S. 404, 408: "It is difficult to locate the exact position of a vessel in a fog, and still more difficult to determine her course and distance." And the Circuit Court of Appeals in this case expresses the result of testimony constantly met with in the trial of such cases when it says: "The cases are very numerous in which the approaching whistle which sounded far off was really very close, and in which the sound seemed to come from one direction, while in fact it came from another. Indeed, it is a matter of com-

mon knowledge that sounds in a dense fog are very deceptive."

It is enough to say that this second paragraph is an addition to the former rule for preventing collisions at sea, which the International Conference recommended, after full discussion by the most intelligent seafaring men of many nations; that, at the time of the collision, obedience to it was commanded by Act of Congress and by the law of the country under the flag of which the "Selja" was sailing, and that if it had been obeyed the collision would not have occurred.

By his own statement, as we have epitomized it, Lie, the master of the "Selja," confesses that when he first heard the whistle of the "Beaver" he realized that it was "forward of the beam" of his ship, and although it is plain that he was not able to ascertain the position of the vessel from which the danger warning came, for he thought it the whistle at Point Bonita, twenty miles away, yet he not only did not stop his engines, as required, but, on the contrary, he continued to run them for five minutes following at half speed (6 knots an hour) in thick fog, until each succeeding whistle of the "Beaver" sounding nearer than the one before, at length convinced him that it was the whistle of an approaching steamer. But even then, when convinced that the danger signals which he had been hearing repeated at one minute intervals for five minutes were from an approaching steamer still "forward of his beam," he did not obey the rule by stopping his engines, but contented himself with reducing his speed to slow, three knots an hour, not out of deference to the rule of law, but because, as he says "I considered that six knots was not moderate enough under the circumstances," and this speed he continued for five minutes longer, until ten minutes past three, when, at length, he ordered his engines stopped, with the result, he is obliged to confess, that at 3.14, two minutes before

the collision, his ship still had steerage way upon her, "was not quite at a standstill," and a moment later the crash came. It is of no avail for this master to say that at the instant of the accident he thinks the momentum of his ship had been overcome, and that she was commencing to move backward in response to the "full speed astern" order, which had been given during the instant that had elapsed between the appearance of the "Beaver" through the fog and the coming of the ships together, for the evil had been done and the collision rendered inevitable.

When it is considered that the statement of the master of the "Selja" as to the moment when he gave the order to reduce speed from half to slow, and then from slow to stop, and then from stop to full speed astern, are all but approximations, arrived at after the disaster to his ship had occurred, when every possible influence, conscious and unconscious, was operating to induce a recollection favorable to the conclusion he most desired, it is not possible in the administration of practical justice to avoid the conclusion that the effect of the wilful disobedience of this imperative and important statutory rule of law, which should have governed his conduct, continued as an effective force, operating on the movement of his vessel to the instant of collision, driving her forward steadily, even though in the last moments slowly, to the fateful point of intersection of the courses of the two ships.

Such a state of fact makes sharply applicable the conclusion of this court in *The Pennsylvania*, 19 Wall. 125: "But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

The record before us not only fails to show that the fault of the "Selja" might not have been one of the causes of the accident, or that it probably was not, or that it could not have been one of the causes of it, but, on the contrary, it clearly shows, as we have seen, that the negligent failure to observe the statutory rule contributed directly to cause the collision.

The case is not one for the application of refinements as to what would have been good seamanship without the rule, such as we are invited in argument to consider, nor is it a case for consideration of the doctrine of major and minor fault. Both of the masters were palpably negligent in respects which contributed directly to cause the collision; the negligence of each continued to operate as an efficient cause until the moment when the accident occurred, and we agree with the lower courts that the case is one in which the master and owner of the "Selja" must be left to suffer their self-inflicted loss.

The judgment of the Circuit Court of Appeals is

Affirmed.

MEMPHIS STREET RAILWAY COMPANY *v.* MOORE, ADMINISTRATOR OF DOUGLAS.

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

No. 623. Argued January 29, 1917.—Decided March 6, 1917.

Where no conflict with the Federal Constitution or laws is involved, a construction of a state statute by the highest court of the State is accepted by this court as conclusive.

The act of Tennessee providing that when nonresidents qualify in the State as the personal representatives of decedents dying and leaving assets therein such nonresidents shall be treated as citizens of the

State for the purpose of suing and being sued, was not intended to exclude them from resort to the federal courts.

The purpose of the act as construed by the State Supreme Court was to permit them to sue *in forma pauperis*.

232 Fed. Rep. 708, affirmed.

THE case is stated in the opinion.

Mr. Roane Waring, with whom *Mr. Luke E. Wright* was on the brief, for petitioner.

Mr. Ike W. Crabtree, with whom *Mr. Milton J. Anderson* was on the briefs, for respondent.

MR. JUSTICE CLARKE delivered the opinion of the court.

The respondent, S. C. Moore, a citizen of Arkansas, in his representative capacity as administrator of the estate of Ivy B. Douglas, deceased, under appointment by the Probate Court of Shelby County, Tennessee, sued the petitioner, the Memphis Street Railway Company, a corporation organized under the laws of Tennessee, in the United States District Court for the Western District of Tennessee, for wrongfully causing the death of his decedent. He recovered judgment, which was affirmed by the Circuit Court of Appeals and the case is here on certiorari for review of the holding of that court that the plaintiff had legal capacity to maintain the suit in a federal court.

On the face of the declaration there was the requisite diversity of citizenship to give the federal court jurisdiction, but the petitioner claims that the respondent, Moore, although a citizen of Arkansas, must be treated as a citizen of Tennessee under the statute of that State, entitled "An Act to declare that for the purpose of suing and being sued, a nonresident of Tennessee, who qualifies as executor or administrator in Tennessee shall be considered a citizen of Tennessee, and to provide for the service of

process upon him" (c. 501, p. 1344, Acts of 1903), which provides:

"That whenever a nonresident of the State of Tennessee qualifies in this State as the executor or administrator of a person dying in or leaving assets or property in this State, for the purpose of suing and being sued, he shall be treated as a citizen of this State."

The remainder of the act prescribes the method of service of summons upon such a nonresident executor or administrator.

Upon a full review of the legislation of the State in *Southern Railway Co.* v. *Maxwell,* 113 Tennessee, 464, the Supreme Court of Tennessee decided that the sole purpose of this act is to extend to such nonresident executors and administrators as are described in it the privilege of suing in the state courts *in forma pauperis,* and that the effect of it, when read with the other statutes of the State on the subject, is to confine this privilege to the people of the State or to suits devoted to their interest, "since the right is not extended to non-resident administrators generally, but only to those who have qualified in this State as the personal representative of persons dying or leaving assets or property in this State." No conflict with the Federal Constitution or laws being involved, this construction of the state statute will be accepted by this court as conclusive. *Elmendorf* v. *Taylor,* 10 Wheat. 152, 159; *Old Colony Trust Co.* v. *Omaha,* 230 U. S. 100, 116.

But irrespective of this rule we quite agree with this authoritative declaration that the only purpose of the act is to determine privileges in the state courts of nonresidents who may be appointed administrators or executors of the estates of persons such as are described in the act. There is nothing whatever in the statute which indicates any intention on the part of the legislature to exclude nonresident executors or administrators from resort to fed-

eral courts under appropriate conditions and the construction which is urged upon us to give to it such an effect is too strained and artificial to be allowed. The judgment of the Circuit Court of Appeals is

Affirmed.

McALLISTER, ADMINISTRATRIX OF McALLISTER, *v.* CHESAPEAKE & OHIO RAILWAY COMPANY ET AL.

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

No. 748. Submitted January 30, 1917.—Decided March 6, 1917.

An order of a District Judge allowing a writ of error from this court and containing a recital that the judgment was based solely upon lack of jurisdiction supplies the place of the certificate required by § 238, Judicial Code.

An allegation in a petition for removal that the plaintiff's motive in joining resident and nonresident defendants is to prevent removal to the federal court is not in itself sufficient ground for removal, but specific facts supporting the charge of fraud must be alleged.

When the plaintiff's petition states a case of joint liability in tort under the state law against a resident and a nonresident defendant and the petition to remove the case on the ground that it contains a separable controversy fails to aver facts showing that the joinder is fraudulent, the District Court must remand.

Under the law of Kentucky a railroad company, though not required by speed laws, must nevertheless take notice of the places where numerous people are accustomed to cross or otherwise to be upon its tracks, and, by moderating speed, maintaining proper look-out, and giving proper signals, must exercise due care to save them from injury by trains. Failure to observe this duty resulting in injury or death is actionable negligence.

Under the law of Kentucky lessor and lessee railroad companies are jointly liable for injury or death inflicted on persons on the

tracks, not trespassers, by the negligence of the lessee in operating trains.

A petition averring that plaintiff's decedent, while at or near a public crossing in a town where numerous people were accustomed to be and travel, as lessor and lessee companies well knew, and while in plain view of their agents and servants, was negligently and wantonly run down and killed, without fault on his part, by a train operated by the lessee, and specifying that the negligence consisted in excessive speed—fifty miles an hour,—failure to keep proper look-out for travelers at such a place, and failure to give adequate signals or warnings of the approaching train—states a cause of action against both companies under the law of Kentucky.

198 Fed. Rep. 660, reversed.

THE case is stated in the opinion.

Mr. Allan D. Cole, Mr. W. T. Cole and *Mr. H. W. Cole* for plaintiff in error.

Mr. E. L. Worthington, Mr. W. D. Cochran, Mr. LeWright Browning and *Mr. Proctor K. Malin* for defendants in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

On March 26, 1902—fifteen years since—the plaintiff filed her petition in the Circuit Court of Greenup County, Kentucky, against The Chesapeake & Ohio Railway Company, a corporation organized under the laws of Virginia, hereinafter called the Virginia company, lessee, and The Maysville & Big Sandy Railroad Company, a corporation organized under the laws of Kentucky, hereinafter called the Kentucky company, the owner and lessor of the railway on which plaintiff's decedent, on March 15th, 1902, was run down by a passing train and so injured that he soon thereafter died.

In due time, the Virginia company filed a petition for removal of the cause to the Circuit Court of the United

States for the Eastern District of Kentucky, in which petition it is alleged: That there is in the case a separable controversy which is wholly between citizens of different States, the petitioner, a corporation of Virginia, and the plaintiff, a citizen of Kentucky; that the Kentucky corporation is not a necessary or proper party to the cause, which can be determined between the Virginia company and the plaintiff without reference to the Kentucky company; and that the Kentucky company is "wrongfully, fraudulently and falsely" made a party for the sole purpose of preventing removal to the federal court without any intention on the part of the plaintiff of proving against it any of the acts of negligence alleged in the petition. It is charged that no cause of action is stated in the amended petition against the Kentucky company.

On May 24, 1905, the plaintiff filed a motion to remand the case to the state court, on the ground that the federal court "is without jurisdiction to hear and determine the cause," which motion was overruled on the same day. Various consent continuances carried the case over for two and one-half years, until December 27, 1907, when the plaintiff filed a motion to set aside "the order heretofore made denying her motion to remand this cause," and in support of this motion, on the same day, she filed an answer to the petition for removal which is, in substance, a detailed denial of all of the allegations of that petition.

On the twenty-fifth of the following May (1908) plaintiff's motion to reconsider the court's ruling denying her motion to remand the case was submitted, and thirty days given for filing a brief, but it was not decided until a year later when, on May 24th, 1909, it was overruled. Again various continuances by consent caused the case to go over for three years more, until May 27th, 1912, when the plaintiff's motion to reconsider the court's action in overruling her motion to remand was again overruled. Then follow other continuances, aggregating two

years more, until, on May 25th, 1914, on motion of the defendant, the case was dismissed for want of prosecution, in an order which four days later was set aside, and again nothing was done for eighteen months, until December 15th, 1915, when the case was a second time dismissed for want of prosecution, in an order which was revoked on the twenty-fourth of the following July, at which time the former action of the court in overruling plaintiff's motion to remand the case was re-affirmed, and the plaintiff, having elected to stand on her motion to remand and "refusing to recognize the jurisdiction of the United States court or to proceed with the prosecution of her cause therein," upon motion, it was dismissed at plaintiff's costs.

On the next day the District Judge allowed a writ of error to this court in an order, reciting that plaintiff's petition had "been dismissed by a judgment of this court upon consideration solely of the question of this court's jurisdiction of the action."

The case is properly in this court, the order of the District Judge being sufficient to take the place of the certificate required by § 238 of the Judicial Code. *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282; *Herndon-Carter Co.* v. *James N. Norris, Son & Co.*, 224 U. S. 496, 498.

The validity of the denial of the plaintiff's motion to remand the case, which is thus brought before us, must be determined upon the allegations of the amended petition and of the petition for removal. *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U. S. 239, 245, when tested by the laws of Kentucky, *Illinois Central R. R. Co.* v. *Sheegog*, 215 U. S. 308; *C. & O. Ry. Co.* v. *Cockrell*, 232 U. S. 146, 153. Fully recognizing this rule, the District Court decided the motion on the face of the pleadings, and its reasons for refusal to remand the case as stated in *McAllister* v. *Chesapeake & Ohio Ry. Co.*, 157 Fed. Rep. 740, 744, are, that the Kentucky company had lawful authority

to lease its railroad to the Virginia company, *McCabe* v. *M. & B. S. R. R. Co.*, 112 Kentucky, 861; that the allegation of plaintiff's amended petition that plaintiff's decedent was injured "at or near a public crossing" is an admission that he was a trespasser on the railroad track at the time, *Davis' Admr.* v. *C. & O. Ry.*, 116 Kentucky, 144; and that the lessor company is not liable for injury to a trespasser by the negligence of its lessee. These reasons were restated at length by the District Judge when he denied the motion to reconsider his refusal to remand.

This conclusion of the District Court that the allegation of the amended petition that the deceased "at the time of the injuries complained of was at or near a public crossing in said town of Fullerton" is an admission that he was a trespasser at the time, is based, we think, upon an insufficient statement of the allegations of the amended petition, and upon much too narrow a view of the effect of the decisions of the Kentucky Court of Appeals as applied to the facts pleaded in this case.

The allegations of the amended petition are:

That since before the year 1890 the Virginia company had been operating the line of railway owned by the Kentucky company under a lease "which in no wise relieves" the lessor "from liability for the torts of the" operating lessee, and that, on March 15th, 1902, when plaintiff's decedent "was at or near a public crossing, . . . a place in the said town of Fullerton where numerous people were accustomed to be and travel," as the defendants well knew, without fault on his part, and while in plain view of the agents and servants of the defendants, he was "negligently and wantonly" run down and killed by a train operated by the defendant, the Virginia company. The negligence alleged is excessive speed of the train—fifty miles an hour,—failure to keep proper lookout for travelers at such a place, and failure to give adequate signals or warnings of the approaching train.

In the case cited by the court in its opinion, *Davis' Administrator* v. *C. & O. Ry. Co.*, 116 Kentucky, 144, the petition alleged that "the intestate was run over and killed 'at or near' a private crossing over the railroad track, between her house and garden," that it was "not far" from public crossings to the east and west of her, and that the train was negligently running at fifty miles an hour, without any appropriate lookout being kept or signals given.

In considering this petition the Court of Appeals, saying that it must be taken most strongly against the pleader, decided, that the allegation that the deceased was killed "at or near a private crossing" must be construed as meaning that she was killed at a place on the track other than at the crossing, and that it is only at a public crossing that reckless speed or any failure to give signals amounts to negligence.

The differences between this decided case and the case at bar are obvious and vital—a private crossing in the one, a public crossing in the other, and "a place where numerous people were accustomed to be and travel" in the one case, and silence as to the extent of use in the other. We shall see the Court of Appeals laying sharp hold upon both of these distinctions when determining what the state law applicable to such cases is.

Whatever doubt there may have been before, as to what duty the operating railroad company owed to the plaintiff's decedent, was settled by the decision in *Illinois Central Ry. Co.* v. *Murphy's Administrator*, 123 Kentucky, 787, in which the Court of Appeals, in a comprehensive survey of its prior decisions, formulates in two "principles" or rules, the duty of the operating railroad company to persons crossing or walking along its tracks. The first of these is that in sparsely-settled districts, or where few people cross or walk along railroad tracks, such users are to be regarded as trespassers to whom no duty is owed by

the company, except to keep from injuring them if it reasonably can, after their presence and peril shall have been discovered.

The second principle, and it is the one applicable to the case stated in the amended petition, is, that in more populous communities, or where many people are accustomed to cross or otherwise use railroad tracks, the duty of the company is

"to operate the train with the fact of the trespasser's presence in mind—that is, at a speed which has the train under control, and keeping such a lookout as will enable the operatives to give timely warnings of its approach, as well as to stop it in case of necessity before injury has been inflicted on the trespasser. Legislation has not regulated the speed of trains in such communities. Each case must rest till then upon its own facts. Whether the speed is so great as to amount to negligence will be a fact to be determined by the jury, for the circumstances will necessarily vary, according to the population, the use of the track for passage by foot or vehicle travelers, the obstruction to the view, and so forth.

"If the railroad company knows that the public habitually uses its tracks and rights of way in a populous community as a foot passway, so that it knows that at any moment people may be expected to be found there, such knowledge is treated as equivalent to seeing them there, and their presence must be taken into consideration by the train operatives in the movement of their trains."

Six years later, in *C. & O. Ry. Co.* v. *Warnock's Administrator*, 150 Kentucky, 74, and, oddly enough, in a case growing out of an accident which occurred in this same village of Fullerton, the Court of Appeals again reviews its decisions, approves the statement of the law in the *Murphy Case*, as we have quoted it, and concludes with the statement that:

"Although Fullerton was not an incorporated town,

it was a town in fact; and the place where the accident occurred [described as 60 feet from any public crossing] was such a locality that the presence of persons upon the track might be anticipated at any time."

Again recurring to the subject, the same court in *Corder's Administrator* v. *C. N. O. & T. P. Railway*, 155 Kentucky, 536, restates the rule, saying:

"It is not so much whether the accident occurred in the city or village as it is that there there was evidence of such long and continued use of the foot path by a large number of people as to impose upon the railroad the duty of giving warning of the approach of its trains to this point. . . . It is the nature and use of the crossing by the public that is to determine the applicability of the rule, which requires the lookout duty."

And yet, again, in *Willis' Administrator* v. *L. & N. R. R. Co.*, 164 Kentucky, 124, the same court concludes another discussion of its decisions with the approval of the *Warnock* and *Carter Cases* and adds:

"Running through all these opinions will be found the thought that it is the habitual use of the track by large numbers of persons rather than the location of the track that creates the distinction between trespassers and licensees."

Watson's Administrator v. *C. & O. Ry. Co.*, 170 Kentucky, 254, the last decision dealing with this subject, plainly is not intended to modify the rule we have thus seen so long established.

While these decisions of the Court of Appeals of Kentucky leave something to be desired in the definition of the distinction between "trespassers" and "licensees," there can be no doubt that, regardless of the terms of designation used, the result of them is that the allegations of the amended petition in the case under consideration, if supported by appropriate testimony would require that the case be sent to a jury under a proper charge of

the court and that it was error for the trial court to hold that they did not state a cause of action as against the lessee, operating, company.

There remains only the question whether the amended petition states a cause of action against the lessor, the Kentucky company, and it is very clear that the decisions of the highest court of that State answer this question in the affirmative.

In *McCabe's Admx.* v. *Maysville & Big Sandy R. R. Co.* (this same Kentucky corporation), 112 Kentucky, 861, the Court of Appeals of Kentucky expressly decides that under the lease of its line to the Virginia company, which was in effect when the action complained of occurred, the lessor company, notwithstanding the lease, continued liable to the public for the torts of its lessee in operating the leased railroad, holding that where both lessor and lessee were joined as defendants in a suit for causing the wrongful death of a man killed by an engine operated by the lessee, the liability was joint, and that a removal petition, not to be distinguished in substance and scarcely in form from the one filed by the Virginia company in this case, did not state a case of a separable controversy, justifying removal to the United States court. To this same effect, construing the constitution and statutes of Kentucky, as applied to leases by other corporations, are *Illinois Central Ry. Co.* v. *Sheegog's Admr.*, 126 Kentucky, 252, affirmed in 215 U. S. 308; and *Louisville Bridge Co.* v. *Sieber*, 157 Kentucky, 151. The plaintiff's decedent was not an employee of the Virginia company and the rule of the cases cited is not modified by *Swice's Admx.* v. *Maysville & Big Sandy R. R. Co.*, 116 Kentucky, 253.

Since the amended petition states a joint cause of action against the Kentucky company and the Virginia company, the claim that there is a separable controversy in the case, justifying removal by the latter company, must fail, and since no facts are alleged in support of the

charge that the joinder of the two companies is fraudulent, except that it was made for the purpose of preventing removal to the federal court, this claimed reason for removal must also fail, *Illinois Central R. R. Co.* v. *Sheegog* and *C. & O. Ry. Co.* v. *Cockrell, supra*, and therefore the decision of the District Court is reversed and the case must be remanded to the state court.

The petition for removal of this case was filed on the twenty-first day of July, 1902, and now, fifteen years after, in directing that the case be remanded, we cannot fail to notice the many seemingly needless delays to which it has been subjected, and we direct that appropriate action be taken to return it as promptly as possible to the state court.

Reversed.

ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY *v.* MOORE.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 573. Argued January 30, 1917.—Decided March 6, 1917.

An action governed by the Federal Employers' Liability Act is not removable from the state to the federal court upon the ground of diverse citizenship.

Where there is substantial evidence of negligence to support the verdict in an action for personal injuries, this court will not disturb the finding of a state court.

Under the Safety Appliance Act, 27 Stat. 531, c. 196, as amended by the Act of March 2, 1903, 32 Stat. 943, c. 976, the duty to provide grab-irons or hand-holds on the ends, as well as on the sides, of locomotive tenders is an absolute duty which must be literally complied with, and claimed equivalents can not satisfy the law.

268 Missouri, 31, affirmed.

THE case is stated in the opinion.

Mr. Robert A. Brown for plaintiff in error.

Mr. John G. Parkinson for defendant in error.

Mr. Justice Clarke delivered the opinion of the court.

Moore, the defendant in error, was in the employ of the plaintiff in error as a brakeman, and was desperately injured on June 9, 1910. His claim is that at the moment of the accident he was engaged in adjusting a defective automatic coupler on the rear end of the tender of an engine, which was started unexpectedly, causing him to be thrown from his feet by the steam hose equipment, which hung down to within a few inches of the surface of the track, and that, in part because the tender was not equipped with grab-irons or hand-holds, as required by the federal law, he fell helpless under the wheels and lost both of his hands.

He recovered a judgment in the trial court, which was affirmed by the Supreme Court of Missouri, and the case is here on writ of error.

The applicability of the Employers' Liability Act to the case was admitted from the beginning, but nevertheless a petition was promptly filed for the removal of the case to the United States Circuit Court on the ground of diversity of citizenship. This petition was denied and the claim that this denial constitutes reversible error is now argued here, albeit somewhat faintly. The claim is wholly without merit, as is apparent from the plain reading of the Federal Employers' Liability Act and as is determined in *Kansas City Southern Ry. Co.* v. *Leslie*, 238 U. S. 599, and in *Southern Railway Co.* v. *Lloyd*, 239 U. S. 496.

It is claimed, with much apparent confidence, that no substantial evidence appears in the record to support the judgment of the state courts, and that under the authority of *Southern Pacific Co.* v. *Pool*, 160 U. S. 438, the judgment

should be reversed. An inspection of the record satisfies us that substantial testimony was introduced in support of the claimed negligence of the railroad company and that, applying the usual rule, the result cannot be disturbed on this claim.

But chief emphasis, perhaps, is laid in the argument upon the claim that the trial court erred in refusing to say to the jury, as a matter of law, that: "Any iron rod or iron device securely fastened upon the end of defendant's tender to which employees could conveniently catch hold while in the performance of their duties in coupling or uncoupling cars was a hand-hold or grab-iron within the meaning of the law," and that, therefore, if the vertical iron hand-hold, and iron rod—pin-lifting or uncoupling lever—extending across the tender just above the coupler, were so designed and constructed as to permit employees engaged in coupling or uncoupling cars to readily grasp them for their better security while in the performance of such work, the defendant was not guilty of negligence in failing to provide necessary and proper hand-holds or grab-irons and the plaintiff cannot recover for any injury sustained from lack of them on the engine tender.

The trial court gave this request as the law of the case, but provided, only, the jury should find "that said attachments or devices furnished reasonable security to the employees of defendant in coupling and uncoupling said tender and cars." The railroad company excepted to this modification of its request to charge and argues now that to so modify it was error.

We quite agree with the Supreme Court of Missouri in its conclusion that the giving of the company's request, even as modified by the trial court, was error in its favor, being much more than it deserved under the law.

Section 4 of the safety appliance statute provides: "It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with se-

cure grab irons or handholds in the ends and sides of each car for greater security to the men in coupling and uncoupling cars." 27 Stat. 531. This statute was, in terms, made applicable to tenders of engines by the amendment of 1903, 32 Stat. 943, c. 976.

The request preferred is an obvious attempt to secure the application of the doctrine of equivalents to the Safety Appliance Act, and to persuade the court to say that it is not necessary for carriers to comply with the law if only they will furnish some other appliance which one jury may say is "just as good" but which another jury may say is not.

It is much too late for such a claim to be seriously entertained. In the case of *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281, often approved by this court, it was settled, once for all, that Congress, not satisfied with the common-law duty and its resulting liability, in the Safety Appliance Act of March 2, 1893, 27 Stat. 531, prescribed and defined certain definite standards to which interstate carriers must conform, and of the required automatic couplers this court said, Congress has "enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or to lessen their significance."

The exercise of care, even the greatest, in supplying and repairing these appliances will not excuse defects in them,—the duty and liability are absolute. *St. Louis, Iron Mountain and Southern Ry. Co.* v. *Taylor, supra; Great Northern Ry. Co.* v. *Otos*, 239 U. S. 349, 351. If equivalents were allowed the statute would be lost in exceptions and its humane purpose defeated in the uncertainty of litigation.

The request to charge on which the plaintiff in error re-

lies in its terms implies the absence of the required hand-holds or grab-irons, and an inspection of the photograph of the tender confirms the inference. The vertical hand-hold referred to in the request was at the corner of the tender and could be useful only to a man walking or running alongside the track to operate the uncoupling lever, or, as it is sometimes called, the pin-lifting lever. It could not be of value when the automatic coupler was not in working condition or to a man in the position in which Moore was when injured.

This grab-iron requirement first appears in the Act of 1893 and the amendment ten years later (March 2nd, 1903) 32 Stat. 943, making the requirement in terms applicable to tenders did not change it. Whatever may be said of 1893, there can be no doubt that in 1903 automatic couplers, and therefore uncoupling or pin-lifting levers, were in common, if not general, use, on the tenders of engines, and if Congress had intended them to be accepted as a substitute for hand-holds or grab-irons we must assume that the amendment of 1903 would have so provided. The statute requires both. If practical confirmation of this conclusion were desired it is to be found in the fact that in the order of the Interstate Commerce Commission standardizing safety appliances, under the Act of Congress of April 14, 1910, 36 Stat. 298, two rear end hand-holds are required on locomotives "one near each side on rear end of tender *on the face of the end sill.*"

It is not admissible to allow such an important statutory requirement to be satisfied by equivalents or by anything less than literal compliance with what it prescribes. The charge as given being more favorable to the company than it deserved, the judgment of the Supreme Court of Missouri is

Affirmed.

UNITED STATES *v.* CRESS.

UNITED STATES *v.* KELLY ET AL.

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

Nos. 84, 718. Argued December 13, 1916.—Decided March 12, 1917.

The servitude to the interests of navigation of privately owned lands forming the banks and bed of a stream is a natural servitude, confined to such streams as in their ordinary and natural condition are susceptible of valuable public use in navigation, and confined to the natural condition of such streams.

When navigable streams affording ways of commerce between States are improved by the federal government by means of locks and dams which raise the water above its natural level, the streams as thus improved remain navigable waters of the United States for all purposes of federal jurisdiction and regulation.

The power of the federal government to improve navigable streams in the interest of interstate and foreign commerce must be exercised, when private property is taken, in subordination to the Fifth Amendment.

In improving the navigation of the Cumberland River, in Kentucky, under the commerce power, the federal government by means of a lock and dam raised the water above the natural level so that lands on a non-navigable tributary, not normally invaded thereby, were subjected permanently to periodical overflows substantially injuring, though not destroying, their value. *Held*, in an action for damages under § 24 of the Judicial Code (derived from the Tucker Act):

(1) That this amounted to a partial taking of the property.

(2) That the United States was liable *ex contractu* to compensate the owner to the extent of the injury.

(3) That, upon payment, the United States would acquire an easement to overflow the land as often as would necessarily result from the use of the lock and dam for navigation, the fee, however, remaining in the private owner.

(4) That the riparian owner also was entitled to compensation for impairment of the value of his land caused by the destruction of a

ford over the tributary used in connection with a private way appurtenant to the land.

A like improvement of the Kentucky River, in Kentucky, by raising its water above natural level raised in like manner the water in a non-navigable tributary on which were a privately owned mill and mill-site, thus ending the usefulness of the mill by doing away with the head of water necessary to run it. *Held*, that the mill-owner, to whom also, under the law of Kentucky, belonged the bed of the tributary with the right to have the water flow there free from artificial obstruction, was entitled *ex contractu* to recover from the United States an amount equal to the depreciation of the mill property resulting from the loss of water-power.

The right to have the water of a non-navigable stream flow away from riparian land without artificial obstruction is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land itself.

Section 152 of the Judicial Code, permitting costs against the United States in claims cases, although appearing in the chapter entitled "The Court of Claims," is not confined to cases in that court but applies also when the District Court is exercising concurrent jurisdiction under § 24. This conclusion results from a consideration of the Tucker Act, of March 3, 1887, c. 359, 24 Stat. 505, and §§ 294 and 295 of the Code, read in connection with the repealing section, 297.

THE cases are stated in the opinion.

Mr. Assistant Attorney General Thompson, with whom *Mr. P. M. Cox* and *Mr. Seth Shepard, Jr.*, were on the briefs, for the United States.

Mr. J. F. Winn for defendants in error in No. 718.

No appearance for defendant in error in No. 84.

MR. JUSTICE PITNEY delivered the opinion of the court.

These cases were argued together, involve similar questions, and may be disposed of in a single opinion. They were actions brought in the District Court by the respective defendants in error against the United States under

the 20th paragraph of § 24, Jud. Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1093), to recover compensation for the taking of lands and water rights by means of backwater resulting from the construction and maintenance by the Government of certain locks and dams upon the Cumberland and Kentucky Rivers, respectively, in the State of Kentucky, in aid of the navigation upon those rivers.

In No. 84 the findings of the District Court are, in substance, that at the time of the erection of Lock and Dam No. 21 in the Cumberland River, the plaintiff was the owner of 189 acres of land on Whiteoak Creek, a tributary of the Cumberland, not far distant from the river; that by reason of the erection of the lock and dam six and six-tenths acres of this land are subject to frequent overflows of water from the river, so as to depreciate it one-half of its value, and a ford across Whiteoak Creek and a part of a pass-way are destroyed; that the six and six-tenths acres were worth $990, and the damage thereto was $495; that the damage to the land by the destruction of the ford was $500; and that plaintiff was entitled to recover the sum of $995. It may be supposed that Whiteoak Creek was not a navigable stream, but there is no finding on the subject.

In No. 718 the findings are to the effect that at the time of the erection by the Government of Lock and Dam No. 12 in the Kentucky River the plaintiffs, together with another person who was joined as a defendant, were the owners and in possession of a tract of land situate on Miller's Creek, a branch of the Kentucky, containing five and one-half acres, upon which there were a mill and a mill seat; that by reason of the erection of the lock and dam the mill no longer can be driven by water power; that the water above the lock and dam, when it is at pool stage, is about one foot below the crest of the mill dam, and this prevents the drop in the current that is necessary to run

the mill; that no part of the land or mill is overflowed or covered by pool stage of water, nor is the mill physically damaged thereby; that Miller's Creek is not a navigable stream; that the damages sustained by the owners of the mill, representing depreciation of the value of the mill property by cutting off the water power, amount to $1500.

Judgments were entered in favor of the respective land owners for the sums mentioned in the findings, together with interest and the costs of the suits, and the United States appealed to this court.

(1.) A fundamental contention made in behalf of the Government, and one that applies to both cases, is that the control by Congress, and the Secretary of War acting for it, over the navigation of the Cumberland and Kentucky Rivers, must also include control of their tributaries, and that in order to improve navigation at the places mentioned in the findings it was necessary to erect dams and back up the water, and the right to do this must include also the right to raise the water in the tributary streams.

In passing upon this contention we may assume, without however deciding, that the rights of defendants in error are no greater than if they had been riparian owners upon the rivers, instead of upon the tributary creeks.

The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders both navigable and non-navigable, and the ownership of the lands forming their beds and banks (*Barney* v. *Keokuk*, 94 U. S. 324, 338; *Packer* v. *Bird*, 137 U. S. 661, 671; *Hardin* v. *Jordan*, 140 U. S. 371, 382; *Shively* v. *Bowlby*, 152 U. S. 1, 40, 58; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners*, 168 U. S. 349, 358), subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce

among the States and with foreign nations (*Shively* v. *Bowlby*, 152 U. S. 1, 40; *Gibson* v. *United States*, 166 U. S. 269, 272; *Scott* v. *Lattig*, 227 U. S. 229, 243); the exercise of this authority being subject, in its turn, to the inhibition of the Fifth Amendment against the taking of private property for public use without just compensation (*Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Lynah*, 188 U. S. 445, 465, 471).

The State of Kentucky, like most of the States of the Union, determines the navigability of her streams, so far as the public right is concerned, not by the common-law test of the ebb and flow of the tide—manifestly inapplicable in a State so wholly remote from the sea—but by the test of navigability in fact (*Thurman* v. *Morrison*, 53 Kentucky, [14 B. Mon.] 367 [2d ed. p. 296]; *Morrison* v. *Thurman*, 56 Kentucky, [17 B. Mon.] 249; *Goodin's Executors* v. *Kentucky Lumber Co.*, 90 Kentucky, 625; *Murray* v. *Preston*, 106 Kentucky, 561, 564; *Banks* v. *Frazier*, 111 Kentucky, 909, 912; *Ireland* v. *Bowman & Cockrell*, 130 Kentucky, 153, 161), while sustaining private ownership of the beds of her streams, both navigable and non-navigable, according to the common-law rule (*Berry* v. *Snyder*, 66 Kentucky, [3 Bush] 266, 273, 277; *Miller* v. *Hepburn*, 71 Kentucky, [8 Bush] 326, 331; *Williamsburg Boom Co.* v. *Smith*, 84 Kentucky, 372, 374; *Wilson* v. *Watson*, 141 Kentucky, 324, 327; *Robinson* v. *Wells*, 142 Kentucky, 800, 804), with incidental rights to the flow of the stream in its natural state (*Anderson* v. *Cincinnati Southern Railway*, 86 Kentucky, 44, 48).

The general rule that private ownership of property in the beds and waters of navigable streams is subject to the exercise of the public right of navigation, and the governmental control and regulation necessary to give effect to that right, is so fully established, and is so amply illustrated by recent decisions of this court, that a mere reference to the cases will suffice. *Scranton* v. *Wheeler*,

179 U. S. 141, 163; *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 634; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 62; *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 85, 88; *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251, 268; *Willink* v. *United States*, 240 U. S. 572, 580.

But this rule, like every other, has its limits, and in the present cases, which require us to ascertain the dividing line between public and private right, it is important to inquire what are "navigable streams" within the meaning of the rule.

In Kentucky, and in other States that have rejected the common-law test of tidal flow and adopted the test of navigability in fact, while recognizing private ownership of the beds of navigable streams, numerous cases have arisen where it has been necessary to draw the line between public and private right in waters alleged to be navigable; and by an unbroken current of authorities it has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation with appropriate compensation for the private right. Cases exemplifying these propositions are cited in a marginal note.[1] We have found no case to the

[1] *Wadsworth* v. *Smith*, 11 Me. 278, 281; *Brown* v. *Chadbourne*, 31 Me. 9, 21; *Treat* v. *Lord*, 42 Me. 552, 561–2; *Pearson* v. *Rolfe*, 76 Me. 380, 385; *Moore* v. *Sanborne*, 2 Mich. 519, 523–4; *Thunder Bay River Booming Co.* v. *Speechly*, 31 Mich. 336, 343, 345; *Witheral* v. *Muskegon Booming Co.*, 68 Mich. 48, 58–9; *Improvement Co.* v. *Lumber Co.*, 69 Mich. 207, 212, 213; *Koopman* v. *Blodgett*, 70 Mich. 610, 616; *Goodin's Ex'rs*

contrary. An apparent but not a real exception is the New York case of *Canal Appraisers* v. *People ex rel. Tibbits* (1836), 17 Wend. 571, where the decision was rested (pp. 609, 612, 624) upon the ground that the bed of the Mohawk River was the property of the State; the authority of the case having been limited accordingly by later decisions of the court of last resort of that State. *Commissioners of Canal Fund* v. *Kempshall*, 26 Wend. 404, 416; *Child* v. *Starr*, 4 Hill, 369, 372; *Fort Plain Bridge Co.* v. *Smith*, 30 N. Y. 44, 63; *Smith* v. *City of Rochester*, 92 N. Y. 463, 482; *Fulton L. H. & P. Co.* v. *State*, 200 N. Y. 400, 413.

Many state courts, including the Court of Appeals of Kentucky, have held, also, that the legislature cannot, by simple declaration that a stream shall be a public highway, if in fact it be not navigable in its natural state, appropriate to public use the private rights therein without compensation. *Morgan* v. *King*, 18 Barb. 277, 284; 35 N. Y. 454, 459, 461; *Chenango Bridge Co.* v. *Paige*, 83 N. Y. 178, 185; *Murray* v. *Preston*, 106 Kentucky, 561, 563; *Stuart* v. *Clark's Lessee*, 32 Tennessee, (2 Swan) 9, 17; *Walker & Fulton* v. *Board of Public Works*, 16 Ohio, 540, 544; *Olive* v. *State*, 86 Alabama, 88, 92; *People* v. *Elk River M. & L. Co.*, 107 California, 221, 224. And see *Thunder Bay River Booming Co.* v. *Speechly*, 31 Michigan, 336, 345; *Koopman* v. *Blodgett*, 70 Michigan, 610, 616.

This court has followed the same line of distinction.

---

v. *Kentucky Lumber Co.*, 90 Ky. 625, 627; *Murray* v. *Preston*, 106 Ky. 561, 565; *Banks* v. *Frazier*, 111 Ky. 909, 912; *Morgan* v. *King*, 35 N. Y. 454, 459; *Chenango Bridge Co.* v. *Paige*, 83 N. Y. 178, 185; *Ten Eyck* v. *Town of Warwick*, 82 N. Y. Sup. Ct. (75 Hun) 562, 566; *Weise* v. *Smith*, 3 Ore. 445, 449; *Goodwill* v. *Police Jury*, 38 La. Ann. 752, 755; *Smith & Hambrick* v. *Fonda*, 64 Miss. 551, 554; *East Hoquiam Boom Co.* v. *Neeson*, 20 Wash. 142, 146; *Stuart* v. *Clark's Lessee*, 32 Tenn. (2 Swan) 9, 16; *Irwin* v. *Brown*, 3 Tenn. Cas. 309; *Webster* v. *Harris*, 111 Tenn. 668, 677; *Little Rock, Mississippi River & Texas R. R. Co.* v. *Brooks*, 39 Ark. 403, 409.

That the test of navigability in fact should be applied to streams in their natural condition was in effect held in *The Daniel Ball*, 10 Wall. 557, a case which turned upon the question whether Grand River, in the State of Michigan, was one of the "navigable waters of the United States" within the meaning of acts of Congress that regulated vessels carrying merchandise and passengers upon such waters. Mr. Justice Field, speaking for the court, after showing that the tidal test was not applicable in this country, said (p. 563): "A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, *in their ordinary condition*, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." The point was set forth more clearly in *The Montello*, 20 Wall. 430, where the question was whether Fox River, in the State of Wisconsin, was a navigable water of the United States within the meaning of the acts of Congress. There were rapids and falls in the river, but the obstructions caused by them had been removed by artificial means so as to furnish uninterrupted water communication for steam vessels of considerable capacity. It was argued (p. 440) that although the river might now be considered a highway for commerce conducted in the ordinary modes, it was not so in its natural state, and therefore was not navigable water of the United States within the purview of *The Daniel Ball* decision. The court, accepting navigability in the natural state of the river as the proper test, proceeded to show that, even before the improvements resulting in an unbroken navigation were undertaken, a large and successful interstate commerce had been carried on through this river by means of Durham boats,

which were vessels from 70 to 100 feet in length, with 12 feet beam, and drawing when loaded from 2 to 2½ feet of water. The court, by Mr. Justice Davis, declared (p. 441) that it would be a narrow rule to hold that, in this country, unless a river was capable of being navigated by steam or sail vessels it could not be treated as a public highway. "The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable *in its natural state* of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway." And again (p. 443): "There are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox River, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but *the vital and essential point is whether the natural navigation of the river* is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars." Numerous decisions of state courts were cited as supporting this view, including some of those to which we have referred.

Pumpelly v. *Green Bay Company*, 13 Wall. 166, involved the right to compensation for land overflowed with backwater from a dam erected and maintained in the Fox River, under authority of the State of Wisconsin, for the improvement of navigation. (A permissible exercise of state power, in the absence of action by Congress, although it was an interstate navigable water; *Willson* v. *Black-Bird Creek Marsh Co.*, 2 Pet. 245, 251; *Gilman* v. *Philadelphia*, 3 Wall. 713.) The raising of the river above

its natural stage, by means of an artificial structure, was the *gravamen* of the complaint. It was argued (p. 174) that the State might, in the interest of the public, "erect such works as may be deemed expedient for the purpose of improving the navigation and increasing usefulness of a navigable river, without rendering itself liable to individuals owning land bordering on such river, for injuries to their lands resulting from their overflow by reason of such improvements." This court overruled the contention, and held there was a taking without compensation contrary to the applicable provision of the constitution of Wisconsin.

In *United States* v. *Lynah*, 188 U. S. 445, the same principle was applied in the case of an operation by the Government of the United States. For the improvement of the navigation of the Savannah River certain dams and other obstructions were placed and maintained in its bed, with the result of raising the water above its natural height and backing it up against plaintiffs' embankment upon the river and interfering with the drainage of their plantation. This was held (pp. 465, 471) to be a taking of private property, requiring compensation under the Fifth Amendment, notwithstanding the work was done by the Government in improving the navigation of a navigable river. The raising of the water above its natural level was held to be an invasion of the private property thereby flowed.

In several other cases, the limitation of the public right to the natural state of the stream has been recognized. *Packer* v. *Bird*, 137 U. S. 661, 667; *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 698; *Leovy* v. *United States*, 177 U. S. 621, 631.

It follows from what we have said that the servitude of privately-owned lands forming the banks and bed of a stream to the interests of navigation is a natural servitude, confined to such streams as in their ordinary and natural

condition are navigable in fact, and confined to the natural condition of the stream. And, assuming that riparian owners upon non-navigable tributaries of navigable streams are subject to such inconveniences as may arise from the exercise of the common right of navigation, this in like manner must be limited to the natural right. The findings make it clear that the dams in question, constructed by the Government in the Cumberland and Kentucky Rivers, respectively, are for raising the level of those streams along certain stretches by means of backwater, so as to render them, to the extent of the raising, artificial canals instead of natural waterways. In the language of engineering, the Government has "canalized" the rivers. We intimate no doubt of the power of the United States to carry out this kind of improvement. Nor do we doubt that, upon the completion of the improvements, these rivers: the Cumberland because it is an avenue of communication between two States; the Kentucky and also the Cumberland because in connection with the Ohio and Mississippi Rivers they furnish highways of commerce among many States (*Gilman* v. *Philadelphia*, 3 Wall. 713, 725; *The Daniel Ball*, 10 Wall. 557, 563; *South Carolina* v. *Georgia*, 93 U. S. 4, 10); remained navigable waters of the United States for all purposes of federal jurisdiction and regulation, notwithstanding the artificial character of the improvements. *Ex parte Boyer*, 109 U. S. 629, 632; *The Robert W. Parsons*, 191 U. S. 17, 28.

But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the Fifth Amendment. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Lynah*, 188 U. S. 445, 465, 471. And we deem it clear that so much of the properties of the respective

defendants in error as was unaffected by the flow of the rivers or their tributaries prior to the construction of the locks and dams in question was private property, and not subject to be overflowed, without compensation, in the raising of the level of the rivers by means of artificial dams.

These cases have no proper relation to cases such as *Gibson* v. *United States*, 166 U. S. 269, where no water was thrown back on claimant's land, and the damage was confined to an interference with the access thence to the navigable portion of the river; *Scranton* v. *Wheeler*, 179 U. S. 141, 153, which likewise had to do with the interruption of access from riparian land to a navigable channel; *Bedford* v. *United States*, 192 U. S. 217, 225, where the damage to claimant's land resulted from operations conducted by the Government six miles farther up the river; *Jackson* v. *United States*, 230 U. S. 1, 23, where owners of lands on the east bank of the Mississippi claimed compensation as for a taking of their property by reason of the effect of levees built on the west bank opposite their lands as a part of a system of levees designed to prevent crevasses, retain the water in the river, and thus improve the navigation. In each of these, there was no direct invasion of the lands of the claimants, the damages were altogether consequential, and the right to compensation was denied on that ground.

(2.) It is contended, in No. 84, that the damage to Cress' land by the overflow of six and six-tenths acres, because it depreciated its value only to the extent of one-half, does not measure up to a taking, but is only a "partial injury," for which the Government is not liable. The findings, however, render it plain that this is not a case of temporary flooding or of consequential injury, but a permanent condition, resulting from the erection of the lock and dam, by which the land is "subject to frequent overflows of water from the river." That overflowing

lands by permanent back-water is a direct invasion, amounting to a taking, is settled by *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 177; *United States* v. *Lynah*, 188 U. S. 445, 468–470. It is true that in the *Pumpelly Case* there was an almost complete destruction, and in the *Lynah Case* a complete destruction, of the value of the lands, while in the present case the value is impaired to the extent of only one-half. But it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking. As the court said, speaking by Mr. Justice Brewer, in *United States* v. *Lynah*, 188 U. S. 445, 470: "Where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the government and it becomes henceforth the owner." There is no difference of kind, but only of degree, between a permanent condition of continual overflow by back-water and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other. If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land. The taking by condemnation of an interest less than the fee is familiar in the law of eminent

domain. Where formal proceedings are initiated by the party condemning, it is usual and proper to specify the precise interest taken, where less than the fee. But where, as in this case, the property-owner resorts to the courts, as he may, to recover compensation for what actually has been taken, upon the principle that the Government by the very act of taking impliedly has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require (*United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656; *United States* v. *Lynah*, 188 U. S. 445, 465), and it appears that less than the whole has been taken and is to be paid for, such a right or interest will be deemed to pass as is necessary fairly to effectuate the purpose of the taking; and where, as in this case with respect to the six and six-tenths acres, land is not constantly but only at intervals overflowed, the fee may be permitted to remain in the owner, subject to an easement in the United States to overflow it with water as often as necessarily may result from the operation of the lock and dam for purposes of navigation.

(3.) In No. 84 some question is made about the allowance for the damage to the land by the destruction of the ford across Whiteoak Creek and the pass-way, but we deem the objection unsubstantial. It is said there is nothing to show how Cress acquired ownership of the ford, and that it does not appear that he had a right to pass over the adjoining land of one Brown. It seems to us, however, that the findings, while meager, sufficiently import that Cress had a right to a private way and ford as appurtenant to his land, and that the damage to the land by the destruction of the ford was $500. This brings the case squarely within *United States* v. *Welch*, 217 U. S. 333, 339, and *United States* v. *Grizzard*, 219 U. S. 180, 184, 185.

(4.) In No. 718 there is a contention that, because the back-water is confined to Miller's Creek, it does not

amount to a taking of land. But the findings render it plain that it had the necessary effect of raising the creek below the dam to such an extent as to destroy the power of the mill dam that was essential to the value of the mill; or, as the findings put it, "The water above the lock and dam, when it is at pool stage, is about one foot below the crest of the mill dam, which prevents the drop in the current which is necessary to run the mill." Under the law of Kentucky, ownership of the bed of the creek, subject only to the natural flow of the water, is recognized as fully as ownership of the mill itself. The right to have the water flow away from the mill dam unobstructed, except as in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land. A destruction of this right is a taking of a part of the land. *Gardner* v. *Village of Newburgh*, 2 Johns. Ch. 162, 166; *Tyler* v. *Wilkinson*, 4 Mason, 397, Fed. Case No. 14,312, 24 Fed. Cas. 472,474; *Johnson* v. *Jordan*, 2 Metc. 234, 239; *Wadsworth* v. *Tillotson*, 15 Connecticut, 366, 373; *Parker* v. *Griswold*, 17 Connecticut, 288, 299; *Harding* v. *Stamford Water Co.*, 41 Connecticut, 87, 92; *Holsman* v. *Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335, 343; *Beach* v. *Sterling Iron & Zinc Co.*, 54 N. J. Eq. 65, 73; *Scriver* v. *Smith*, 100 N. Y. 471, 480; *Crook* v. *Hewitt*, 4 Washington, 749, 754; *Rigney* v. *Tacoma Light & Water Co.*, 9 Washington, 576, 583; *Benton* v. *Johncox*, 17 Washington, 277, 281; *Lux* v. *Haggin*, 69 California, 255, 390; *Hargrave* v. *Cook*, 108 California, 72, 77; *Pine* v. *Mayor, etc., of City of New York*, 103 Fed. Rep. 337, 339; 112 Fed. Rep. 98, 103; *Wood* v. *Waud*, 3 Exch. 748, 775; *Dickinson* v. *Grand Junction Canal Co.*, 7 Exch. 282, 299; *Stokoe* v. *Singers*, 8 El. & Bl. 31, 36 (Erle, J.).

(5.) In both cases it is urged that there was error in allowing costs against the Government. Section 24 (20) of the Judicial Code, under which the suits were brought, originated in the provisions of the so-called Tucker Act

of March 3, 1887, c. 359, 24 Stat. 505, and the argument of the Government is that while under § 15 of that act costs were recoverable against the United States, in the District Court as in the Court of Claims, yet that § 297, Jud. Code, repealed all of the Tucker Act with the exception of §§ 4, 5, 6, 7, and 10, which relate to matters of procedure, and that there is no longer any authority of law for allowing costs against the United States in suits brought in the District Court. The fact is that § 297, Jud. Code, besides the clause repealing the Tucker Act with the exceptions mentioned, contains in its final paragraph a repeal of "all other Acts and parts of Acts, in so far as they are embraced within and superseded by this Act." Now, not only is the provision of § 2 of the Tucker Act, conferring upon the District Courts concurrent jurisdiction with the Court of Claims over certain claims against the United States, carried into § 24 (20) of the Code, but the provision of § 15 of the Tucker Act for the allowance of costs against the Government is carried in as § 152. It is true that § 24 (20) is a part of Chapter 2 of the Code, entitled "District Courts—Jurisdiction," while § 152 is a part of Chapter 7, entitled "The Court of Claims." But by §§ 294 and 295 it is declared and enacted as follows: "Sec. 294. The provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest. Sec. 295. The arrangement and classification of the several sections of this Act have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapter under which any particular section is placed."

From this it is plain that § 152 of the Code applies to suits in the District Courts, as well as to those in the Court of Claims.

Judgments affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of these cases.

WILSON, UNITED STATES ATTORNEY FOR THE WESTERN DISTRICT OF MISSOURI, *v.* NEW ET AL., RECEIVERS OF THE MISSOURI, OKLAHOMA & GULF RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 797. Argued January 8, 9, 10, 1917.—Decided March 19, 1917.

The effect of the Act of September 3, 5, 1916, entitled "An Act to establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce, and for other purposes," c. 436, 39 Stat. 721, is not only to establish permanently an eight-hour standard for work and wages as between the carriers and employees affected, but also to fix a scale of minimum wages, to wit, the rate of wages then existing, for the eight-hour day and proportionately for overtime, to be in force only during the limited period defined by the act.

Viewed as an act establishing an eight-hour day as the standard of service by employees, the statute is clearly within the power of Congress under the commerce clause.

The power to establish an eight-hour day does not beget the power to fix wages.

In an emergency arising from a nation-wide dispute over wages between railroad companies and their train operatives, in which a general strike, commercial paralysis and grave loss and suffering overhang the country because the disputants are unable to agree,

Congress has power to prescribe a standard of minimum wages, not confiscatory in its effects but obligatory on both parties, to be in force for a reasonable time, in order that the calamity may be averted and that opportunity may be afforded the contending parties to agree upon and substitute a standard of their own.

Where a particular subject lies within the commerce power, the extent to which it may be regulated depends on its nature and the appropriateness of means.

The business of common carriers by rail is in one aspect a public business, because of the interest of society in its continued operation and rightful conduct; and this public interest gives rise to a public right of regulation to the full extent necessary to secure and protect it.

Although emergency may not create power (*Ex parte Milligan*, 4 Wall. 2), it may afford reason for exerting a power already enjoyed.

The act above cited in substance and effect amounts to an exertion of the power of Congress, existing under the circumstances, to arbitrate compulsorily the dispute between the parties—a power susceptible of exercise by direct legislation as well as by enactment of other appropriate means for reaching the same result.

Viewed as an act fixing wages, the statute merely illustrates the character of regulation essential, and hence permissible, for the protection of the public right.

The act does not invade the private rights of carriers, since all their business and property must be deemed subject to the regulatory power to insure fit relief by appropriate means.

The act does not invade private rights of employees, since their rights to demand wages according to their desire and to leave the employment, individually or in concert, if the demand is refused, are not such as they might be if the employment were in private business, but are necessarily subject to limitation by Congress, the employment accepted being in a business charged with a public interest which Congress may regulate under the commerce power.

The act is not wanting in equality of protection either because it exempts certain short-line and electric railroads, or because it deals with the wages of those employees only who are engaged in the movement of trains—they being the class concerned in the dispute which threatened interruption of commerce.

Whether the provision for penalties is unconstitutional will not be determined in a suit not concerning penalties.

The history of the dispute, the inquiries and circumstances which culminated in the legislation, the nature of the provisions made and a comparison of them with the issues which existed between the dis-

putants, refute the claim that the act was passed without consideration and in arbitrary disregard of the rights of the carriers and the public.

After the paramount duty to enforce the Constitution, the very highest of judicial duties is to give effect to the legislative will, with judgment uninfluenced by those considerations which belong to the legislature alone.

The contention that the act is unworkable is without merit.

THE case is stated in the opinion.

The Solicitor General and *Mr. Frank Hagerman*, Special Assistant to the Attorney General, with whom *The Attorney General* and *Mr. Assistant Attorney General Underwood* were on the briefs, for appellant.

The act is constitutional as an hours-of-service law.

It is constitutional if purely a wage law. From the beginning, Congress's power over interstate commerce has been declared to be supreme. It consists of "direct supervision, control, and management" and extends to the regulation of employees while engaged in interstate commerce; also to the regulation of the relations of common carriers and their employees while both are engaged in interstate commerce. *Second Employers' Liability Cases*, 223 U. S. 1, 48–49. The wage regulation here involved has substantial connection with interstate commerce, because its natural tendency is to keep open the channels of interstate commerce and render such commerce safer and more efficient. Whether looked at from the standpoint of promoting commerce or removing obstructions to its free flow, the regulation of wages bears a close relation to the proper performance by carriers of their public duties. The efficiency and safety of railroad service depend upon the skill and physical fitness of the employees. It is just as necessary to properly care for employees as to keep in good condition the physical instrumentalities used in interstate commerce. Physical efficiency is

impossible without proper living conditions, which demand suitable food, clothing, housing, rest, and recreation. These, in turn, can not be secured without the payment of an adequate wage. An adequate wage, therefore, is essential to safe, regular, and efficient service in interstate commerce, and the public, through Congress, has a right to demand its payment. *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 570.

On the other hand, the public is interested in preventing the payment of wages which are too high, since they constitute the largest element in the cost of transportation and necessarily affect rates. An unreasonably high wage means an unjust rate or impaired service. In either event, it is the public that pays, and the public has the right to demand the regulation of wages to the end that it may enjoy reasonable and just rates.

But wage regulation has a still more vital connection with interstate commerce. Disputes about wages may be, and frequently are, the cause of interference with or entire stoppage of the flow of interstate commerce. In this law the idea of the board of arbitration has been adopted, though the regulation is accomplished by direct action of Congress rather than through the instrumentality of a commission. And by this regulation of the wage relation and the hours of service of railroad employees a disastrous strike was averted and the channels of interstate commerce kept open. Surely, Congress's power over interstate commerce, which has been so many times declared to be supreme, is, in the face of an interference greater than any other that can be imagined, ample enough to authorize the assumption of "direct supervision, control, or management" over the wage relation of persons engaged in such commerce. *McDermott* v. *Wisconsin*, 228 U. S. 115, 128.

The law does not conflict with any of the limitations upon the power of Congress prescribed in the Constitu-

tion. It does not deprive the carriers of liberty of contract nor take property without due process of law. If Congress has power to regulate the hours of labor and the wage relation of persons engaged in interstate commerce, the fact that some contracts are interfered with is immaterial and not forbidden by the Fifth Amendment. The same principle holds with reference to the taking of property without due process of law. *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 593; *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251.

The classifications made in the act are not arbitrary. *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612; *Chesapeake & Ohio Ry. Co.* v. *Conley*, 230 U. S. 513, 522; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Arkansas*, 240 U. S. 518.

The act is workable. The penalties are not excessive.

Mr. Walker D. Hines and *Mr. John G. Johnson*, with whom *Mr. Arthur Miller* was on the briefs, for appellees:

The act is a direct attempt to regulate the method of computing compensation and to fix the amount thereof. No support for its constitutionality can be derived from any theory that it establishes a public policy that hours of train service should be shortened, and has a direct tendency to promote that policy.

In order to hold that the act is within the commerce power it will be necessary for the court to see that the provisions have a substantial relation to some purpose which is within that power, *Adair* v. *United States*, 208 U. S. 161, 178; *Second Employers' Liability Cases*, 223 U. S. 1, 49; determining the purpose from the natural and legal effect of the language, *Soon Hing* v. *Crowley*, 113 U. S. 703, 710; *Lochner* v. *New York*, 198 U. S. 45, 64; *Minnesota* v. *Barber*, 136 U. S. 313, 319. Furthermore, whatever the purpose, no provision can be upheld under the commerce

power which violates the Fifth Amendment. *Lottery Case*, 188 U. S. 321, 362; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Joint Traffic Association*, 171 U. S. 305, 571. Manifestly Congress has no wider choice of means to accomplish a constitutional purpose than any state legislature would have, for both would be subject to constitutional limitations.

Section 3 of the act, even if susceptible of the construction assumed by its advocates, is unconstitutional because it is not a regulation of commerce among the States and violates the Fifth Amendment. The standard of compensation and the amount of compensation are mere incidents of commerce not *per se* within the power of Congress. *Hooper* v. *California*, 155 U. S. 648. The *Second Employers' Liability Case*, 223 U. S. 1, is not authority for the position that Congress has power to regulate the master-and-servant relationship *per se* in all its aspects between railroad companies and their trainmen; the power was there based on the substantial tendency to make transportation safe. A regulation of the amount of compensation which the railroad company shall pay its employee for his services can have no more relationship to any purpose to regulate commerce among the States than a regulation as to the price the railroad company shall pay for its locomotives, rails, cross ties or fuel or other supplies.

Section 3 is an extreme interference with the liberty of contract. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Adair* v. *United States*, 208 U. S. 161, 172. Wages, which Congress assumes to determine, are the very heart of the contract between the employer and employee. On its face § 3 is for the direct pecuniary benefit of a particular class of a community, to wit, the persons who are actually engaged in the operation of railroad trains. *Colon* v. *Lisk*, 153 N. Y. 188; *Lawton* v. *Steel*, 152 U. S. 133. It is a direct taking of the carrier's property without compensation and the transfer of the same to private individuals.

Section 3 cannot be upheld on the ground that its object was to avert the strike, that it has a substantial relation to that object, and that the interference with the liberty of contract and the appropriation of property without compensation to the benefit of the employees are under such circumstances permissible. The act does not purport to avoid the strike, and that end could not be appropriately accomplished by destroying the liberty of contract of the common carrier, or taking its property and giving it to another without provision for compensating the carrier. No case can be found where the property of one was transferred to another merely to appease that other and prevent him from committing an injury or doing harm to the community; and that is what § 3 would accomplish if it were to be justified on the ground that it was passed to avert the strike. The principle of necessity permitting of the destruction of buildings where absolutely necessary to stay conflagration, is not analogous. Freund on Police Power, pp. 563, 565.

The power of Congress is not enlarged by emergency. If it were, Congress could enlarge its powers at will by simply postponing its dealing with a matter until it had reached a dangerous crisis. Another answer is that Congress and not the courts would in practice be the judge as to when the crisis existed; so that if such a power be conceded constitutional limitations will cease to have a meaning. *Ex parte Milligan*, 4 Wall. 2.

Congress cannot regulate commerce among the States by entering into an extra-constitutional arrangement with the labor unions to avoid a strike, and then, as a consideration to the labor unions for carrying out this arrangement, enact legislation which is not in itself a prevention of the strike and which has no legal relation to that end.

Section 3 cannot be sustained on the ground that Congress has the power to provide methods for settling controversies between railroad companies and their train-

service employees and that § 3 is an appropriate means of settlement; nor upon the theory that its object is to prevent unsafe or inefficient railroad operation as a result of wages which are too low, that Congress has the power to accomplish that object through raising wages, and that § 3 is an appropriate means to accomplish that object.

It cannot be upheld by analogy to the rate-making power. It does not purport to protect the public or interstate commerce against improper wages. On the contrary, it requires a heavy increase in existing wages. Legislation respecting the amount of wages to be in any sense analogous to rate-fixing legislation would have to be binding on the person who makes the charge, i. e., the employee. But § 3 is binding only on the person who has to pay the charge, i. e., the employer. It cannot be upheld on any theory of a power in Congress to control railroad expenses so as to promote reasonable rates; nor on the ground that hereafter the railroad companies may be reimbursed through increased rates or otherwise for the deprivation of their property and its appropriation to the private use of the employees. *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Wisconsin*, 238 U. S. 491.

Section 3 is void for its failure to define a standard of conduct. That a statute must itself prescribe or designate the standard by which the parties affected can govern their conduct, to the end that they may avoid incurring the penalties prescribed, is recognized in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Polt*, 232 U. S. 165; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *United States* v. *Pennsylvania R. R. Co.*, 242 U. S. 208.

The entire act is unconstitutional on account of the invalidity of § 3. Section 1 is unconstitutional *per se*. It is an arbitrary interference with reasonable methods of contracting and has no substantial relation to the promotion of commerce among the States. It is unconstitutional because it provides no standard of conduct. *Chicago,*

Milwaukee & St. Paul Ry. Co. v. *Polt, supra; International Harvester Co.* v. *Kentucky, supra; United States* v. *Pennsylvania R. R. Co., supra; United States* v. *Northern Pacific Ry. Co.*, 242 U. S. 190.

The act arbitrarily discriminates in not applying to employees not engaged in operating trains, or to street and interurban railroads and other roads not 100 miles long. It is void on account of the excessive penalties. *Missouri, Kansas & Texas Ry. Co.* v. *United States*, 231 U. S. 112; *Bonnett* v. *Vallier*, 136 Wisconsin, 193; *Wadley Southern Railway Co.* v. *Georgia*, 235 U. S. 651, 655.

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

Was there power in Congress under the circumstances existing to deal with the hours of work and wages of railroad employees engaged in interstate commerce, is the principal question here to be considered. Its solution as well as that of other questions which also arise will be clarified by a brief statement of the conditions out of which the controversy arose.

Two systems controlled in March, 1916, concerning wages of railroad employees; one, an eight-hour standard of work and wages with additional pay for overtime, governing on about fifteen per cent. of the railroads; the other, a stated mileage task of 100 miles to be performed during ten hours with extra pay for any excess, in force on about eighty-five per cent. of the roads. The organizations representing the employees of the railroads in that month made a formal demand on the employers that as to all engaged in the movement of trains except passenger trains the 100-mile task be fixed for eight hours, provided that it was not so done as to lower wages and provided that an extra allowance for overtime calculated by the minute at one and one-half times the rate of the regular

hours service be established. The demand made this standard obligatory on the railroads but optional on the employees, as it left the right to the employees to retain their existing system on any particular road if they elected to do so. The terms of the demand were as follows, except the one which reserved the option which is in the margin,[1] and others making Article 1 applicable to yard and switching and hostling service.

"Article 1 (a) In all road service 100 miles or less, eight hours or less will constitute a day, except in passenger service. Miles in excess of 100 will be paid for at the same rate per mile.

"(b) On runs of 100 miles or less overtime will begin at the expiration of eight hours.

"(c) On runs of over 100 miles overtime will begin when the time on duty exceeds the miles run divided by 12½ miles per hour.

"(d) All overtime to be computed on the minute basis and paid for at time and one-half times the pro rata rate.

"(e) No one shall receive less for eight hours or 100 miles than they now receive for a minimum day or 100 miles for the class of engine used or for service performed.

"(f) Time will be computed continuously from time required for duty until release from duty and responsibility at end of day or run."

---

[1] "Article 4. Any rates of pay, including excess mileage or arbitrary differentials that are higher, or any rules or conditions of employment contained in individual schedules in effect January 1, 1916, that are more favorable to the employees, shall not be modified or affected by any settlement reached in connection with these proposals. The general committee representing the employees on each railroad will determine which is preferable and advise the officers of their company. Nothing in the settlement that may be reached on the above submitted articles is to be construed to deprive the employees on any railroad from retaining their present rules and accepting any rates that may be agreed upon or retaining their present rates and accepting any rules that may be agreed upon."

The employers refused the demand and the employees through their organizations by concert of action took the steps to call a general strike of all railroad employees throughout the whole country.

The President of the United States invited a conference between the parties. He proposed arbitration. The employers agreed to it and the employees rejected it. The President then suggested the eight-hour standard of work and wages. The employers rejected this and the employees accepted it. Before the disagreement was resolved the representatives of the employees abruptly called a general strike throughout the whole country fixed for an early day. The President, stating his efforts to relieve the situation and pointing out that no resources at law were at his disposal for compulsory arbitration, to save the commercial disaster, the property injury and the personal suffering of all, not to say starvation, which would be brought to many among the vast body of the people if the strike was not prevented, asked Congress, first, that the eight-hour standard of work and wages be fixed by law, and second, that an official body be created to observe during a reasonable time the operation of the legislation and that an explicit assurance be given that if the result of such observation established such an increased cost to the employers as justified an increased rate, the power would be given to the Interstate Commerce Commission to authorize it. Congress responded by enacting the statute whose validity as we have said we are called upon to consider. Act of September 3, 5, 1916, 39 Stat. 721, c. 436. The duty to do so arises from the fact that the employers, unwilling to accept the act and challenging the constitutional power of Congress to enact it, began this typical suit against the officers of certain labor unions and the United States District Attorney to enjoin the enforcement of the statute. The law was made to take effect only on the first of January, 1917. To expedite the

final decision before that date, the representatives of the labor unions were dropped out, agreements essential to hasten were made and it was stipulated that pending the final disposition of the cause the carriers would keep accounts of the wages which would have been earned if the statute was enforced so as to enable their payment if the law was finally upheld. Stating its desire to coöperate with the parties in their purpose to expedite the cause, the court below, briefly announcing that it was of opinion that Congress had no constitutional power to enact the statute, enjoined its enforcement and as the result of the direct appeal which followed we come, after elaborate oral and printed arguments, to dispose of the controversy.

All the propositions relied upon and arguments advanced ultimately come to two questions: First, the entire want of constitutional power to deal with the subjects embraced by the statute, and second, such abuse of the power if possessed as rendered its exercise unconstitutional. We will consider these subjects under distinct propositions separately.

I. *The entire want of constitutional power to deal with the subjects embraced by the statute.*

To dispose of the contentions under this heading calls at once for a consideration of the statute and we reproduce its title and text so far as is material.

"An Act To establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That beginning January first, nineteen hundred and seventeen, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, except

railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, which is subject to the provisions of the Act of February fourth, eighteen hundred and eighty-seven, entitled 'An Act to regulate commerce,' as amended, and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, . . .

"Sec. 2. That the President shall appoint a commission of three, which shall observe the operation and effects of the institution of the eight-hour standard workday as above defined and the facts and conditions affecting the relations between such common carriers and employees during a period of not less than six months nor more than nine months, in the discretion of the commission, and within thirty days thereafter such commission shall report its findings to the President and Congress; . . .

"Sec. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this Act for a standard eight-hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour workday.

"Sec. 4. That any person violating any provision of this Act shall be guilty of a misdemeanor and upon conviction shall be fined not less than $100 and not more than $1,000, or imprisoned not to exceed one year, or both."

There must be knowledge of the power exerted before determining whether as exercised it was constitutional and we must hence settle a dispute on that question before going further. Only an eight-hour standard for work

and wages was provided, is the contention on the one side, and in substance only a scale of wages was provided, is the argument on the other. We are of the opinion that both are right and in a sense both wrong in so far as it is assumed that the one excludes the other. The provision of section one that "eight hours shall . . . be deemed a day's work and the measure or standard of a day's work," leaves no doubt about the first proposition. As to the second, this is equally true because of the provision of section three forbidding any lowering of wages as a result of applying the eight-hour standard established by section one during the limited period prescribed in section two. Both provisions are equally mandatory. If it be said that the second, the depriving of all power to change the wages during the fixed period, is but ancillary to the first command, the standard of eight hours, that would not make the prohibition as to any change of wages any the less a fixing of wages. It certainly would not change the question of power unless it could be assumed that the legislative power to fix one thing, the standard of hours, could be enforced by exerting the power to do another, fix the wages, although there was no legislative authority to exert the latter power. The doing of one thing which is authorized cannot be made the source of an authority to do another thing which there is no power to do. If to deprive employer and employee of the right to contract for wages and to provide that a particular rate of wages shall be paid for a specified time is not a fixing of wages, it is difficult to see what would be.

However, there is this very broad difference between the two powers exerted. The first, the eight-hour standard, is permanently fixed. The second, the fixing of the wage standard resulting from the prohibition against paying lower wages, is expressly limited to the time specified in section two. It is, therefore, not permanent but temporary, leaving the employers and employees free as to

the subject of wages to govern their relations by their own agreements after the specified time. Concretely stated, therefore, the question is this: Did Congress have power under the circumstances stated, that is, in dealing with the dispute between the employers and employees as to wages, to provide a permanent eight-hour standard and to create by legislative action a standard of wages to be operative upon the employers and employees for such reasonable time as it deemed necessary to afford an opportunity for the meeting of the minds of employers and employees on the subject of wages? Or, in other words, did it have the power in order to prevent the interruption of interstate commerce to exert its will to supply the absence of a wage scale resulting from the disagreement as to wages between the employers and employees and to make its will on that subject controlling for the limited period provided for?

Coming to the general considerations by which both subjects must be controlled, to simplify the analysis for the purpose of considering the question of inherent power, we put the question as to the eight-hour standard entirely out of view on the ground that the authority to permanently establish it is so clearly sustained as to render the subject not disputable.[1]

That common carriers by rail in interstate commerce are within the legislative power of Congress to regulate commerce is not subject to dispute.[2] It is equally certain that where a particular subject is within such authority the extent of regulation depends on the nature and character of the subject and what is appropriate to its regulation.[3] The powers possessed by government to deal with

[1] *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612; *Missouri, Kansas & Texas Ry. Co.* v. *United States*, 231 U. S. 112.

[2] *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366.

[3] *McCulloch* v. *Maryland*, 4 Wheat. 316, 421–423; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 472; *Lottery Case*, 188 U. S. 321; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311.

a subject are neither inordinately enlarged or greatly dwarfed because the power to regulate interstate commerce applies. This is illustrated by the difference between the much greater power of regulation which may be exerted as to liquor and that which may be exercised as to flour, dry-goods and other commodities. It is shown by the settled doctrine sustaining the right by regulation absolutely to prohibit lottery tickets and by the obvious consideration that such right to prohibit could not be applied to pig iron, steel rails, or most of the vast body of commodities.

What was the extent of the power therefore of Congress to regulate considering the scope of regulation which government had the right to exert with reference to interstate commerce carriers when it came to exercise its legislative authority to regulate commerce? is the matter to be decided. That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, state and federal, and is illustrated by such a continuous exertion of state and federal legislative power as to leave no room for question on the subject. It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority. But taking all these propositions as undoubted, if the situation which we have described and with which the act of Congress dealt be taken into view, that is, the dispute between the employers and employees as to a standard of wages, their failure to agree, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened,

and the infinite injury to the public interest which was imminent, it would seem inevitably to result that the power to regulate necessarily obtained and was subject to be applied to the extent necessary to provide a remedy for the situation, which included the power to deal with the dispute, to provide by appropriate action for a standard of wages to fill the want of one caused by the failure to exert the private right on the subject and to give effect by appropriate legislation to the regulations thus adopted. This must be unless it can be said that the right to so regulate as to save and protect the public interest did not apply to a case where the destruction of the public right was imminent as the result of a dispute between the parties and their consequent failure to establish by private agreement the standard of wages which was essential; in other words that the existence of the public right and the public power to preserve it was wholly under the control of the private right to establish a standard by agreement. Nor is it an answer to this view to suggest that the situation was one of emergency and that emergency cannot be made the source of power. *Ex parte Milligan*, 4 Wall. 2. The proposition begs the question, since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. If acts which, if done, would interrupt, if not destroy, interstate commerce may be by anticipation legislatively prevented, by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce threatened by a failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite to the uninterrupted flow of interstate commerce.

But passing this, let us come to briefly recapitulate some of the more important of the regulations which have been enacted in the past in order to show how necessarily the

exertion of the power to enact them manifests the existence of the legislative authority to ordain the regulation now before us, and how completely the whole system of regulations adopted in the past would be frustrated or rendered unavailing if the power to regulate under the conditions stated which was exerted by the act before us was not possessed. That regulation gives the authority to fix for interstate carriage a reasonable rate subject to the limitation that rights of private property may not be destroyed by establishing them on a confiscatory basis, is settled by long practice and decisions.[1] That the power to regulate also extends to many phases of the business of carriage and embraces the right to control the contract power of the carrier in so far as the public interest requires such limitation, has also been manifested by repeated acts of legislation as to bills of lading, tariffs and many other things too numerous to mention.[2] Equally certain is it that the power has been exercised so as to deal not only with the carrier, but with its servants and to regulate the relation of such servants not only with their employers, but between themselves.[3] Illustrations of the latter are afforded by the Hours of Service Act, the Safety Appliance Act and the Employers' Liability Act. Clear

---

[1] *Chicago, Burlington & Quincy R. R. Co.* v. *Iowa*, 94 U. S. 155, 161; *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307; *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88; *Minnesota Rate Cases*, 230 U. S. 352.

[2] *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361; *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186; *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Boston & Maine Railroad* v. *Hooker*, 233 U. S. 97.

[3] *Johnson* v. *Southern Pacific Company*, 196 U. S. 1; *Employers' Liability Cases*, 207 U. S. 463; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612; *Southern Railway Co.* v. *United States*, 222 U. S. 20; *Second Employers' Liability Cases*, 223 U. S. 1.

also is it that an obligation rests upon a carrier to carry on its business and that conditions of cost or other obstacles afford no excuse and exempt from no responsibility which arises from a failure to do so and also that government possesses the full regulatory power to compel performance of such duty.[1]

In the presence of this vast body of acknowledged powers there would seem to be no ground for disputing the power which was exercised in the act which is before us so as to prescribe by law for the absence of a standard of wages caused by the failure to exercise the private right as a result of the dispute between the parties, that is, to exert the legislative will for the purpose of settling the dispute and bind both parties to the duty of acceptance and compliance to the end that no individual dispute or difference might bring ruin to the vast interests concerned in the movement of interstate commerce, for the express purpose of protecting and preserving which the plenary legislative authority granted to Congress was reposed. This result is further demonstrated, as we have suggested, by considering how completely the purpose intended to be accomplished by the regulations which have been adopted in the past would be rendered unavailing or their enactment inexplicable if the power was not possessed to meet a situation like the one with which the statute dealt. What would be the value of the right to a reasonable rate if all movement in interstate commerce could be stopped as a result of a mere dispute between the parties or their failure to exert a primary private right concerning a matter of interstate commerce? Again, what purpose would be subserved by all the regulations established to secure the enjoyment by the public of an efficient and reasonable service, if there was no power in government to prevent

[1] *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 26; *Missouri Pacific Railway* v. *Kansas*, 216 U. S. 262, 278.

all service from being destroyed? Further yet what benefits would flow to society by recognizing the right, because of the public interest, to regulate the relation of employer and employee and of the employees among themselves and to give to the latter peculiar and special rights safeguarding their persons, protecting them in case of accident and giving efficient remedies for that purpose, if there was no power to remedy a situation created by a dispute between employers and employees as to rate of wages, which if not remedied, would leave the public helpless, the whole people ruined and all the homes of the land submitted to a danger of the most serious character? And finally, to what derision would it not reduce the proposition that government had power to enforce the duty of operation, if that power did not extend to doing that which was essential to prevent operation from being completely stopped by filling the interregnum created by an absence of a conventional standard of wages because of a dispute on that subject between the employers and employees by a legislative standard binding on employers and employees for such a time as might be deemed by the legislature reasonably adequate to enable normal conditions to come about as the result of agreements as to wages between the parties?

We are of opinion that the reasons stated conclusively establish that from the point of view of inherent power the act which is before us was clearly within the legislative power of Congress to adopt, and that in substance and effect it amounted to an exertion of its authority under the circumstances disclosed to compulsorily arbitrate the dispute between the parties by establishing as to the subject matter of that dispute a legislative standard of wages operative and binding as a matter of law upon the parties,—a power none the less efficaciously exerted because exercised by direct legislative act instead of by the enactment of other and appropriate means providing for

the bringing about of such result. If it be conceded that the power to enact the statute was in effect the exercise of the right to fix wages where by reason of the dispute there had been a failure to fix by agreement, it would simply serve to show the nature and character of the regulation essential to protect the public right and safeguard the movement of interstate commerce, not involving any denial of the authority to adopt it.

And this leaves only to be generally considered whether the right to exercise such a power under the conditions which existed was limited or restrained by the private rights of the carriers or their employees.

(a) *As to the carrier.* As engaging in the business of interstate commerce carriage subjects the carrier to the lawful power of Congress to regulate irrespective of the source whence the carrier draws its existence, and as also by engaging in a business charged with a public interest all the vast property and every right of the carrier become subject to the authority to regulate possessed by Congress to the extent that regulation may be exerted considering the subject regulated and what is appropriate and relevant thereto, it follows that the very absence of the scale of wages by agreement and the impediment and destruction of interstate commerce which was threatened called for the appropriate and relevant remedy, the creation of a standard by operation of law binding upon the carrier.

(b) *As to the employee.* Here again it is obvious that what we have previously said is applicable and decisive, since whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest and as to which the power to regulate commerce possessed by Congress applied and the

resulting right to fix in case of disagreement and dispute a standard of wages as we have seen necessarily obtained.

In other words, considering comprehensively the situation of the employer and the employee in the light of the obligations arising from the public interest and of the work in which they are engaged and the degree of regulation which may be lawfully exerted by Congress as to that business, it must follow that the exercise of the lawful governmental right is controlling. This results from the considerations which we have previously pointed out and which we repeat, since conceding that from the point of view of the private right and private interest as contradistinguished from the public interest the power exists between the parties, the employers and employees, to agree as to a standard of wages free from legislative interference, that right in no way affects the lawmaking power to protect the public right and create a standard of wages resulting from a dispute as to wages and a failure therefore to establish by consent a standard. The capacity to exercise the private right free from legislative interference affords no ground for saying that legislative power does not exist to protect the public interest from the injury resulting from a failure to exercise the private right. In saying this of course it is always to be borne in mind that as to both carrier and employee the beneficent and ever-present safeguards of the Constitution are applicable and therefore both are protected against confiscation and against every act of arbitrary power which if given effect to would amount to a denial of due process or would be repugnant to any other constitutional right. And this emphasizes that there is no question here of purely private right since the law is concerned only with those who are engaged in a business charged with a public interest where the subject dealt with as to all the parties is one involved in that business and which we have seen comes under the control of the right to regulate to the extent that the power

to do so is appropriate or relevant to the business regulated.

Having thus adversely disposed of the contentions as to the inherent want of power, we come to consider all the other propositions which group themselves under a common heading, that is,

II. *Such an abuse of the power if possessed as rendered its exercise unconstitutional.*

We shall consider the various contentions which come under this heading under separate subdivisions.

(a) *Equal protection of the laws and penalties.*

The want of equality is based upon two considerations. The one is the exemption of certain short line and electric railroads. We dismiss it because it has been adversely disposed of by many previous decisions.[1] The second rests upon the charge that unlawful inequality results because the statute deals not with all, but only with the wages of employees engaged in the movement of trains. But such employees were those concerning whom the dispute as to wages existed growing out of which the threat of interruption of interstate commerce arose,—a consideration which establishes an adequate basis for the statutory classification.

As to the penalties it suffices to say that in this case a recovery of penalties is not asked and consequently the subject may well be postponed until it actually arises for decision.[2]

---

[1] *Dow* v. *Beidelman*, 125 U. S. 680; *Chicago, Rock Island & Pacific Ry. Co.* v. *Arkansas*, 219 U. S. 453; *Omaha & Council Bluffs Street Ry.* v. *Interstate Commerce Commission*, 230 U. S. 324; *Chesapeake & Ohio Ry. Co.* v. *Conley*, 230 U. S. 513, 522–524; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Arkansas*, 240 U. S. 518.

[2] *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 417; *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 443; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 120; *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160, 172; *Chesapeake & Ohio Ry. Co.* v. *Conley*, 230 U. S. 513, 522.

(b) *Want of due process resulting from the improvidence with which the statute was enacted and the impossibility in practice of giving effect to its provisions; in other words, as stated in the argument, its "unworkability."*

The contention virtually is that, conceding the legislative power under the circumstances stated to fix a standard of wages, such authority necessarily contemplates consideration before action and not a total and obvious disregard of every right of the employer and his property—a want of consideration and a disregard which, it is urged, appear on the face of the statute and which cause it therefore to amount to a decision without a hearing and to a mere arbitrary bestowal of millions by way of wages upon employees to the injury not only of the employer but of the public upon whom the burden must necessarily fall. Upon the assumption that unconstitutionality would result if there be ground for the propositions,[1] let us test them. In the first place, as we have seen, there is no room for question that it was the dispute between the parties, their failure to agree as to wages and the threatened disruption of interstate commerce caused by that dispute which was the subject which called for the exertion of the power to regulate commerce and which was dealt with by the exertion of that power which followed. In the second place, all the contentions as to want of consideration sustaining the action taken are disposed of by the history we have given of the events out of which the controversy grew, the public nature of the dispute, the interposition of the President, the call by him upon Congress for action in conjunction with the action taken, all demonstrating not unwitting action or a failure to consider, whatever may be the room, if any, for a divergence of opinion as to the want of wisdom shown by the action taken.

But to bring the subject to a closer analysis, let us briefly

---

[1] *McCray* v. *United States*, 195 U. S. 27, 63.

recall the situation, the conditions dealt with and the terms of the statute. What was the demand made by the employees? A permanent agreement as to wages by which the period should be shortened in which the fixed mileage task previously existing should be performed, an allowance to be made of extra pay by the minute at one and one-half times the regular pay for any overtime required to perform the task if it was not done in the reduced time, with a condition that no reduction in wages should occur from putting the demands into effect and also that in that event their operation should be binding upon the employers and optional on the employees. What was the real dispute? The employers insisted that this largely increased the pay because the allotted task would not be performed in the new and shorter time and a large increase for overtime would result. The employees on the other hand insisted that as the task would be unchanged and would be performed in the shorter hours, there would be no material, or at all events no inordinate, increase of pay. What did the statute do in settling these differences? It permanently applied an eight-hour standard for work and wages which existed and had been in practice on about fifteen per cent. of the railroads. It did not fix the amount of the task to be done during those hours, thus leaving that to the will of the parties. It yielded in part to the objections of the employers by permitting overtime only if "necessary" and it also absolutely rejected in favor of the employers and against the employees the demand for an increased rate of pay during overtime if there was any and confined it to the regular rate and it moreover rejected the option in favor of the employees by making the law obligatory upon both parties. In addition, by the provision prohibiting a lower rate of wages under the new system than was previously paid, it fixed the wages for such period. But this was not a permanent fixing, but in the nature of things a temporary one which left the will

of the employers and employees to control at the end of the period if their dispute had then ceased.

Considering the extreme contentions relied upon in the light of this situation we can discover no basis upon which they may rest. It certainly is not afforded because of the establishment of the eight-hour standard, since that standard was existing as we have said on about fifteen per cent. of the railroads, had already been established by act of Congress as a basis for work on government contracts, and had been upheld by this court in sustaining state legislation.[1] It certainly cannot be said that the act took away from the parties, employers and employees, their private right to contract on the subject of a scale of wages since the power which the act exerted was only exercised because of the failure of the parties to agree and the resulting necessity for the lawmaking will to supply the standard rendered necessary by such failure of the parties to exercise their private right. Further, in view of the provisions of the act narrowing and limiting the demands made, the statute certainly affords no ground for the proposition that it arbitrarily considered only one side of the dispute to the absolute and total disregard of the rights of the other, since it is impossible to state the modifications which the statute made of the demands without by the very words of the statement manifesting that there was an exertion of legislative discretion and judgment in acting upon the dispute between the parties. How can this demonstration fail to result if it be stated that the scope of the task to be performed in the eight-hour period was not expressed but was left therefore to adjustment between the parties, that overtime was only permitted if "necessary," and that extra pay for

[1] *United States* v. *Martin*, 94 U. S. 400; *Holden* v. *Hardy*, 169 U. S. 366; *Ellis* v. *United States*, 206 U. S. 246; *United States* v. *Garbish*, 222 U. S. 257; *Miller* v. *Wilson*, 236 U. S. 373; *Bosley* v. *McLaughlin*, 236 U. S. 385.

overtime was rejected and regular rate of pay substituted?

Conceding that there would necessarily result from the enforcement of the statute an increase of pay during the period for which the statute forbade a reduction, such concession would not bring the statute within the grounds stated. The right to meet the situation caused by the dispute and to fix a standard which should be binding upon both parties included of course the legislative authority to take into consideration the elements of difference and in giving heed to them all to express such legislative judgment as was deemed best under the circumstances.

From this it also follows that there is no foundation for the proposition that arbitrary action in total disregard of the private rights concerned was taken because the right to change or lower the wages was left to be provided for by agreement between the parties after a reasonable period which the statute fixed. This must be unless it can be said that to afford an opportunity for the exertion of the private right of agreement as to the standard of wages was in conflict with such right.

When it is considered that no contention is made that in any view the enforcement of the act would result in confiscation, the misconception upon which all the propositions proceed becomes apparent. Indeed in seeking to test the arguments by which the propositions are sought to be supported we are of opinion that it is evident that in substance they assert not that no legislative judgment was exercised, but that in enacting the statute there was an unwise exertion of legislative power begotten either from some misconception or some mistaken economic view or partiality for the rights of one disputant over the other or some unstated motive which should not have been permitted to influence action. But to state such considerations is to state also the entire want of judicial power to

consider them,—a view which therefore has excluded them absolutely from our mind and which impels us as a duty to say that we have not in the slightest degree passed upon them. While it is a truism to say that the duty to enforce the Constitution is paramount and abiding, it is also true that the very highest of judicial duties is to give effect to the legislative will and in doing so to scrupulously abstain from permitting subjects which are exclusively within the field of legislative discretion to influence our opinion or to control judgment.

Finally we say that the contention that the act was void and could not be made operative because of the unworkability of its provisions is without merit, since we see no reason to doubt that if the standard fixed by the act were made applicable and a candid effort followed to carry it out, the result would be without difficulty accomplished. It is true that it might follow that in some cases because of particular terms of employment or exceptional surroundings some change might be necessary, but these exceptions afford no ground for holding the act void because its provisions are not susceptible in practice of being carried out.

Being of the opinion that Congress had the power to adopt the act in question, whether it be viewed as a direct fixing of wages to meet the absence of a standard on that subject resulting from the dispute between the parties or as the exertion by Congress of the power which it undoubtedly possessed to provide by appropriate legislation for compulsory arbitration—a power which inevitably resulted from its authority to protect interstate commerce in dealing with a situation like that which was before it—we conclude that the court below erred in holding the statute was not within the power of Congress to enact and in restraining its enforcement and its decree therefore must be and it is reversed and the cause remanded with directions to dismiss the bill.

And it is so ordered.

Mr. Justice McKenna, concurring.

It is the contention of the Government that the act is an hours-of-service law, the intent of Congress being by its enactment "to proclaim a substantial eight-hour day." The opposing contention is that "the language of the act shows that it deals solely with the construction of contracts and with the standard and amount of compensation, and not with any limitation upon the hours of labor."

Upon these opposing contentions the parties respectively assert and deny the power of Congress to enact the law. The Government, however, further contends that, even viewing the law as a wage law, Congress under the commerce clause had power to pass it.

My purpose is to deal with the meaning of the act. With the consideration of the power to pass it I am satisfied with the opinion.

The title of the act (and to the title of an act we may resort to resolve ambiguity or to confirm its words) expresses its purpose to be "to establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce, and for other purposes."

The description of the title was repeated in the House of Representatives by the chairman of the committee who reported the bill and from whom it has received its designation. Among other things, he said: "The law fixes an eight-hour day. We had previously a sixteen-hour day and a nine-hour day. We now have an eight-hour day. The only reference to wages is in the language used to hold in statu quo until the workings of the eight-hour law could be observed and all other features of the service adjusted to the eight-hour law." Explanations of like import were made in the Senate.

The words of the act, I think, support this characterization and it may be assumed were accepted by Congress as expressing and securing it; and I think they do so with

fair directness. Whatever involution there may be in them was caused by the situation to which they were addressed, derangement of which was sought to be avoided, the situation indeed made use of, "features of the service adjusted" to the law.

The provision of § 1 is: "That, beginning January first, nineteen hundred and seventeen, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, except . . . "

Nothing is fixed but the time of service—the hours which shall be deemed a day's work—the number to be eight. All else—compensation and conditions—is left to contract; only, whatever the compensation, it shall be for a service of eight hours reckoned (computed) or measured by such time as its determining factor. Except as so determined the compensation may be whatever the carriers and employees may agree upon. Their power of convention has no other limitation.

The distinction between what is left to the parties and what is fixed by the law is real. There is certainly a difference between the prescription of the time of service and the prescription of compensation for the service, and the difference is observed in the speech and conduct of men; it is observed in the regulations of legislation. It has never been supposed that the agitation for an eight-hour day for labor or the legislation which has responded to it, was intended to fix or did fix the rate of wages to be paid.

Of course, in a sense, the two things are related. The time of service and the price of service may be said to be the reciprocals of each other—each the price of the other. There can be no real estimate of the wages one receives until it is understood what time one has worked to receive

them. They rise and fall with the increase or decrease of the time of service. One who works ten hours a day for $5.00 may be said to get less than one who works eight hours for the same sum. The labor of the latter is of greater value to him than the labor of the ten-hour man is to him. And, correspondingly, the expense to the employer is greater in the one case than in the other, though the wages he pays, expressed in terms of money, are the same. It may be contended that there is no element, therefore, in the regulation of the price of labor that there is not in the regulation of the hours of labor. But, as I have said, in the practice of men and in the examples of legislation, regulation of one is not regarded as the regulation of the other. In certain hazardous employments the hours of labor have been prescribed. It has not been supposed, certainly not declared, that the power as exerted was the regulation of wages. The interest of the State has been assumed to terminate with the hours of service, and its compensation, therefore, has been left to the agreement of the parties.

As examples of legislation I may adduce *Holden* v. *Hardy*, 169 U. S. 366, where a state law was sustained, and *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, where a law of Congress was sustained. Both laws limited the hours of service, but neither the rate of wages. There may be also cited *Ellis* v. *United States*, 206 U. S. 246; *Muller* v. *Oregon*, 208 U. S. 412; *Bosley* v. *McLaughlin*, 236 U. S. 385; *Miller* v. *Wilson*, 236 U. S. 373.

It may be contended that the power that can limit the hours of service can fix the wages for the service. To this I shall presently refer. My immediate purpose is the interpretation of the law under review, and I have only to point out that it is the sense of the practical world that prescribing the hours of labor is not prescribing the wages of labor, and Congress has kept the purposes distinct.

I do not think that other provisions of the act militate against these views. Section 2 provides for the appointment of a commission to observe the operation of the law, and this for the reason I have expressed of the dependence of the cost of the services upon the time they are rendered. The shorter hours may or may not involve an increase of expense to the roads and may or may not require recompense by an increase of their rates.

Pending the report of the commission and for thirty days thereafter it is provided (§ 3) that compensation shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours employees shall be paid at a rate not less than the *pro rata* rate for such standard eight-hour work day.

In a sense, this may be considered as a prescription of wages. To those roads (85%) that have a ten-hour standard the provision, so far as applicable, may be said to be a change of compensation. To those (15%) having an eight-hour standard it is not a change. The effort of the law is to secure an eight-hour day service and the "penalty of payment for overtime service," to quote the Government's brief, "is imposed in order to enforce obedience to the eight-hour provision, as far as practicable."

But even if § 3 be given a broader effect it would not give character to the whole act and make it the exertion of power to establish permanently a rate of wages. To so consider it would, I think, be contrary to the intention of Congress and convert the expediency for a particular occasion and condition into the rule for all occasions and conditions.

So far as the fate of the pending appeal is concerned, it is not of much importance whether the act be held to be an hours-of-service law or a wage-regulating law; but one may be regarded as having consequences that the other has not. To a carrier a wage law is but an item in its accounts, and requiring, it may be, an adjustment of its

operations, the expense to be recompensed through its rates. If it be said that rates cannot be changed at will but only by permission of authority, I cannot think that permission will not be given if it be necessary to fulfill the command of the law. Indeed, if not given, the law might encounter constitutional restriction.

To an employee a wage law may be of more vital consequence, be of the very essence of his life, involving factors—many and various—which he alone can know and estimate, and which, besides, might not have an enduring constancy and be submissive to a precedent judgment. There well might be hesitation to displace him and substitute the determination of the law for his action.

I speak only of intention; of the power I have no doubt. When one enters into interstate commerce one enters into a service in which the public has an interest and subjects one's self to its behests. And this is no limitation of liberty; it is the consequence of liberty exercised, the obligation of his undertaking, and constrains no more than any contract constrains. The obligation of a contract is the law under which it is made and submission to regulation is the condition which attaches to one who enters into or accepts employment in a business in which the public has an interest.

I concur in the answer of the opinion to the contentions of inequality of the law and the deprivation to the carriers of due process.

MR. JUSTICE DAY, dissenting.

I am unable to agree with the opinion and judgment just pronounced. The very serious constitutional questions involved seem to warrant a statement of the reasons which constrain me to this action.

I am not prepared to deny to Congress, in view of its constitutional authority to regulate commerce among the

States, the right to fix by lawful enactment the wages to be paid to those engaged in such commerce in the operation of trains carrying passengers and freight. While the railroads of the country are privately owned, they are engaged in a public service, and because of that fact are subject in a large measure to governmental control.

The regulatory power of Congress under the commerce clause of the Constitution is of a broad nature, but is subject to the applicable limitations of the Constitution.

I agree that upon the reasoning which sustained the power of Congress to regulate the hours of service of employees, and the degree of care which employers must observe to protect the safety of those engaged in the service and in view of the enactments which are held to be lawful regulations of interstate transportation, Congress has the power to fix the amount of compensation necessary to secure a proper service and to insure reasonable rates to the public upon the part of the railroads engaged in such traffic. While this much must necessarily follow from the constitutional authority of Congress, in the light of the interpretation given to the commerce clause in decisions of this court, it is equally true that this regulatory power is subject to any applicable constitutional limitations. This power cannot, any more than others conferred by the Constitution, be the subject of lawful exercise when such exertion of authority violates fundamental rights secured by the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 571; *Lottery Case*, 188 U. S. 321, 353.

The power to legislate, as well as other powers conferred by the Constitution upon the coördinate branches of the Government, is limited by the provisions of the Fifth Amendment of the Constitution preventing deprivation of life, liberty, or property without due process of law.

The phrase "Due Process of Law" has been the subject

of much discussion, and while its precise definition has not been attempted, and its limitations have been left to the gradual process of inclusion and exclusion, the binding force of its requirements is always conceded, and has been frequently enforced in cases as they have arisen. If the Constitution is not to become a dead letter the protection of the due process clause must be given to all entitled to this safeguard of rights which the Amendment intended to secure. The due process clause restrains alike every branch of the Government, and is binding upon all who exercise federal power, whether of an executive, legislative, or judicial character. It withholds from the executive the exercise of arbitrary authority, it prevents the judiciary from condemning one in his person or property without orderly methods of procedure adapted to the situation, and opportunity to be heard before judgment. We are now immediately concerned with its effect upon the exercise of legislative authority.

While every case must depend upon its peculiar circumstances, certain general principles are well settled; perhaps they have not been better stated than in the words of Mr. Justice Matthews, speaking for this court in *Hurtado* v. *California*, 110 U. S. 516, 531, wherein he said: "The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land. . . . The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons. In this country written constitutions were deemed essential to

protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial. . . . Applied in England only as guards against executive usurpation and tyranny, here they have become also bulwarks against arbitrary legislation." See *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272; *Bank of Columbia* v. *Okely*, 4 Wheat. 235; 2 Story on the Constitution, 4th ed., § 1944; Cooley on the Constitution, 241 *et seq.*; McGehee on Due Process of Law, p. 22 *et seq.*, and the illuminating discussion of the subject by Mr. Justice Moody in *Twining* v. *New Jersey*, 211 U. S. 78.

It results from the principles which have been enforced in this court, and recognized by writers of authority, that due process of law, when applied to the legislative branch of the Government, will not permit Congress to make anything due process of law which it sees fit to declare such by the mere enactment of the statute; if this were true, life, liberty, or property might be taken by the terms of the legislative act, depending for its authority upon the will or caprice of the legislature, and constitutional provisions would thus become a mere nullity. See the frequently quoted argument of Mr. Webster in the *Dartmouth College Case*, 4 Wheat. 518; *Davidson* v. *New Orleans*, 96 U. S. 97; *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226; McGehee on Due Process of Law, p. 30.

The underlying principle of the decisions which have constrained this court in rare instances to exercise its constitutional right to declare congressional enactments void, is the protection intended to be afforded against legislation of an arbitrary character.

While it is true, as stated in the majority opinion, that it is the duty of courts to enforce lawful legislative enact-

ments of Congress, it is equally their duty and sworn obligation when differences between acts of the legislature and the guaranties of the Federal Constitution arise, to govern their decisions by the provisions of that instrument which represents the will of all the people, and under the authority of which every branch of the Government is enabled to discharge the duty imposed upon it.

The act in question must be brought to the test of these fundamental principles, and if found to be violative of the Federal Constitution it must be declared void. Grave and important as the duty is it cannot be avoided consistently with the obligations imposed by the Constitution upon every branch of the judiciary, federal and state, and particularly upon this court, to which under our system is entrusted the ultimate decision of questions of this nature.

Applying these principles, in my opinion this act cannot successfully withstand the attack that is made upon it as an arbitrary and unlawful exertion of supposed legislative power. It is not an act limiting the hours of service. Nor is it, in my judgment, a legitimate enactment fixing the wages of employees engaged in such service. In one of its most important aspects, and in view of the mandatory provisions of § 3 of the act, it is one the effect of which is to increase the wages of certain employees in interstate commerce by the requirement that pending investigation, the wages which have theretofore been paid for ten hours' service shall be given for eight hours' service of the same character. The increase of wages is to be in force only during the period of observation provided in the act. Before the passage of this enactment the wages of the character involved herein had been fixed by agreement, or determined by arbitration between the parties concerned. By this enactment the wage theretofore paid for a ten-hours' service is required to be paid for an eight-hours' service pending the investigation provided for in other parts of the law. In other words, Congress upon the face

of the enactment expresses its inability to fix in advance of investigation a just and proper wage for the employees concerned. It inevitably follows that the cost of the experiment, measured by the increase in wages amounting, it is stated, to many millions of dollars, and certain to cost a very large sum, must be paid, not by the public, nor be equally borne by the contracting parties, but by legislative edict is made to fall entirely upon one of the parties, with no provision for compensation should the subsequent investigation establish the injustice or impropriety of the temporary increase.

An examination of the history of the legislation, and public documents submitted for our consideration, amply support this conclusion. In submitting the matter to Congress the President recommended: "Explicit approval by the Congress of the consideration by the Interstate Commerce Commission of an increase of freight rates to meet such additional expenditures by the railroads as may have been rendered necessary by the adoption of the eight-hour day and which have not been offset by administrative readjustments and economies, should the facts disclosed justify the increase."

This recommendation was not followed in the enactment of the statute. The Senate Committee having the subject under consideration expressed a desire for investigation and consideration before enacting a law of this character. Such was not had, and the law in its present form was speedily passed.

In fixing wages, conceding the power of Congress for this purpose, that body acts having in mind the rights of the public, of the owners of railroads, and of the employees engaged in their service. Inherently, such legislation requires that investigation and deliberation shall precede action. In fixing rates Congress has itself recognized this principle and has delegated its power to a Commission which acts only upon full investigation, and an oppor-

tunity to be heard, wherein the interest of the public, the carrier, and the shipper may be given ample consideration.

Conceding that every presumption exists in favor of the legitimate exercise of legislative power, and that there is no authority in the courts to inquire into the motives which may have influenced legislators, and that every such enactment presupposes the possession of proper motives and sufficient information and knowledge to warrant the action taken, nevertheless Congress has in this act itself declared the lack of the requisite information for definite action, and has directed an experiment to determine what it should do, imposing in the meantime an increase of wages peremptorily declared, the expense of which is to be borne entirely by the carrier, without recompense if the investigation proves the injustice or impropriety of the increase.

Such legislation, it seems to me, amounts to the taking of the property of one and giving it to another in violation of the spirit of fair play and equal right which the Constitution intended to secure in the due process clause to all coming within its protection, and is a striking illustration of that method which has always been deemed to be the plainest illustration of arbitrary action, the taking of the property of A and giving it to B by legislative fiat. *Davidson* v. *New Orleans*, 96 U. S. 97, 104.

It may be taken to be true, as stated in the majority opinion, that but for this legislation a strike of employees engaged in interstate commerce would have been precipitated, disastrous in its consequences to the commerce of the country.

If I am right in the conclusion that this legislation amounted to a deprivation of property without due process of law, no emergency and no consequence, whatever their character, could justify the violation of constitutional rights. The argument of justification by emergency was made and answered in this court in *Ex parte Milligan*,

4 Wall. 2, decided more than fifty years ago, in which it was held that not even the perils of war could impair the right of a resident of a loyal State, not connected with the military service, and where the courts were open, and in the proper exercise of their jurisdiction, to be tried, convicted, or sentenced only by the ordinary courts of law, with trial by jury and with the safeguards intended to secure a fair trial in the courts of law. Speaking of the purposes which controlled in the adoption of the Federal Constitution, and animated those who framed that instrument this court said, p. 120: "Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

This principle is equally applicable to-day. Constitutional protection is more essential in times of unrest and agitation than it can be in the security of less turbulent periods. The Constitution intended to protect the citizen

against encroachments upon his rights impelled by existing emergencies, or supposed necessity of prompt and vigorous action. Constitutional rights, if they are to be available in time of greatest need, cannot give way to an emergency, however immediate, or justify the sacrifice of private rights secured by the Constitution.

I agree that a situation, such as was presented to Congress at this time, properly called for the exertion of its proper authority to avert impending calamity. I cannot agree that constitutional rights may be sacrificed because of public necessity, nor taken away because of emergencies which might result in disaster or inconvenience to public or private interests. If this be not so, the constitutional limitations for the protection of life, liberty, and property, are of little value, and may be taken away whenever it is supposed that the public interests will be promoted by the sacrifice of rights which the framers of the Constitution intended should be forever protected from governmental invasion by any branch of the Government.

There are certain matters in the opinion of the majority which I am unable to approve by silent acquiescence. I am not prepared to admit that Congress may when deemed necessary for the public interest coerce employees against their will to continue in service in interstate commerce. Nor do I think it necessary to decide, as declared in the majority opinion, that in matters of this kind Congress can enact a compulsory arbitration law. These questions are not involved in this case and their decision need not be anticipated until they actually arise.

The reasons, which I have outlined, impel me to the conclusion that the enactment under consideration necessarily deprives the complaining railroad companies of rights secured to them, as well as to others, by one of the most essential of the protections guaranteed by the Federal Constitution. In this view I am constrained to dissent from the opinion and judgment in this case.

MR. JUSTICE PITNEY, dissenting.

I am constrained to dissent from the decision just announced and from the reasoning upon which it is based. I am convinced that the statute under consideration (Act of September 3, 5, 1916, c. 436, 39 Stat. 721) is not within the constitutional power of Congress. The infirmity that I find in it is so fundamental that, for the sake of brevity, I lay aside all minor grounds upon which it is attacked, and hence may begin by setting forth the title and essential provisions of the act, so as to render plain its true effect and operation, omitting portions not necessary to a consideration of the main questions. I quote as follows:

"An Act To establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce, and for other purposes.

"*Be it enacted* . . . That beginning January first, nineteen hundred and seventeen, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, . . . which is subject to the provisions of the Act of February fourth, eighteen hundred and eighty-seven, entitled 'An Act to regulate commerce,' as amended, and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads, . . . from any State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia," etc.

"Sec. 2. That the President shall appoint a commission of three, which shall observe the operation and effects of the institution of the eight-hour standard workday as above defined and the facts and conditions affecting the

relations between such common carriers and employees during a period of not less than six months nor more than nine months, in the discretion of the commission, and within thirty days thereafter such commission shall report its findings to the President and Congress; . . .

"Sec. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this Act for a standard eight-hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour workday.

"Sec. 4. That any person violating any provision of this Act shall be guilty of a misdemeanor," etc.

It is, I think, too plain for argument that the act departs from its title, in that it does not establish eight hours as the limit of a day's work. There is no prohibition of service in excess of eight hours per day, nor any penalty for overtime work, for this is to be paid for only *pro rata*. There is no language evincing an intent to repeal or modify the Sixteen Hour Act of March 4, 1907, c. 2939, 34 Stat. 1415. It is a matter of common knowledge that railroad train service must be arranged according to the distances between terminals or "division points," and a change from a sixteen-hour limit to an eight-hour limit would be so revolutionary that a purpose to make such a change is not to be lightly inferred. This act affords no basis for such an inference. What it prescribes is that "eight hours shall, *in contracts for labor and service*, be deemed a day's work and *the measure or standard* of a day's work *for the purpose of reckoning the compensation* for services." It defines the terms of contracts for service and prescribes a measure only for the purpose of reckoning compensation. This is the whole effect of the first section. To shorten the discussion, I will concede, *arguendo*, that

this section of itself is not in conflict with the Constitution. This being assumed, the second section evidently is unexceptionable.

Serious difficulty appears, however, when we come to consider the operation and effect of the third section in connection with the first and second. It provides that, pending the report of the commission, and for thirty days thereafter, "the compensation of railway employees subject to this Act for a standard eight-hour workday shall not be reduced below the present standard day's wage," etc. This, of course, is to be practically enforced by means of prosecutions under § 4. The "present standard day's wage," in effect upon the railroad represented by appellees in this case and upon most of the other railroads of the country, is a term not easily defined. Accepting the paraphrase employed in the brief for the United States, the standard may be expressed as follows: "One hundred miles or less, ten hours or less, shall constitute a day." The effect of § 3 is that during a period of from seven to eleven months the carriers shall pay as much for eight hours' work as previously was paid for ten hours' work; the excess over eight hours to be paid for *pro rata* on the eight-hour basis. The effect is to increase wages in a large but undefined amount upon the railroad represented in this suit, and in the amount of many millions of dollars considering all the railroads that are affected.

The legislation is attempted to be sustained solely as an exercise of the power of Congress to regulate interstate and foreign commerce. Evidently it can find no other support, for Congress has no authority over the Missouri, Oklahoma & Gulf Railway Company, whose receivers are appellees here, or over the other companies affected by this law, except by reason of its power to regulate commerce; and it possesses this authority only because those corporations voluntarily have chosen to engage in commerce among the States. A contention that Congress

has power to compel the railroads and their employees to continue to carry on such commerce at all costs will be dealt with hereafter.

If, therefore, the act be not in a real and substantial sense a regulation of commerce, it is in excess of the constitutional power of Congress. "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated." *Adair* v. *United States*, 208 U. S. 161, 178. And, though it be a regulation of commerce, it is void if it conflicts with the provisions of the Fifth Amendment, that no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Lynah*, 188 U. S. 445, 471; *Adair* v. *United States*, 208 U. S. 161, 180; *United States* v. *Cress*, decided March 12, 1917, *ante*, 316.

I am convinced, in the first place, that the act cannot be sustained as a regulation of commerce, because it has no such object, operation, or effect. It removes no impediment or obstruction from the way of traffic or intercourse, prescribes no service to the public, lays down no rule respecting the mode in which service is to be performed, or the safeguards to be placed about it, or the qualifications or conduct of those who are to perform it. In short, it has no substantial relation to or connection with commerce—no closer relation than has the price which the carrier pays for its engines and cars or for the coal used in propelling them.

The suggestion that it was passed to prevent a threatened strike, and in this sense to remove an obstruction from the path of commerce, while true in fact is immaterial in law. It amounts to no more than saying that it was

enacted to take care of an emergency. But an emergency can neither create a power nor excuse a defiance of the limitations upon the powers of the Government. *Ex parte Milligan*, 4 Wall. 2, 121.

The simple effect of § 3 is to increase, during the period of its operation, the rate of wages of railroad trainmen employed in interstate commerce. It comes to this,—that whereas the owners of the railroads have devoted their property to the movement of interstate as well as intrastate commerce, and whereas the trainmen have accepted employment in such commerce, and thus employers and employees are engaged together in a *quasi* public service, the act steps in and prescribes how the money earned in the public service shall be divided between the owners of the railroads and these particular employees. This, in my view, is a regulation not of commerce but of the internal affairs of the commerce carriers,—precisely as if an act were to provide that the rate of interest payable to the bondholders must be increased and the dividend payments to the stockholders correspondingly decreased—and is not only without support in the commerce clause of the Constitution, but, as I shall endeavor to show, transgresses the limitations of the Fifth Amendment.

The oft-quoted declaration of Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, that the power to regulate commerce among the States, like all others vested in Congress, "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution," means that the exercise of the power is not dependent on, and is not to be hampered by, the action of the States, and is unrestrained by any qualification other than such as are contained in the fundamental law. To say that the power "acknowledges no limitations" is not to say that it is limitless in extent, for it is confined by the very definition of the subject matter. The power is vast, but is not vague, and

error inevitably must result from treating it as nebulous.

The act stands wholly without precedent in either state or national legislation. Let it be admitted that mere novelty is not a ground of constitutional objection, since it is the appropriate function of a legislature to change the law. This act, however, differs not only in degree, but in kind, from any and all that have preceded it. It is now nearly thirty years since Congress entered the field of direct regulation of interstate railway carriers. Before that the entire field was open to the States, and since the year 1887 the regulation of their internal commerce has still remained open to them. This has been a period of intense and widespread activity and progress in commerce regulation, and, as it happens, of equal progress respecting legislation in the interest of workingmen. The fact that no law fixing the rate of compensation for railroad employees ever was proposed until this act was brought forward a very few days before its passage, and then only under the coercive influence of a threatened public calamity, is the strongest evidence that in the judgment of executives and legislators, state and national, measures of this sort were not within the bounds of permissible regulation of commerce.

As already stated, the act has not the effect of imposing any limit to the number of hours that a trainman may work in a day, nor any penalty for overtime work. Therefore, it cannot be sustained upon the ground on which the court sustained the Act of March 4, 1907, 34 Stat. 1415, c. 2939, limiting the hours of service of employees engaged in interstate commerce, a ground epitomized in *Baltimore & Ohio R. R.* v. *Interstate Com. Comm.*, 221 U. S. 612, 619, as follows: "The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. . . In its power suitably to provide for the safety of employés

and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act."

The Safety Appliance Acts are as evidently distinguishable, they likewise being designed to secure the safety of employees and travelers, as this court repeatedly has held. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 17; *Southern Ry. Co.* v. *United States*, 222 U. S. 20, 26; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 41.

Nor does the Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65, c. 149, furnish a precedent for the present legislation. The constitutionality of that act was sustained in *Second Employers' Liability Cases*, 223 U. S. 1, upon grounds very clearly set forth in the opinion, thus (p. 48): "Congress, in the exertion of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employés, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employés are engaged"; and again (pp. 50–51): "The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and, as whatever makes for that end tends to promote the safety of the employés and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution."

Progressive as has been the legislation of Congress and

the States enacted during the past thirty years for the regulation of common carriers, I have found none at all analogous to that now under consideration. Besides the acts already referred to, laws have been passed respecting tariffs, bills of lading, through routes, joint rates, the exchange of traffic, terminal charges, locomotive headlights, and a multitude of other matters; but each and all of these have some direct and substantial relation to commerce itself.

The suggestion that an increase in the wages of trainmen will increase their contentment, encourage prompt and efficient service, and thus facilitate the movement of commerce, is altogether fanciful. The increase effected is not at all conditioned upon contented or efficient service. It benefits alike those who are efficient and those who are not. It does not equalize wages, but applies proportionately in all cases; making the least increase upon railroads whose rates of pay are the lowest, the greatest where wages are the highest. As a measure for improving the quality of railroad locomotives, a law requiring the companies to pay 25% more than before for each locomotive, without stipulating for any improvement in the quality, would be absurdly ineffective. Equally futile, as a measure for improvement of the quality of railway supplies, would be a provision of law compelling the roads to pay 25% more than formerly for rails, crossties, fuel, and the like, irrespective of the question of quality. In each of these instances the natural effect of the regulation as an aid to commerce would be precisely the same as that of the act under consideration—that is, *nil.*

The attempt is made to sustain the act as analogous to the exercise of the power to fix rates of freight and fare for the carriage of commodities and passengers, or as a branch of that power. This, in my judgment, is a false analogy. The origin and basis of the governmental power to regulate rates are in the right of the public to demand

and secure the services of the common carrier on reasonable and equal terms, and without haggling as to rates or other terms. Every member of the public is entitled to be served, and rates are established by public authority in order to protect the public against oppression and discrimination. But there is no common or other right on the part of the trainmen to demand employment from the carriers, nor any right on the part of the carriers to compel the trainmen to serve them. The employment is a matter of private bargaining between the parties, in which each has a constitutional right to exact such terms as he may deem proper. *Adair* v. *United States*, 208 U. S. 161, 172–3; *Coppage* v. *Kansas*, 236 U. S. 1, 20. Thus the sole foundation of the governmental power to fix rates is absent in the case of wages, and the asserted power to fix the latter is inconsistent with the constitutional rights of employer and employee to agree between themselves respecting the terms of the employment.

But further, the interest of the public in the regulation of rates lies in limiting the carrier to a reasonable compensation for his services. Incidentally, such a regulation may exert an indirect influence upon wages, as upon other expenditures of the carrier. Thus, the Interstate Commerce Commission has held that undue cost of operation or management cannot stand as a justification for unreasonably high rates. *Milk Producers' Protective Association* v. *Delaware, L. & W. R. R. Co.*, 7 I. C. C. 92, 164; *Society of American Florists* v. *U. S. Express Co.*, 12 I. C. C. 120, 127. But whatever concern the public authorities, as regulators of commerce, have in the cost of operation or management (including the rates of wages) is in the direction of lowering—not increasing—expenses. The present act has for its purpose and necessary effect the raising of wages; and, whatever may be its justification from the humanitarian standpoint, it cannot seriously be regarded as a regulation of commerce because incidental to a regula-

tion of rates. It is, indeed, the very antithesis of such a regulation. If it reduced wages, it would be much more easily supportable on this theory.

The primary and fundamental constitutional defect that I find in the act now under consideration is precisely this: That it undertakes to regulate the relations of common carriers by railroad to their employees in respect to a particular matter—an increase of wages—that has no real and substantial connection with the interstate commerce in which the carriers and their employees are engaged. Certainly the amount of wages that shall be paid to a trainman has no more substantial relation to commerce than the matter which was under consideration in *Adair* v. *United States*, 208 U. S. 161, that is, the right of an employee to retain his employment notwithstanding his membership in a labor organization. In that case this court, by Mr. Justice Harlan, used the following language (p. 178): "But what possible legal or logical connection is there between an employé's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employé is connected by his labor and services."

It proves nothing to say that the increase of pay was or is necessary, in the judgment of Congress, to prevent all railroad service in interstate commerce from being suspended. As a law to prevent a strike, the act is quite intelligible; but, as we have seen, the emergency conferred no power upon Congress to impose the burden upon the carriers. If the public exigency required it, Congress perhaps might have appropriated public moneys to satisfy the demands of the trainmen. But there is no argument for requiring the carriers to pay the cost, that would not equally apply to renewed demands, as often as made, if made by men who had the power to tie up traffic. I cannot

believe that this is regulation of commerce, within the meaning of the Constitution.

But, secondly, as already remarked, and as shown in the above quotation from 223 U. S. p. 49, the power of Congress to regulate commerce among the States is "subject always to the limitations prescribed in the Constitution," and, among others, to the inhibition of the Fifth Amendment against the deprivation of liberty or property without due process of law and the taking of private property for public use without just compensation. This has been held so often that it hardly is necessary to cite cases. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Lynah*, 188 U. S. 445, 471; *Adair* v. *United States*, 208 U. S. 161, 180; *United States* v. *Cress*, decided March 12, 1917, *ante*, 316.

I am convinced that the act trangresses this provision of the Amendment in two respects; first, in that it exceeds the bounds of proper regulation, and deprives the owners of the railroads of their fundamental rights of liberty and property; and, secondly, in that Congress, although confessedly not in possession of the information necessary for intelligent and just treatment of the pending controversy between the carriers and the trainmen (for the act itself, in its second section, provides for the very investigation that the history of the legislation shows was imperatively necessary), arbitrarily imposed upon the carriers the entire and enormous cost of an experimental increase in wages, without providing for any compensation to be paid in case the investigation should demonstrate the impropriety of the increase.

Upon the first of these points, I repeat that the sole authority of Congress to regulate these railroad corporations, including that company which is represented in the present action, arises from the fact that they voluntarily have devoted their property to the service of interstate commerce. I am unable to find in the Constitution any

authority on the part of Congress to commandeer the railroads, or the services of the trainmen. The cases that are referred to as sustaining the supposed obligation of the carrier to carry on its business regardless of cost, and the authority of government to compel performance of that obligation (*Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 27; *Missouri Pacific Railway* v. *Kansas*, 216 U. S. 262, 279; see, also, *Wisconsin &c. Railroad Co.* v. *Jacobson*, 179 U. S. 287, 302), were decisions sustaining the power of *state* governments to enforce obligations arising out of the grant by the State to the railroad company of the right of existence and the franchise to operate its road; and they were decided upon the authority of a line of decisions in the state courts (*Mayor &c. of Worcester* v. *Norwich &c. Railroad Co.*, 109 Massachusetts, 103, 113; *People* v. *Boston & Albany R. R. Co.*, 70 N. Y. 569, 571; *People* v. *New York &c. R. R. Co.*, 104 N. Y. 58, 67; *People* v. *St. Louis &c. R. R. Co.*, 176 Illinois, 512, 524) that based the right of control upon the power of the State to enforce the charter obligation and the reserved power to alter or amend the charter in the public interest. The relation of the Federal Government to railroad companies not chartered by it is altogether different, being dependent entirely upon the fact that the companies have seen fit to engage in interstate transportation, a branch of business from which, in my opinion, they are at liberty to withdraw at any time,—so far as any authority of the Federal Government to prevent it is concerned,—however impracticable such withdrawal may be.

The extent to which regulation properly can go under such circumstances was defined very clearly by this court in the great case of *Munn* v. *Illinois*, 94 U. S. 113, where Mr. Chief Justice Waite, speaking for the court, said (p. 126): "Property does become clothed with a public interest when used in a manner to make it of public con-

sequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." The control there referred to was a regulation by the State of the service performed by public warehouses and a limitation of the charges for that service. The opinion made it plain that the interest of the public was not in the property, but in the use of it; that not its management or disposition in general, but only the manner of its use in the service of the public, was subject to control.

The same limitation upon the authority of the public has been variously expressed in many decisions. Thus in *Interstate Com. Comm.* v. *Chicago G. W. Ry.*, 209 U. S. 108, 118, the court, by Mr. Justice Brewer, said: "It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager." In *Southern Pacific Co.* v. *Interstate Com. Comm.*, 219 U. S. 433, 444, reference was made to the unwarranted assertion by the Commission of "a power which if it obtained would open a vast field for the exercise of discretion, to the destruction of rights of private property in railroads, and would in effect assert public ownership without any of the responsibilities which ownership would imply." And, in the *Minnesota Rate Cases*, 230 U. S. 352, 433, it was said: "The property of the railroad corporation has been devoted to a public use. There is always the obligation springing from the nature of the business in which it is

engaged—which private exigency may not be permitted to ignore—that there shall not be an exorbitant charge for the service rendered. But the State has not seen fit to undertake the service itself; and the private property embarked in it is not placed at the mercy of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title but to the right to receive just compensation for the service given to the public."

The case last mentioned was one of alleged confiscation resulting from a state law limiting rates of freight, and the language quoted was appropriate to that topic. But the right to immunity from confiscation is not the only right of property safeguarded by the Fifth Amendment. Rights of property include something more than mere ownership and the privilege of receiving a limited return from its use. The right to control, to manage, and to dispose of it, the right to put it at risk in business, and by legitimate skill and enterprise to make gains beyond the fixed rates of interest, the right to hire employees, to bargain freely with them about the rate of wages, and from their labors to make lawful gains—these are among the essential rights of property, that pertain to owners of railroads as to others. The devotion of their property to the public use does not give to the public an interest in the property, but only in its use.

This act, in my judgment, usurps the right of the owners of the railroads to manage their own properties, and is an attempt to control and manage the properties rather than to regulate their use in commerce. In particular, it deprives the carriers of their right to agree with their employees as to the terms of employment. Without amplifying the point, I need only refer again to *Adair* v. *United States*, 208 U. S. 161, 174, 178.

I wholly dissent from the suggestion, upon which great stress is laid in the opinion of the majority of the court,

that the admittedly private right of the carriers and their employees to fix by agreement between themselves the standard of wages to control their relations—a right guaranteed by the "due process of law" clause, as this court repeatedly has held—can be set at naught or treated as waived in the present instance because the parties have failed to agree, or that legislative interference can be justified on that ground. The right to contract is the right to say by what terms one will be bound. It is of the very essence of the right that the parties may remain in disagreement if either party is not content with any term proposed by the other. A failure to agree is not a waiver but an exercise of the right—as much so as the making of an agreement.

To say that the United States has such a relation to interstate traffic and the transportation of the mails that it may interfere directly by force, or indirectly through the courts, to remove obstructions placed by wrongdoers in the way of such transportation (*In re Debs*, 158 U. S. 564, 582, 586), is not to say that, when obstruction is threatened, Congress, without taking over the railroads and paying just compensation to the owners, may exercise control of the revenues and dispose of them for the purpose of buying peace, either by direct intervention or through coercive legislation. To do this is to ignore the distinction between *meum* and *tuum*, to safeguard which was one of the objects of the Fifth Amendment.

The logical consequences of the doctrine now announced are sufficient to condemn it. If Congress may fix wages of trainmen in interstate commerce during a term of months, it may do so during a term of years, or indefinitely. If it may increase wages, much more certainly it may reduce them. If it may establish a minimum it may establish a maximum. If it may impose its arbitral award upon the parties in a dispute about wages, it may do the same in the event of a dispute between the railroads and

the coal-miners, the car-builders, or the producers of any other commodity essential to the proper movement of traffic.

That the act is a wide departure from all previous legislation for regulating commerce has been shown. The bearing of this upon the present point is obvious, since it is a safe assertion that every dollar of the thousands of millions that are invested in railroads in this country has been invested without any anticipation or reason for anticipating that a law of this character would be adjudged to be permissible, either as a regulation of commerce or on any other ground.

Upon the second ground of repugnancy to the Fifth Amendment I need not dwell, since it is dealt with fully in the dissenting opinion of Mr. Justice Day, with whose views upon that question I entirely agree.

Mr. Justice Van Devanter concurs in this dissent, including that portion of Mr. Justice Day's dissenting opinion just mentioned.

Mr. Justice McReynolds, dissenting.

Whatever else the Act of September 3, 1916, may do, it certainly commands that during a minimum period of seven months interstate common carriers by railroads shall pay their employees engaged in operating trains for eight hours' work a wage not less than the one then established for a standard day—generally ten hours.

I have not heretofore supposed that such action was a regulation of commerce within the fair intendment of those words as used in the Constitution; and the argument advanced in support of the contrary view is unsatisfactory to my mind. I cannot, therefore, concur in the conclusion that it was within the power of Congress to enact the statute.

But, considering the doctrine now affirmed by a majority of the court as established, it follows as of course that Congress has power to fix a maximum as well as a minimum wage for trainmen; to require compulsory arbitration of labor disputes which may seriously and directly jeopardize the movement of interstate traffic; and to take measures effectively to protect the free flow of such commerce against any combination, whether of operatives, owners, or strangers.

UTAH POWER & LIGHT COMPANY *v.* UNITED STATES.

UNITED STATES *v.* UTAH POWER & LIGHT COMPANY.

BEAVER RIVER POWER COMPANY *v.* UNITED STATES.

UNITED STATES *v.* BEAVER RIVER POWER COMPANY.

NUNN ET AL. *v.* UNITED STATES.

UNITED STATES *v.* NUNN ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

Nos. 202–207. Argued October 11, 12, 1916.—Decided March 19, 1917.

The power to regulate the use of the lands of the United States, and to prescribe the conditions upon which rights in them may be acquired by others, is vested exclusively in Congress.

The inclusion of such lands within a State does not diminish this power, or subject the lands or interests in them to disposition by the state

power; and, therefore, such lands, within a State, or ways across them, are not subject to be occupied or used for private or *quasi*-public purposes, under state laws, save such laws as have been adopted or made applicable by Congress.

The Act of May 14, 1896, c. 179, 29 Stat. 120, relating exclusively to rights of way and the use of land for electric power purposes, covering the subject fully and specifically and containing new provisions, was evidently designed to be complete in itself, and therefore, by necessary implication, superseded the provisions of Rev. Stats., §§ 2339 and 2340 (derived from the Acts of 1866 and 1870), in so far as they were applicable to such rights of way.

The legislation embodied in Rev. Stats., §§ 2339 and 2340, granted rights of way for ditches, canals and reservoirs only, and did not cover power-houses, transmission lines, or subsidiary structures.

Sections 18–21 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, relate to rights for ditches, canals and reservoirs for the purpose of irrigation and call for the filing of maps, to be effective when approved by the Secretary of the Interior; the Act of May 11, 1898, c. 292, 30 Stat. 404, permits the rights so approved under the Act of 1891 to be used for certain purposes, including power development, as subsidiary to the main purpose of irrigation; but neither act applies where no maps have been filed or approved, where the rights claimed include power-houses, subsidiary buildings and transmission lines, and where irrigation is neither the sole nor the main purpose of the use.

Whether or not the Act of February 15, 1901, c. 372, 31 Stat. 790, superseded other earlier right of way provisions, it obviously took the place of the Act of May 14, 1896, *supra*.

The Act of February 1, 1905, c. 288, 33 Stat. 628, makes no provision for electric power-houses, transmission lines or structures subsidiary thereto, the rights of way granted being only for ditches, canals and reservoirs for diverting, storing and carrying water.

The purposes for which rights of way may be obtained under the Act of February 1, 1905, *supra*, viz., municipal or mining purposes and for milling and reduction of ores, do not include the generating of electricity for general, commercial disposition even though some part of the current is sold in adjacent or distant towns for power, lighting and heating, or to persons engaged in mining, milling or reducing ores.

The United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. So *held*

in regard to an alleged agreement for the use of federal lands by a power company.

As a general rule, laches or neglect of duty on the part of government officers is no defense to a suit to enforce a public right or protect a public interest.

If this rule has exceptions, they in turn are limited by the principle which places on different planes an ordinary private suit over title and a suit maintained by the United States to enforce its policy respecting land held in trust for all the people. *Causey* v. *United States*, 240 U. S. 399, 402.

The discretion of Congress to control the use of federal lands through administrative regulations is not narrowly confined.

Where such regulations exceed the power of or authorization by Congress, they may be disregarded as void, but not so where they are merely illiberal, inequitable or unwise.

Parties whose occupancy and use of federal lands can be legitimated only by complying with the Act of February 15, 1901, *supra*, may not be heard to complain of the regulations adopted in its execution until they seek a license or permit under the act and conform, or appropriately offer to conform, to all of the regulations which are lawful.

The acts of Congress providing or recognizing that rights to the use of water in streams running through public lands and reservations may be acquired in accordance with local laws do not authorize the appropriation of rights of way through lands of the United States.

In a suit by the United States to enjoin unlawful occupancy and use of its reserved lands, compensation measured by the reasonable value of the occupancy and use, considering its extent and duration, should be included in the decree.

The compensation should not be measured by the charges prescribed for like uses by governmental regulations when the regulations have not been accepted or assented to by the defendants.

THE case is stated in the opinion.

Mr. William V. Hodges and *Mr. Graham Sumner*, for the Utah Power & Light Co.

Every State has the power of eminent domain as an attribute of sovereignty. The essence of the power is the right to take property for a public purpose. It depends upon the jurisdiction of the sovereign over the property

and not its jurisdiction over the owner. *Kohl* v. *United States*, 91 U. S. 367; *Boom Co.* v. *Patterson*, 98 U. S. 403; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525; *Adirondack Ry. Co.* v. *New York State*, 176 U. S. 335, 346.

The rights and powers of the United States as the owner of land within a State which is not used or needed for a governmental purpose, are the same as those of other owners of similar land within the same State. Section 3 of Article IV of the Federal Constitution does not create or define the rights or powers of the United States as an owner of land. It relates only to property owned by the United States and confers upon Congress only such rights and powers as are incidents of ownership. The nature and scope of such rights and powers must be determined by the general law of the State in which the land is located. Const. Art. I, § 8, Par. 17; Art. IV, § 3; *Broder* v. *Natoma Water Co.*, 101 U. S. 274; *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525; *Chicago, R. I. & P. Ry. Co.* v. *McGlinn*, 114 U. S. 542; *Ward* v. *Race Horse*, 163 U. S. 504; *Camfield* v. *United States*, 167 U. S. 518; *Clark* v. *Clark*, 178 U. S. 186; *Butte City Water Co.* v. *Baker*, 196 U. S. 119; *Thompson* v. *Fairbanks*, 196 U. S. 516; *Kansas* v. *Colorado*, 206 U. S. 46, 87. The grant of a power to Congress should not be held to impair the sovereign powers of the States unless there is affirmative evidence that it was so intended. The United States has no power to interfere with the governmental operations of the States. *Houston* v. *Moore*, 5 Wheat. 49; *McCulloch* v. *Maryland*, 4 Wheat. 316; *Withers* v. *Buckley*, 20 How. 84; *Texas* v. *White*, 7 Wall. 700; *Collector* v. *Day*, 11 Wall. 113; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; *South Carolina* v. *United States*, 199 U. S. 437.

Property of any State or municipality which is not used or needed for a governmental purpose may be taxed by the United States and may be taken and sold on execution. *Klein* v. *New Orleans*, 99 U. S. 149; *Merryweather* v. *Gar-*

rett, 102 U. S. 472; *New Orleans* v. *Morris*, 105 U. S. 600; *New Orleans* v. *Louisiana &c. Co.*, 140 U. S. 654; *Werlein* v. *New Orleans*, 177 U. S. 390; *South Carolina* v. *United States*, 199 U. S. 437.

The immunity of the United States or any other sovereign from interference extends only to property which is used or needed for a governmental purpose. *The Davis*, 10 Wall. 15; *The Fidelity*, 8 Fed. Cases, 1189, Case No. 4758; *Long* v. *The Tampico*, 16 Fed. Rep. 491; *Rees* v. *United States*, 134 Fed. Rep. 146.

The mere holding of land not used or needed for a governmental purpose is not a sovereign or governmental function of the United States. The taking of such land by a State in the exercise of its power of eminent domain does not interfere with the governmental functions of the United States. The purely proprietary interests of the United States should yield to the sovereign powers and public needs of the States.

The authorities sustain the power of eminent domain of the States with respect to land of the United States which is not used or needed for a governmental purpose. *United States* v. *City of Chicago*, 7 How. 185; *United States* v. *Railroad Bridge Co.*, 6 McLean, 517; *U. P. R. Co.* v. *B. & M. R. Co.*, 3 Fed. Rep. 106; *Illinois Central R. R. Co.* v. *C. B. & N. R. R. Co.*, 26 Fed. Rep. 477, 478; *U. P. R. R. Co.* v. *Leavenworth, N. & S. Ry. Co.*, 29 Fed. Rep. 728; *Jones* v. *F. C. & P. R. Co.*, 41 Fed. Rep. 70, 72; *Camp* v. *Smith*, 2 Minnesota, 131; *State* v. *Bachelder*, 5 Minnesota, 178, 180; *Simonson* v. *Thompson*, 25 Minnesota, 450, 453; *Burt* v. *Mechanics Ins. Co.*, 106 Massachusetts, 356, 360; Lewis on Eminent Domain, 3d. ed., Vol. II, § 414.

The failure of Congress to provide for actions to condemn land of the United States does not affect the substantive rights or powers of the States. The United States by bringing this suit has submitted to the jurisdiction of the court. When a public service corporation

constructs its plant upon the land of another without condemnation or agreement it will not be ousted at the suit of the owner, but will merely be compelled to pay damages measured by the reasonable value of the land. *Roberts* v. *Northern Pacific R. R. Co.*, 158 U. S. 1; *Northern Pacific R. R. Co.* v. *Smith*, 171 U. S. 260; *Donohue* v. *R. R. Co.*, 214 U. S. 499.

The land involved in this suit was vacant, unoccupied, unappropriated land, open to entry and settlement under the general land laws. These laws amounted to a declaration by Congress that the land was not needed for any governmental purpose. The reservation of this land later as a national forest did not amount to a declaration that it was needed for a governmental purpose.

The State of Utah has the power of eminent domain for the purpose of developing hydro-electric power and selling the same to the public and has authorized the defendant to use the land involved in this action for that purpose. Act of Territory of Utah, approved Feb. 20, 1880, § 15; Rev. Stat. of Utah, § 1288x21; *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Highland &c. Co.*, 200 U. S. 527; *Offield* v. *N. Y., N. H. & H. R. R. Co.*, 203 U. S. 372; *Mt. Vernon &c. Co.* v. *Alabama Inter-State Power Co.*, 240 U. S. 30.

The various acts of Congress recognize that rights of way on the public land for the storage and conveyance of water can be acquired under the local customs, laws and decisions of courts without the permission of the Secretary of the Interior. Acts of July 26, 1866, 14 Stat. 251; July 9, 1870, 16 Stat. 217; Rev. Stats., §§ 2339, 2340; Acts of March 3, 1891, 26 Stat. 1101; Jan. 21, 1895, 28 Stat. 635; May 14, 1896, 29 Stat. 120; May 11, 1898, 30 Stat. 404; Feb. 15, 1901, 31 Stat. 790; Reclamation Act, 1902, 32 Stat. 390; Forest Reserve Act, 1905, 33 Stat. 628; *Jennison* v. *Kirk*, 98 U. S. 453; *Broder* v. *Natoma Water Co.*, 101 U. S. 274; *United States* v. *Rio Grande Irrigation Co.*,

174 U. S. 690, 704; *Gutierres* v. *Albuquerque Land Co.*, 188 U. S. 545, 553.

Sections 2339 and 2340, Rev. Stats., were not repealed or superseded by the subsequent acts of Congress. *Rasmussen* v. *Blush*, 83 Nebraska, 678; 85 Nebraska, 198; *United States* v. *Utah Power & Light Co.*, 209 Fed. Rep. 554; *Cottonwood Ditch Co.* v. *Thom*, 39 Montana, 115, 118; *Lynch* v. *Irrigation Co.*, 131 Pac. Rep. 829; *Pecos &c. Co.*, 15 L. D. 470 (1892); *Cache County Canal Co.*, 16 L. D. 192 (1893); *Kings River Power Co.* v. *Knight*, 32 L. D. 144 (1903); *Lincoln County Co.* v. *Big Sandy Co.*, 32 L. D. 463 (1904).

The Act of February 15, 1901, did not supersede or repeal the Act of March 3, 1891. *Lynch* v. *Irrigation Co.*, 131 Pac. Rep. 829; *United States* v. *Lee*, 15 N. M. 382; *United States* v. *Port Neuf &c. Co.*, 213 Fed. Rep. 601; *Regulations under Act of 1901*, 31 L. D. 13; *Lincoln County Co.* v. *Big Sandy Co.*, 32 L. D. 463; *Regulations under Act of 1905*, 33 L. D. 451; 33 L. D. 564; *Regulations under Act of 1901*, 34 L. D. 228; 35 L. D. 154; 36 L. D. 18; 37 L. D. 338; *Sierra Ditch and Water Co.*, 38 L. D. 547; *DeWeese* v. *Henry Investment Co.*, 39 L. D. 27; *California-Nevada Canal Co.*, 40 L. D. 380; *Instruction*, 41 L. D. 10; *Malone Land & Water Co.*, 41 L. D. 138; *H. H. Tompkins*, 41 L. D. 516; *Joseph Williams*, 42 L. D. 111; *Manti Livestock Co.*, 42 L. D. 217; *George B. McFadden*, 42 L. D. 562; *Boughner* v. *Magenheimer et al.*, 42 L. D. 595.

There is no obvious repugnancy between §§ 2339 and 2340, Rev. Stats., and the later acts of Congress.

The defendant has not violated any lawful regulations of the Secretary of the Interior or the Secretary of Agriculture, and has the right under the Acts of 1901 and 1905 to maintain and operate its structures. "Municipal purposes" as used in the Act of 1905 includes all purposes for which a municipality may use water, and is coextensive with public purposes.

A sovereign is with respect to its property or proprietary interests subject to the principles of equitable estoppel in the same manner and under the same circumstances as a private individual or corporation. *Indiana* v. *Foulk*, 11 Fed. Rep. 398; *United States* v. *Willamette &c. Wagon-Road Co.*, 54 Fed. Rep. 807; *Michigan* v. *Railroad Co.*, 69 Fed. Rep. 116; *Walker* v. *United States*, 139 Fed. Rep. 409; *Mountain Copper Co.* v. *United States*, 142 Fed. Rep. 625; *Iowa* v. *Carr*, 191 Fed. Rep. 257; *Iowa* v. *Trust Co.*, 191 Fed. Rep. 270; *Hemmer* v. *United States*, 204 Fed. Rep. 898. It makes no difference in this connection whether the defendant has or has not the power of eminent domain. *N. Y. City* v. *Pine*, 185 U. S. 93; *West & Co.* v. *Octoraro Water Co.*, 159 Fed. Rep. 528; *McCann* v. *Chasm Power Co.*, 211 N. Y. 301.

The United States may be deprived of rights or interests in land under the principles of equitable estoppel. *Jennison* v. *Kirk*, 98 U. S. 453; *Broder* v. *Natoma Water Co.*, 101 U. S. 274.

Mr. Clyde C. Dawson and *Mr. Frank H. Short*, with whom *Mr. Frank J. Gustin*, *Mr. Charles A. Gillette*, *Mr. Dean F. Brayton* and *Mr. H. R. Waldo* were on the briefs, for the Beaver River Power Company and Nunn *et al.*

The power to dispose of the territory or other property belonging to the United States should not be so construed as to interfere with the governmental powers of any State. The admission of a new State into the Union, *ipso facto*, conveys to that State such jurisdiction and interest, over all the territory within its borders, as is essential to the exercise of its proper functions, under the Constitution, upon an equal footing with the original States. *Pollard's Lessee* v. *Hagan*, 3 How. 212, 218 *et seq.*; *Veazie* v. *Moor*, 14 How. 568, 572, 573; *Withers* v. *Buckley*, 20 How. 84, 92, 93; *Escanaba Company* v. *Chicago*, 107

U. S. 678, 687; *Huse* v. *Glover*, 119 U. S. 543, 548, 549; *Ward* v. *Race Horse*, 163 U. S. 504, 514; *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 258, 296.

The State has a right, directly or through its authorized agencies, to establish rights of way or easements of a local public nature over vacant federal lands. *United States* v. *Railroad Bridge Co.*, 6 McLean, 517, 27 Fed. Cas. 692, 693.

The title to lands of the United States under navigable waters within its territories passes to the new State in which such lands are situated.

The jurisdiction of the State is not prejudiced by reason of the ownership by the federal government of lands situated within the borders of the State and not reserved for any of the federal uses enumerated in the Constitution. *People* v. *Shearer*, 60 California, 658; *United States* v. *Cornell*, 2 Mason, 60; *Woodruff* v. *North Bloomfield Co.*, 18 Fed. Rep. 772; *Mobile* v. *Eslava*, 16 Pet. 234, 253; *Illinois R. R. Co.* v. *Illinois*, 146 U. S. 434; *New Orleans* v. *United States*, 10 Pet. 662, 736; *Coyle* v. *Smith*, 221 U. S. 559, 566; *South Carolina* v. *United States*, 199 U. S. 437; *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525.

The laws of the State governing the appropriation and use of water for all purposes, except interstate and foreign commerce, are exclusive. They form part of the internal police of the State and are paramount to any proprietary interest or legislative power of the federal government. *Jennison* v. *Kirk*, 98 U. S. 453, 458; *Broder* v. *Water Company*, 101 U. S. 274, 276; *Gutierres* v. *Albuquerque*, 188 U. S. 545; *Kansas* v. *Colorado*, 206 U. S. 46; *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 356; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, *III Documentary History of the Constitution*, 306, 307, 308, 314; *Federalist*, Nos. 78, 32, 39, 45; *Illinois* v. *Economy Light & Power Co.*, 234 U. S. 497; *Utah Session Laws*, 1880, 40; *ib.*, 1896, 316; *ib.*, 1897, 223.

The use of water for beneficial purposes may be declared by the laws of the State to be a public use.

General acts of Congress intended to aid and encourage the development of the country should be liberally construed so as to effectuate their purpose.

The Acts of 1866 and 1870, now §§ 2339 and 2340, Rev. Stats., are to be construed as recognizing and confirming, and not as granting, rights of way over the public land for the beneficial use of water. Such rights are acquired by appropriation under the local laws. *Jennison* v. *Kirk*, 98 U. S. 453; *Broder* v. *Water Co.*, 101 U. S. 274; *Kansas* v. *Colorado*, 206 U. S. 46, 87; *Hough* v. *Porter*, 51 Oregon, 318; *Boquillas Land & Water Co.* v. *Curtis*, 213 U. S. 339, 344.

The Act of March 3, 1891, 26 Stat. 1095, does not repeal §§ 2339 and 2340. All beneficial uses of water are covered by said act; and rights of way under it may be reserved by the filing and approval of maps, or may be acquired by definite location and construction alone. In this respect the act is like the general railroad right-of-way act of 1875. *Jamestown R. R. Co.* v. *Jones*, 177 U. S. 125; *Stalker* v. *Oregon Short Line R. R. Co.*, 225 U. S. 142; *Minidoka & S. W. Ry. Co.* v. *United States*, 235 U. S. 211; *Cache Valley Canal Co.*, 16 L. D. 192; *Lincoln County Co.* v. *Big Sandy Co.*, 32 L. D. 27, 33.

Regulations of the departments which are inconsistent with the acts of Congress, or which assume legislative powers, are void.

The easements in question are permanent in nature, are used in serving the public, and must be continued. Upon principles of equitable estoppel a license cannot be revoked after expenditures are made thereon by the licensee, when the use is in its nature permanent [citing numerous cases].

The regulations of the Departments of the Interior and of Agriculture, which are sought to be enforced, are un-

authorized by the Act of February 15, 1901, 31 Stat. 790, or any other act of Congress, are attempts at the exercise of legislative power, and are null and void.

The power of the United States by its own laws to protect its property from private waste or trespass does not give it a general jurisdiction over vacant lands within a State.

Section 2339, Rev. Stats., is not inconsistent with and has not been repealed by any subsequent congressional legislation, including the Acts of May 14, 1896, and February 15, 1901. Repeals by implication are not favored.

The Act of 1901, considered as a substitute for other laws and as providing the only method under which rights of way could be obtained, acquired or used over the public lands for the purposes indicated, would be unconstitutional.

Mr. Assistant Attorney General Knaebel for the United States.

By leave of court, a brief was filed by the Attorneys General of the States of Utah, Colorado, Idaho, Nevada and Nebraska, and Messrs. Frank H. Short, Clyde C. Dawson and S. A. Bailey, special counsel, as *amici curiæ:*

The act of Congress admitting a State operates as a grant of the title to federal lands submerged by navigable waters, subject to the commercial power of the federal government. Likewise the jurisdiction over its internal affairs, transferred to the new State by virtue of the act of admission, carries with it the right to establish, control and regulate local public uses and facilities over the vacant public lands not subjected to federal jurisdiction for the purposes enumerated or implied in the Constitution. Even the grant of a privilege carries with it the rights to which the privilege is attached and without which its exercise would be impossible.

The power of the United States to protect its property by its own legislation from private trespass and waste does not, and cannot, imply a general police power over the vacant public lands within a State.

The section in the Constitution relating to the admission of new States, and the concomitant disposition of the public lands, excludes, by its express terms, any construction by which the United States may claim any additional governmental or police powers within the States in which such public land is situated.

The existence of easements of a public nature over vacant federal lands does not interfere with the disposal of such lands by the federal government, but is in aid thereof; and the claim made by the States of the right to control the creation and continuance of such easements, within their respective territorial jurisdictions, does not conflict with the power of Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." *Idaho-Iowa Lateral & Reservoir Co.* v. *Fisher*, 27 Idaho, 695; *Homer E. Brayton*, 31 L. D. 364, 365; *Crane Falls Co.* v. *Snake River Co.*, 24 Idaho, 77.

The ninth section of the Act of July 26, 1866 (Rev. Stats., § 2339), was an express recognition of the right of the States to regulate the appropriation and use of water for all purposes except navigation, and of the subordination of the proprietary interest of the United States in its vacant public lands to that right. *Broder* v. *Water Company*, 101 U. S. 274, 275; *Butte City Water Co.* v. *Baker*, 196 U. S. 119; *Stowell* v. *Johnson*, 7 Utah, 215.

Subsequent acts of Congress on the subject not only can, but should, be construed consistently with this right of the States so recognized by the Act of July 26, 1866. As an act intended to encourage the development of the country, it should be liberally construed.

The Act of March 3, 1891, 26 Stat. 1095, and acts

supplemental thereto, were intended to encourage the appropriation of water for beneficial purposes by providing for the reservation of rights of way over the public land in advance of construction and use, and were not intended to limit or modify the authority and operation of the local laws in respect thereof.

The Acts of May 14, 1896, 29 Stat. 120, February 26, 1897, 29 Stat. 599; May 11, 1898, 30 Stat. 404; February 15, 1901, 31 Stat. 790, and § 4 of the Act of February 1, 1905, 33 Stat. 628, were intended to correct erroneous rulings by the Land Department under the Act of March 3, 1891, *supra*, and not to supersede, modify or repeal the ninth section of the Act of July 26, 1866, nor to interfere with the operation of the local laws on the subject of the beneficial use of water.

The rights of way mentioned in the Act of February 15, 1901, *supra*, are all permanent in their nature; and from the body of the act it is plain that the only one which is subject to purchase and termination after construction is the right of way for telephone and telegraph lines, and that this can only be terminated by paying the valuation to be fixed in accordance with the prior statute referred to in the act. The administration of the Act of February 15, 1901, remains, therefore, in the hands of the Secretary of the Interior and was not transferred to the Secretary of Agriculture in forest reservations by the Act of February 1, 1905.

The regulations of the Departments of the Interior and of Agriculture, assuming entire control over the appropriation and use of water on the public domain, sought to be enforced in this and similar cases, are unauthorized by any Act of Congress, and are unconstitutional and void. The laws and policy of a State may be framed and shaped to suit its conditions of climate and soil. The State has the police power to provide for its internal development and to this end to declare what uses are public within its

territorial jurisdiction and to regulate the same. *Clark* v. *Nash*, 198 U. S. 361; *Offield* v. *N. Y., N. H. & H. R. Co.*, 203 U. S. 372, 377; *Strickley* v. *Highland Boy Gold Min. Co.*, 200 U. S. 527; *Bacon* v. *Walker*, 204 U. S. 311, 315.

The claims of the federal government, in this and similar cases, are devoid of equity. *Woodruff* v. *Trapnall*, 10 How. 190, 207; *Indiana* v. *Milk*, 11 Fed. Rep. 389, 397.

Mr. John R. Dixon, by leave of court, filed a brief as *amicus curiæ*.

Mr. William B. Bosley, by leave of court, filed a brief as *amicus curiæ*.

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

We are concerned here with three suits by the United States to enjoin the continued occupancy and use, without its permission, of certain of its lands in forest reservations in Utah as sites for works employed in generating and distributing electric power, and to secure compensation for such occupancy and use in the past. The reservations were created by executive orders and proclamations with the express sanction of Congress. Almost all the lands therein belong to the United States and before the reservations were created were public lands subject to disposal and acquisition under the general land laws. The works in question consist of diversion dams, reservoirs, pipe lines, power houses, transmission lines and some subsidiary structures. In the aggregate these are used in collecting water from mountain streams, in conducting it for considerable distances to power houses where the force arising from its descent through the pipe lines is transmuted into electric energy, and in transmitting that energy to places beyond the reservations, where it is sold

to whoever has occasion to use it for power, lighting or heating. In each case some part of the works is on private lands, but much the greater part is on lands of the United States. Part was constructed before and part after the reservation was created, but all after 1896 and nearly all after 1901. The entire works are conducted in each instance as a commercial enterprise, and not as an incident to or in aid of any other business in which the defendant is engaged.

In occupying and using the government lands as sites for these works the defendants have proceeded upon the assumption that they were entitled so to do without seeking or securing any grant or license from the Secretary of the Interior or the Secretary of Agriculture under the legislation of Congress, and, in truth, they have neither applied for nor received such a grant or license from either. But, notwithstanding this, they assert that they have acquired and are invested with rights to occupy and use permanently, for the purposes indicated, the government lands upon which the works are located.

The principal object of the suits, as is said in one of the briefs, is to test the validity of these asserted rights and, if they be found invalid, to require the defendants to conform to the legislation of Congress or, at their option, to remove from the government lands. The District Court ruled against the defendants upon the main question, following a decision of the Circuit Court of Appeals in another case, 209 Fed. Rep. 554, but refused the Government's prayer for pecuniary relief. Cross appeals were then taken directly to this court.

The first position taken by the defendants is that their claims must be tested by the laws of the State in which the lands are situate rather than by the legislation of Congress, and in support of this position they say that lands of the United States within a State, when not used or needed for a fort or other governmental purpose of the

United States, are subject to the jurisdiction, powers and laws of the State in the same way and to the same extent as are similar lands of others. To this we cannot assent. Not only does the Constitution (Art. IV, § 3, cl. 2) commit to Congress the power "to dispose of and make all needful rules and regulations respecting" the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them. Thus while the State may punish public offenses, such as murder or larceny, committed on such lands, and may tax private property, such as live stock, located thereon, it may not tax the lands themselves or invest others with any right whatever in them. *United States* v. *McBratney*, 104 U. S. 621, 624; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 168; *Wisconsin Central R. R. Co.* v. *Price Co.*, 133 U. S. 496, 504. From the earliest times Congress by its legislation, applicable alike in the States and Territories, has regulated in many particulars the use by others of the lands of the United States, has prohibited and made punishable various acts calculated to be injurious to them or to prevent their use in the way intended, and has provided for and controlled the acquisition of rights of way over them for highways, railroads, canals, ditches, telegraph lines and the like. The States and the public have almost uniformly accepted this legislation as controlling, and in the instances where it has been questioned in this court its validity has been upheld and

its supremacy over state enactments sustained. *Wilcox* v. *Jackson*, 13 Pet. 498, 516; *Jourdan* v. *Barrett*, 4 How. 168, 185; *Gibson* v. *Chouteau*, 13 Wall. 92, 99; *Camfield* v. *United States*, 167 U. S. 518; *Light* v. *United States*, 220 U. S. 523, 536–537. And so we are of opinion that the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power. "A different rule," as was said in *Camfield* v. *United States*, *supra*, "would place the public domain of the United States completely at the mercy of state legislation."

It results that state laws, including those relating to the exercise of the power of eminent domain, have no bearing upon a controversy such as is here presented, save as they may have been adopted or made applicable by Congress.

The next position taken by the defendants is that their claims are amply sustained by §§ 2339 and 2340 of the Revised Statutes, originally enacted in 1866 and 1870. By them the right of way over the public lands was granted for ditches, canals and reservoirs used in diverting, storing and carrying water for "mining, agricultural, manufacturing and other purposes." The extent of the right of way in point of width or area was not stated and the grant was noticeably free from conditions. No application to an administrative officer was contemplated, no consent or approval by such an officer was required, and no direction was given for noting the right of way upon any record. Obviously this legislation was primitive. At that time works for generating and distributing electric power were unknown, and so were not in the mind of Congress. Afterwards when they came into use it was found that this legislation was at best poorly adapted

to their needs. It was limited to ditches, canals and reservoirs, and did not cover power houses, transmission lines or the necessary subsidiary structures. In that situation Congress passed the Act of May 14, 1896, c. 179, 29 Stat. 120, which related exclusively to rights of way for electric power purposes, and read as follows:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing, or distributing electric power."

We regard it as plain that this act superseded §§ 2339 and 2340 in so far as they were applicable to such rights of way. It dealt specifically with that subject, covered it fully, embodied some new provisions and evidently was designed to be complete in itself. That it contained no express mention of ditches, canals and reservoirs is of no significance, for it was similarly silent respecting power houses, transmission lines and subsidiary structures. What was done was to provide for all in a general way without naming any of them.

As the works in question were constructed after §§ 2339 and 2340 were thus superseded, the defendants' claims receive no support from those sections. No attempt was made to conform to the Act of 1896, and nothing is claimed under it.

Some reliance is placed upon §§ 18–21 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, and the Act of May 11, 1898, c. 292, 30 Stat. 404. The first relate to rights of way for ditches, canals and reservoirs for the purpose of irrigation, and, differing from §§ 2339 and 2340, call for the filing of maps of location which are to be effective

and noted upon the public records when approved by the Secretary of the Interior. The second permits rights of way "approved" under the first to be used for certain additional purposes, including the development of power, "as subsidiary to the main purpose of irrigation." But here no maps of location have been filed or approved, the rights of way are not claimed merely for ditches, canals or reservoirs, and irrigation is neither the sole nor the main purpose for which any part of the asserted rights of way is used. So it is apparent that the reliance upon these acts is ill founded.

In the oral and written arguments counsel have given much attention to the Act of February 15, 1901, c. 372, 31 Stat. 790. On the part of the Government it is insisted that the comprehensive terms of the act and its legislative history [1] conclusively show that it was adopted as a complete revision of the confused and fragmentary right-of-way provisions found in several earlier enactments, including those already noticed, but this need not be considered or decided now beyond observing that the act obviously superseded and took the place of the law of May 14, 1896, *supra*. The act empowers the Secretary of the Interior, "under general regulations to be fixed by him," to permit the use of rights of way through the public lands, forest reservations,[2] etc., for any one or more of several purposes, including the generation and distribution of electric power, carefully defines the extent of such rights of way and embodies provisions not found in any of the earlier enactments. But the defendants can claim nothing under the act. They have not conformed

[1] Report Secretary of the Interior, 1899, pp. 6–7; House Report, 1850, 56th Cong., 1st Sess.; Cong. Rec., 56th Cong., 1st Sess., 6762; *ibid.*, 56th Cong., 2d Sess., 2075.

[2] The forest reserves were measurably placed under the control of the Secretary of Agriculture by the Act of February 1, 1905, c. 288, 33 Stat. 628.

to its requirements and have not received any permission or license under it.

Another statute upon which the defendants rely is the Act of February 1, 1905, c. 288, 33 Stat. 628. But we think it does not help them. While providing for rights of way in forest reserves for ditches, canals, reservoirs and the like "for municipal or mining purposes, and for the purposes of the milling and reduction of ores," it makes no provision for power houses, transmission lines or subsidiary structures such as the defendants have. And, in our opinion, the purposes named do not include those for which the works in question are used. It is not enough that some of the electric energy is sold in adjacent or distant towns or to those who are engaged in mining or in milling or reducing ores. In an opinion rendered June 4, 1914, the Attorney General said of this act: "The rights granted are described with particularity. The right of way for transmitting and distributing electrical power is not included expressly, nor is it so intimately related to any of the rights enumerated that a grant of the one must needs be implied as essential to the enjoyment of the other." 30 Ops. A. G. 263. We regard this as the correct view.

In their answers some of the defendants assert that when the forest reservations were created an understanding and agreement was had between the defendants, or their predecessors, and some unmentioned officers or agents of the United States to the effect that the reservations would not be an obstacle to the construction or operation of the works in question; that all rights essential thereto would be allowed and granted under the Act of 1905; that consistently with this understanding and agreement and relying thereon the defendants, or their predecessors, completed the works and proceeded with the generation and distribution of electric energy, and that in consequence the United States is estopped to question the right of the defendants to maintain and operate the works. Of this

it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. *Lee* v. *Munroe*, 7 Cranch, 366; *Filor* v. *United States*, 9 Wall. 45, 49; *Hart* v. *United States*, 95 U. S. 316; *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 291.

As presenting another ground of estoppel it is said that the agents in the forestry service and other officers and employees of the Government, with knowledge of what the defendants were doing, not only did not object thereto but impliedly acquiesced therein until after the works were completed and put in operation. This ground also must fail. As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. *United States* v. *Kirkpatrick*, 9 Wheat. 720, 735; *Steele* v. *United States*, 113 U. S. 128, 134; *United States* v. *Beebe*, 127 U. S. 338, 344; *United States* v. *Insley*, 130 U. S. 263, 265–266; *United States* v. *Dalles Military Road Co.*, 140 U. S. 599, 632; *United States* v. *Michigan*, 190 U. S. 379, 405; *State ex rel. Lott* v. *Brewer*, 64 Alabama, 287, 298; *State* v. *Brown*, 67 Illinois, 435, 438; *Den* v. *Lunsford*, 20 N. Car. 407; *Humphrey* v. *Queen*, 2 Can. Exch. 386, 390; *Queen* v. *Black*, 6 Can. Exch. 236, 253. And, if it be assumed that the rule is subject to exceptions, we find nothing in the cases in hand which fairly can be said to take them out of it as heretofore understood and applied in this court. A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it. *Causey* v. *United States*, 240 U. S. 399, 402.

By their answers the defendants assert that some of the

administrative regulations promulgated under the Act of February 15, 1901, go beyond what is appropriate for the protection of the interest of the United States and are unconstitutional, unauthorized and unreasonable. The regulations occupy many printed pages and the answers do not adequately show which regulations are assailed or the grounds upon which the invalidity of particular ones is asserted. That Congress intends there shall be some administrative regulations on the subject is plainly shown in the act, and that its discretion in the matter is not narrowly confined is shown by our decisions in *United States* v. *Grimaud*, 220 U. S. 506, and *Light* v. *United States*, *ibid*, 523. If any of the regulations go beyond what Congress can authorize or beyond what it has authorized, those regulations are void and may be disregarded; but not so of such as are thought merely to be illiberal, inequitable or not conducive to the best results. In the nature of things it hardly can be that all are invalid, and this was conceded in argument. The defendants have not complied with any, or really offered to do so, but have proceeded upon the theory that the act and all the regulations are without application to their situation. In this they have been mistaken, and so are occupying and using reserved lands of the United States without its permission and contrary to its laws. Not until they seek a license or permit under the act and conform, or appropriately offer to conform, to all lawful regulations thereunder will they be in a position to complain that some of the regulations are invalid. As we interpret the decrees below, they enjoin the defendants from occupying and using the lands of the United States until, and only until, they acquire rights to do so by complying with some applicable statute and the lawful regulations. Of course, we do not imply that any of the regulations are invalid but leave that question entirely open.

Much is said in the briefs about several congressional

enactments providing or recognizing that rights to the use of water in streams running through the public lands and forest reservations may be acquired in accordance with local laws, but these enactments do not require particular mention, for this is not a controversy over water-rights but over rights of way through lands of the United States, which is a different matter and is so treated in the right-of-way acts before mentioned. See *Snyder* v. *Colorado Gold Dredging Co.*, 181 Fed. Rep. 62, 69.

As the defendants have been occupying and using reserved lands of the United States without its permission and contrary to its laws, we think it is entitled to have appropriate compensation therefor included in the decree. The compensation should be measured by the reasonable value of the occupancy and use, considering its extent and duration, and not by the scale of charges named in the regulations as prayed in the bill. However much this scale of charges may bind one whose occupancy and use are under a license or permit granted under the statute, it cannot be taken as controlling what may be recovered from an occupant and user who has not accepted or assented to the regulations in any way.

It follows that the decrees are right and must be affirmed, save as they deny the Government's right to compensation for the occupancy and use in the past, and in that respect they must be reversed.

It is so ordered.

LEHIGH VALLEY RAILROAD COMPANY *v.* UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

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

No. 733. Argued March 15, 1917.—Decided March 26, 1917.

The District Court is without jurisdiction over an order of the Interstate Commerce Commission, negative in substance and form, in which the Commission declined to exercise its authority under the "Panama Canal Act" of August 24, 1912, c. 390, § 11, 37 Stat. 560, 566, to extend the period fixed in the act for the divorcement of railroad and water carriers. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282.

234 Fed. Rep. 682, affirmed.

THE case is stated in the opinion.

Mr. Richard W. Barrett, with whom *Mr. John G. Johnson* and *Mr. Edgar H. Boles* were on the brief, for appellant.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States.

Mr. Joseph W. Folk for the Interstate Commerce Commission.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to prevent the enforcement of an order of the Interstate Commerce Commission. On December 2, 1913, the Commission issued a circular calling attention

to the fact that the Act of August 24, 1912, c. 390, § 11, 37 Stat. 560, 566, known as the Panama Canal Act, prohibited, after July 1, 1914, any ownership by a railroad in any common carrier by water when the railroad might compete for traffic with the water carrier; and that the Commission was authorized to determine questions of fact as to such competition, and to extend the time beyond July 1, 1914, if the extension would not exclude or reduce competition on the water route. Notice was given that applications for extension of time should be filed by March 1, 1914. Thereupon, in January, 1914, the appellant filed a petition praying for a hearing as to whether the services of a steamboat line owned by it would be in violation of the above section and for an extension of time. It is the order issued upon this petition against which relief is sought.

The facts other than the question whether they warrant the conclusion that the railroad and the steamboat line do or may compete are not disputed. The railroad extends from Jersey City to Buffalo and there connects with the line of the Lehigh Valley Transportation Company which runs vessels between Buffalo and Chicago and Milwaukee. The railroad company owns all the stock of the Transportation Company, but with the exception of the interchange port of Buffalo serves no point in common with the boats of the latter. It is, however, a party to certain fast-freight-line arrangements and all-rail routes and joint rates to the ports served by its vessels. The effect of these connections and of the railroad's membership of the Lake Lines Association was held by the Commission to put the railroad in a position inimical to the best interests of the boat line, to deprive the latter of its initial rate-making power and to determine by outside authority whether freight shall move by all rail or by lake and rail routes, and if by the latter, by which lake line. It was held that by virtue of these arrangements the railroad

did or might compete with its boat line and upon that decision the petition of the appellant was dismissed. 33 I. C. C. 699, 706, 716. 37 I. C. C. 77.

Three judges sitting in the District Court denied the injunction asked and dismissed the bill. 234 Fed. Rep. 682. Although they proceeded to discuss the merits of the case they intimated at the outset a strong doubt whether in any event an injunction could be granted. If this doubt was well founded there is nothing more to be said, since the ground of jurisdiction is gone. We assume that the question whether the facts found by the Commission present a case of real or possible competition within the meaning of the statute is a question of law that could not be conclusively answered by the Commission; but still there is nothing for a court of equity to enjoin if all that the Commission has done is to decline to extend the time during which the railroad can keep its boat line without risk.

The order of the Commission was negative in substance as well as in form. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, 292, 293. The risk to which the railroad was left subject did not come from the order but from the above-mentioned section of the Panama Canal Act (amending § 5 of the Act to Regulate Commerce) making each day of violation a separate offence and the provision of the latter act, § 10, which imposes a possibly large fine. This risk is the same that it was before the order or that it would have been if appellant had not applied to the Commission, except so far as the findings establish facts that we believe there is no desire to dispute. Without going further it appears to us plain that the decree of the District Court dismissing the bill was right.

Decree affirmed.

STATE OF CALIFORNIA *v.* DESERET WATER, OIL & IRRIGATION COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 269. Argued January 29, 1917.—Decided March 26, 1917.

When the decision of the state court in the application of state laws to real property is controlled by a construction of federal statutes concerning the title, which were relied on by the party complaining, this court has jurisdiction to review the judgment.

When a forest reservation is made to include a school section previously surveyed, the State may waive its right to the section and select other lands in lieu, under §§ 2275, 2276, Rev. Stats., as amended by the Act of March 3, 1891, c. 384, 26 Stat. 796.

This court will not readily disturb a construction of a land law by the Land Department which, though differing from an earlier one, has been adopted on full consideration and long consistently adhered to by the Department, and upon the faith of which large acreages have been acquired and large expenditures have been made.

167 California, 147, reversed.

THE case is stated in the opinion.

Mr. John T. Nourse, Deputy Attorney General of the State of California, with whom *Mr. U. S. Webb,* Attorney General of the State of California, was on the briefs, for plaintiff in error.

Mr. Charles F. Consaul, with whom *Mr. A. H. Ricketts* and *Mr. W. H. Metson* were on the briefs, for defendant in error.

Mr. Charles D. Mahaffie, Solicitor for the Department of the Interior, *Mr. C. Edward Wright* and *Mr. Oscar W. Lange,* by leave of court, filed a brief on behalf of the United States as *amici curiæ.*

MR. JUSTICE DAY delivered the opinion of the court.

The Deseret Water, Oil & Irrigation Company brought a proceeding in condemnation in the Superior Court of Mono County, California, against the State of California, to appropriate by right of eminent domain certain lands in that State, for the purpose of preserving and maintaining water rights, equipping and operating canals, etc., to be used in supplying water and power to mines, farming neighborhoods, cities, and towns and villages, and to corporations and individuals, draining, reclaiming and irrigating lands, equipping, operating and maintaining ditches, reservoirs, etc., and for the operation and maintenance of pumps and pumping plants, electrical lighting and power plants, and electric and power lines.

The right to make such appropriation was sustained in the Superior Court, but upon appeal this judgment was reversed by the District Court of Appeal for the Third Appellate District. Thereupon, upon motion to the Supreme Court of California, the cause was transferred to that court for hearing and decision, and, upon consideration, the judgment of the Superior Court was affirmed. 167 California, 147. The Supreme Court held that the lands belonged to the State, and that by certain statutes of the State it had been provided that, notwithstanding the ownership of the State, the lands might be appropriated to a public use such as the Water Company was lawfully proposing to make of them, and that as to such matters the State had consented to be sued in the same manner as any private proprietor might be. A writ of error brings the case to this court.

The land in question is a sixteenth section, passing to the State by virtue of the federal grant for school purposes. Act of 1853, 10 Stat. 244; Act of 1866, 14 Stat. 218. Afterward, a national reservation, known as the Mono Forest Reserve, was established by proclamation of the President.

This reservation included this section 16 within its boundaries.

It was shown at the trial that the lands in question were withdrawn from sale by the State by an act of the legislature, and it was contended they could only be used as bases for lieu selections. The surveyor-general of the State offered the lands as bases for such selections, except forty acres, for which the State had sold an indemnity certificate entitling the purchaser to surrender that land, and apply for unappropriated public land in lieu thereof. All the remainder had been offered for lieu selections which are pending in the General Land Office.

The Supreme Court of California held that the title to the lands was completely vested in the State, and subject to condemnation at the instance of the Water Company.

A motion to dismiss for want of jurisdiction has been submitted. As we shall have occasion to see in the further discussion of the case, its disposition depended upon the construction of statutes of the United States, and the opinion of the state court shows that these statutes were considered and federal rights asserted under them denied. Nor can we agree that there was a local ground of decision broad enough to sustain the judgment of the state court independently of the construction and effect given to the federal statute. The controlling effect of the federal statutes is conceded in the opinion of the state court, and must necessarily follow in view of the nature of the rights dealt with. In this situation this court has jurisdiction. *Miedreich* v. *Lauenstein*, 232 U. S. 236, 242; *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 257; *Rogers* v. *Hennepin County*, 240 U. S. 184, 188.

The federal statutes involved are §§ 2275 and 2276 of the Revised Statutes of the United States, as amended in 1891, 26 Stat. 796, 797. They are found in the margin.[1]

[1] "'Sec. 2275. Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of

As we have already stated, the State has elected to surrender this section 16 to the United States, asking compensation in other lands for the same under the provisions contained in the sections of the federal statutes just referred to. It is the contention of the State that because of such

---

the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State of Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.' And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: *Provided, however*, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

"Sec. 2276. That the lands appropriated by the preceding section

action the lands in question in equity belong to the United States, and that consequently they could not be condemned for the uses of the Water Company.

The controversy reduces itself to the precise question whether when a forest reservation, subsequently proclaimed, includes within its limits a school section surveyed before the establishment of the reservation, the State may under § 2275, Revised Statutes of the United States, as amended in 1891, waive its right to such section and select other lands in lieu thereof.

The first part of the section, giving the right to select lands in lieu of such as were settled upon with a view to pre-emption or homestead, is clearly limited to settlements made before survey of lands in the field, and under the following provision, giving the right of selection to the State where the lands are mineral or are included in an Indian, military or other reservation or are otherwise disposed of by the United States, it well may be that, in the absence of the proviso, the right of selection would be confined to instances where the lands were unsurveyed

---

shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township one-quarter section of land: *Provided*, That the States or Territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships."

when found to be mineral or included in a reservation, and this because if the lands were unreserved and not known to be mineral when surveyed the title would then vest in the State (*Sherman* v. *Buick*, 93 U. S. 209; *Heydenfeldt* v. *Daney Gold & Silver Mining Co.*, 93 U. S. 634; *United States* v. *Morrison*, 240 U. S. 192, 204, 207), and because lieu selections are usually, although not always, permitted where the right to the place lands is cut off before the time for the title to become vested. But the proviso, which was not originally in the statute, is an important part of it and, according to a familiar rule, must be given some effect. It reads:

"Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections." This language, while not as clear as it might be, operates, as we interpret it, to give to the State a right to waive its right to such lands where, as in this case, the same are included in a forest reservation after survey, that is, after the title vests in the State. Unless this proviso refers to lands, the title to which has passed to the State it adds nothing to the statute and performs no office whatever. This construction preserves the integrity of forest reservations, and permits the State to acquire other lands not surrounded by large tracts in such reservations which are withdrawn from settlement.

It is true that the interpretation of the statute has not been uniform in the Department of the Interior, and it has been otherwise construed in at least one of the federal courts, *Hibberd* v. *Slack*, U. S. Circ. Ct., S. Dist. of California, 84 Fed. Rep. 571. But the interpretation for which the State insists has been long given to it by the Interior Department. It was more than suggested in *Gregg* v.

Colorado, 15 L. D. 151, 154, and *Rice* v. *California*, 24 L. D. 14, 15, was adopted upon full consideration in *State of California*, 28 L. D. 57, and has been uniformly followed ever since. *Territory of New Mexico*, 29 L. D. 364; *School Land Opinion*, 30 L. D. 438; *Dunn* v. *California*, 30 L. D. 608; *Territory of New Mexico*, 34 L. D. 599; *State of California*, 34 L. D. 613.

In the brief presented by leave of court on behalf of the United States it is set forth that the rule laid down in *State of California*, 28 L. D., *supra*, is still adhered to by the Land Department; that selections aggregating many thousands of acres have been made in reliance upon it, and that no doubt large expenditures of money have been made in good faith upon the selected lands. It is therefore urged that such construction has become a rule of property. In this situation we should be slow to disturb a ruling of the department of the Government to which is committed the administration of public lands. *McMichael* v. *Murphy*, 197 U. S. 304.

Furthermore, the reasoning upon which the departmental interpretation is founded commends itself to our judgment as best calculated to carry out the purposes intended to be accomplished by the statute in question.

It follows that the Supreme Court of California erred in its decision of the federal question involved. With the state questions we have no concern, their ultimate solution being a matter for that court. The judgment is reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

CHICAGO & ALTON RAILROAD COMPANY ET AL. *v.* McWHIRT.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 714. Argued January 29, 30, 1917.—Decided March 26, 1917.

A provision in the special charter of a railroad company permitting the grantee to lease its road to any other railroad company "upon such terms as may be mutually agreed upon" is not to be construed as authority for the lessor and lessee to determine what shall be their respective liabilities to third persons who may be tortiously injured in the operation of the road when leased; therefore it creates no contract right which would be impaired by subsequent general legislation rendering the lessor and lessee jointly liable for such torts when committed by the latter, and this quite apart from any power of the legislature to alter or amend the charter.

A state law rendering any railroad company of the State leasing its road to a company of another State liable jointly with the lessee for actionable torts of the latter committed in the operation of the road, does not deprive of due process or deny the equal protection of the laws.

When the plaintiff pleads a case of joint liability under the state law against a resident and a nonresident defendant, the case is not removable from the state to the federal court in the absence of any showing that the defendants were joined fraudulently for the purpose of preventing removal.

187 S. W. Rep. 830, affirmed.

THE case is stated in the opinion.

Mr. Elliott H. Jones, with whom *Mr. William C. Scarritt*, *Mr. Charles M. Miller*, *Mr. Alfred M. Seddon*, *Mr. Edward S. North* and *Mr. E. L. Scarritt* were on the briefs, for plaintiffs in error.

Mr. Patrick Henry Cullen, with whom *Mr. Thomas T. Fauntleroy* and *Mr. Charles M. Hay* were on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action to recover for personal injuries caused, as was alleged, by negligently backing an engine and cars across a public street in Vandalia, Missouri, without taking any precautions for the safety of persons using the street at the time. The action was against two railroad companies, one incorporated in Missouri and the other in Illinois. The former had constructed and still owned the railroad and the latter was operating it under a lease. A trial resulted in a judgment for the plaintiff, and this was affirmed. 187 S. W. Rep. 830.

The Missouri company was created by a special act in 1859, Laws 1859, p. 400, which was amended, with the company's consent, by special acts in 1868 and 1870, Laws 1868, p. 97; Laws 1870, p. 93. A general and older statute provided that all subsequent corporate charters should be "subject to alteration, suspension and repeal, in the discretion of the Legislature," Rev. Stats. 1855, p. 371, § 7; but these special acts declared that this provision should have no application to them or to the Missouri company. After the Act of 1859 and before it was amended the State adopted a new constitution containing a provision that corporations, other than for municipal purposes, could be formed only under general laws and that these might be altered, amended or repealed; but under the local decisions it is doubtful at least that this provision was applicable to subsequent amendments of charters previously granted, *State ex rel. Circuit Attorney &c.* v. *Cape Girardeau & State Line R. R.*, 48 Missouri, 468; *St. Joseph & Iowa R. R. Co.* v. *Shambaugh*, 106 Missouri, 557, 569; *County of Callaway* v. *Foster*, 93 U. S. 567, 570, and so it may be put out of view. The amendment of 1870, which took effect on March 20th of that year, authorized the Missouri company to lease its road

for a period of years to any other railroad company "upon such terms as may be mutually agreed upon." March 24 of the same year a general statute was enacted which, as locally interpreted, renders any railroad company of that State leasing its road to a company of another State liable jointly with the lessee for any actionable tort of the latter committed in the operation of the road. Laws 1870, p. 91, § 2; *Brown* v. *Louisiana & Missouri River R. R. Co.*, 256 Missouri, 522, 534. Following this enactment the Missouri company leased its road to the Illinois company, and it was under this lease that the latter was operating the road when the plaintiff was injured. In the lease the lessee agreed to pay off and satisfy all lawful claims for damages arising out of its negligence or dereliction of duty while operating the road.

The general statute of March 24, 1870, now embodied in Rev. Stats. 1909, § 3078, was applied in this case over the Missouri company's objection that it could not be so applied without bringing it in conflict with the contract clause of the Constitution of the United States and with the due process and equal protection clauses in the Fourteenth Amendment. The overruling of this objection and the denial of a petition for removal to the federal court are the matters to be reviewed here.

In invoking the contract clause the Missouri company goes upon the theory that the special acts constituting its corporate charter broadly authorized it to lease its road to any other railroad company upon any terms which might be agreeable to both and that, in the absence of a reservation of power to alter, amend or repeal the charter, a later statute qualifying the authority to lease or attaching any condition to its exercise—as by making the company liable for the torts of the lessee committed in conducting the road—necessarily impairs the obligation of the charter contract. While not doubting that any lawful contract contained in the charter is within the pro-

tection of the clause invoked, *Stone* v. *Mississippi*, 101 U. S. 814, 816–817, we find nothing in the charter respecting the liability of the Missouri company for torts committed by another company to which it commits the operation of its road under a lease. That subject is not dealt with in the charter in any way. The provision that the leasing may be upon such terms as are mutually agreeable to the parties is not in point, for it obviously relates to matters which appropriately can be left to the lessor and lessee, such as their rights and duties as between themselves, and not to matters of public concern, such as the rights of third persons to recover for injuries sustained through the negligent operation of the road under the lease. As to the latter we think it is plain that no contract was intended or made by the State and that the matter remained open to legislative action when the provision in the Act of March 24, 1870, was adopted. *Texas & New Orleans R. R. Co.* v. *Miller*, 221 U. S. 408; *St. Louis & San Francisco Ry. Co.* v. *Mathews*, 165 U. S. 1; *Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67, 76.

That provision was in force when the lease was made. It is not inherently arbitrary, is found in the laws of other States, and applies to all railroad companies of Missouri which lease their roads to companies of other States. In these circumstances it neither deprives the Missouri company of its property without due process of law nor denies to it the equal protection of the laws.

The plaintiff was a citizen of Missouri and, as before stated, one of the defendants was an Illinois corporation. The latter sought to remove the case against it into the federal court upon the ground that the same involved a distinct and separable controversy between citizens of different States. But the petition for removal was denied, and rightly so. Under the local law the case stated in the plaintiff's pleading was one of joint liability on the part of the defendants and, for the purpose of passing upon the

petition for removal, this was decisive of the nature of the controversy, there being no showing that the defendants were fraudulently joined for the purpose of preventing a removal. *Alabama Great Southern Ry. Co.* v. *Thompson*, 200 U. S. 206, 213, *et seq.; Chesapeake & Ohio Ry. Co.* v. *Cockrell*, 232 U. S. 146, 152.

Judgment affirmed.

BUNTING *v.* STATE OF OREGON.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 38. Argued April 18, 1916; restored to docket for reargument June 12, 1916; reargued January 19, 1917.—Decided April 9, 1917.

Section 2 of the General Laws of Oregon, 1913, c. 102, p. 169, providing that "No person shall be employed in any mill, factory or manufacturing establishment in this State more than ten hours in any one day, except watchmen and employees when engaged in making necessary repairs, or in case of emergency, where life or property is in imminent danger; *provided, however*, employees may work overtime not to exceed three hours in any one day, conditioned that payment be made for said overtime at the rate of time and one-half of the regular wage," is construed as in purpose an hours of service law and as such is upheld as a valid health regulation.

Whether the law could be upheld as a regulation of wages is not considered or decided.

While mere legislative declaration can not give character to a law or turn illegal into legal operation, the court will not ascribe to the legislature an intent to disguise an illegal purpose or the improvidence of effecting one thing while intending another when, as in this case, the purpose as declared in the act (§ 1) and confirmed by the state court is legal and the provisions of the act can be accommodated to it.

The provision for overtime and extra pay is in nature a penalty to deter from excess of the ten-hour limit.

In sustaining a state law passed in the exercise of an admitted power

of government the court need not be sure of the precise reasons for means adopted by the legislature, nor may it pass upon their adequacy or wisdom.

Upon the question whether a ten-hour law is necessary or useful for the preservation of the health of employees in "mills, factories, and manufacturing establishments" the court may accept the judgment of the state legislature and state supreme court, when the record contains no facts to support the contrary contention.

The Oregon law, *supra*, in limiting the hours of employees in "mills, factories, and manufacturing establishments" does not unduly discriminate against their employers as compared with other employers not included in the classification.

71 Oregon, 259, affirmed.

THE case is stated in the opinion.

Mr. W. Lair Thompson, with whom *Mr. C. W. Fulton* was on the briefs, for plaintiff in error:

When dealing with subjects which do not affect the public generally, legislation restricting private activities and the enjoyment of private property must be plainly necessary before it can be upheld under the police power. *Hannibal & St. Joseph Ry. Co.* v. *Husen*, 95 U. S. 465. It belongs to the judiciary to determine what are the proper subjects for the exercise of the police power and when the legislative discretion is reasonably employed. *Ruhstrat* v. *People*, 185 Illinois, 133; *Holden* v. *Hardy*, 169 U. S. 366; *Lochner* v. *New York*, 198 U. S. 46. It is not sufficient that the general purpose of the act shall be within the recognized limits of police power, but the means employed to accomplish that purpose must not invade private rights secured by the Federal Constitution. *Connelly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Vosburg*, 238 U. S. 56. Police regulations have not generally been extended to the restriction of the right of contract between employer and employee. *Allgeyer* v. *Louisiana*, 165 U. S. 579; *Coppage* v. *Kansas*, 236 U. S. 1.

Laws regulating hours of employment have been seldom upheld and only in respect of employment directly affecting the welfare, health or safety of the public, or to which the State or one of its subdivisions is a party, or involving unusual danger to the health of the employee. *People* v. *Erie R. R. Company*, 198 N. Y. 369; *Atkins* v. *Kansas*, 191 U. S. 207; *Holden* v. *Hardy*, 169 U. S. 366; *State* v. *Muller*, 208 U. S. 412.

Interference with private labor contracts not affecting the public can only be sustained when reasonably necessary to preserve health, and not unless the court can say that the place or nature of employment is of such unusual danger to health as to demand legislative interference. *Lochner* v. *New York*, 198 U. S. 46; *State* v. *Muller, supra.* If legislative interference with property right is to be sanctioned in every case in which the court cannot say that beyond reasonable doubt such interference will not tend to benefit or protect the health or welfare of a laborer, then the Fourteenth Amendment means nothing in matters of this kind. It is only when the court can say that such regulation is reasonably necessary that the Fourteenth Amendment ceases to inhibit the regulation. Considering those matters of common knowledge, which the court should do (*Jacobson* v. *Massachusetts*, 197 U. S. 11), it may seem hardly conceivable that a law with the broad scope of the Oregon act can be held to be necessary for the preservation of the health of employees in mills, factories and manufacturing establishments. The occupations affected are the ordinary employments of life, and involve only the ordinary dangers to health that accompany manual labor. It can hardly be contended that the man who wheels sacked flour from the mill to the warehouse, or who keeps the books, or deals with the farmer, receiving the grain, works in a position of unusual danger, or that his health will be impaired if he is permitted to work the number of hours his own judgment

dictates, or that he is not of sufficient intelligence to sell his labor without the paternal guidance of a legislative majority.

The law upon its face refutes the contention that it is a health law, or that the recitals of the act in § 1 thereof were deemed true by the legislature. The legislative declaration of necessity, even if the act followed such declaration, is not binding upon this court. *Coppage* v. *Kansas*, 236 U. S. 1; *Minnesota* v. *Barber*, 136 U. S. 313; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Yates* v. *Milwaukee*, 10 Wall. 497. The law is not a ten-hour law; it is a thirteen-hour law designed solely for the purpose of compelling the employer of labor in mills, factories and manufacturing establishments to pay more for labor than the actual market value thereof. It is based upon economic grounds exclusively. The provision for overtime at time and one-half the regular wage robs the law of any argument that might be made to bring it within those grounds that justify an exercise of the police power. Freund, Police Power, §§ 316, 318.

The right of the legislature to regulate wages is denied in *Street* v. *Varney Electrical Supply Co.*, 160 Indiana, 338, and *People* v. *Coler*, 166 N. Y. 1. These decisions are not affected by *Atkin* v. *Kansas*, 191 U. S. 207, and *Heim* v. *McCall*, 239 U. S. 175, which relate to hours of labor in public employments. See also *Low* v. *Rees Printing Co.*, 41 Nebraska, 127, and *Wheeling Bridge & Terminal Ry. Co.* v. *Gilmore*, 8 Ohio Cir. Ct. Rep. 858.

Insufficiency of wage does not justify legislative regulation. The wage has no bearing upon health. Society may not force the employer to pay wages sufficient to support the employee upon the scale of his desire. But this law goes further, fixing the amount arbitrarily. In this case the employee was receiving a regular wage of 40 cents per hour, on its face a living wage, and there was no basis for an arbitrary demand that he be paid 60 cents per

hour for three hours of his time. The effect is to take money from the employer and give it to the laborer without due process or value in return. Although the terms of employment are more important than the selection of the employee, even the right to select cannot be invaded by state dictation. *Adair* v. *United States*, 208 U. S. 161; *Coppage* v. *Kansas*, 236 U. S. 1; *Chicago, Burlington & Quincy Ry. Co.* v. *McGuire*, 219 U. S. 549.

The Oregon act discriminates against plaintiff in error, denying the equal protection of the laws. *Atchison, Topeka & Santa Fe. Ry. Co.* v. *Vosburg*, 238 U. S. 56; Cooley Const. Lim., 7th ed., p. 560.

The provision for extra wages does not aid in the enforcement of the law as an hours-of-service law. The commingling of unlawful methods of execution with a lawful purpose may make an act unconstitutional as effectively as may an unlawful purpose. *Coppage* v. *Kansas*, 236 U. S. 1. The fixing and execution of the overtime pay is an unconstitutional means. Furthermore, it has no reasonable tendency to enforce the declared purpose (distinguishing *Commonwealth* v. *Riley*, 210 Massachusetts, 394; *s. c.*, 232 U. S. 671). The penalty theory is untenable. It involves penalizing an employer for doing the very thing the law authorizes, since the act itself permits employment beyond the ten hours. The purpose and scope are fixed by § 2 where the time and overtime provisions appear together. The penalty for violating that section is provided by § 3, is complete in itself, and uniform for every violation of the act. Penal laws should be strictly construed; a court has no province to superadd a penalty by mere implication. Black on Interpretation of Laws, 2d ed., pp. 455, 471.

The act being unconstitutional in a vital part must fail as a whole. *Low* v. *Rees Printing Co.*, 41 Nebraska, 127.

Mr. Felix Frankfurter, with whom *Mr. George M. Brown*, Attorney General of the State of Oregon, and *Mr. J. O.*

Bailey, Assistant Attorney General of the State of Oregon, were on the briefs, for defendant in error:

The law is an hours law, not a wage law; the provision for overtime work and extra pay being merely to allow a limited and reasonable flexibility in time of unusual business pressure. The conditions in Oregon, which must be considered in passing on the law, show that this must be so since over 93 per cent. of employers find it unprofitable to employ men beyond ten hours at normal pay. Such provisions for higher rates for overtime are common in the regulation of hours, as is shown by trade agreements in this country and in England. They are necessary to preserve the regulation.

The issue concerning the validity of the law presents the familiar case of application and delimitation of accepted principles. The liberty of the Fourteenth Amendment is set up against the police power of a State. The boundaries must be drawn in each specific case, not by resort to theory and assumption, but in the light of experience, granting to the legislature the function of discerning, detecting and remedying the evils which may be obstacles to the "greater public welfare" (*Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342) and upholding its judgment if in the light of experience the judgment seems not arbitrary or wanton. Experience in England most strikingly dispelled the old theoretical opposition to limitation of the hours of labor and the preference for unfettered individual competition as an economic principle. The matter has now come to be looked on no longer as a mere contest between capital and labor, but as a concern of the State as an organic whole. The question, therefore, is not whether the State can regulate hours of labor in modern industry, but what evils are manifest, and what tendencies are disclosed, that present a reasonable field for legislative repression; what remedies are available that present a reasonable field for legislative encouragement.

This field of reasonable action is the State's police power. See *Holden* v. *Hardy*, 169 U. S. 366. In *Lochner* v. *New York*, 198 U. S. 45, the state authority in the specific instance was denied because no reasonable relation was discernible to the majority between a ten hour law for bakers and the public welfare. This judgment was based upon a view of the nature of the baker's employment beyond ten hours as known "to the common understanding" *Id.* 59. See Hours of Labor and Realism in Constitutional Law, 29 Harv. L. Rev. 353. It is now clear that "common understanding" is a treacherous criterion both as to the assumptions on which such understanding is based, and as to the evil consequences, if they are allowed to govern. Pound's Liberty of Contract, 18 Yale L. J. 454, 480, note 123; 2 Ely's Property and Contract, 662, 674–5. The subject is one for scientific scrutiny and critique, for authoritative interpretation of accredited facts. To this end science has been devoted all over the world. Particularly in the last decade science has been giving us the basis for judgment by experience to which, when furnished, judgment by speculation must yield. This is precisely what *Holden* v. *Hardy*, *supra*, looked forward to.

The insight expressed in that case has now been amply justified by experience. What in 1898 presented a specific, and apparently, exceptional instance—the poisoning of the human system through long hours of labor in mines, and the implications of this evil to the general welfare—is now disclosed to be of far wider and deeper application. It is now demonstrable that the considerations that were patent as to miners in 1898 are to-day operative, to a greater or less degree, throughout the industrial system.

It is to this body of experience that the court's attention is invited. It is a mass of data that, partly, was not presented in cases like *Lochner* v. *New York*, *supra*, but mostly could not have been before the court, because it

was not heretofore in existence. Inasmuch as the application of the contending principles must vary with the facts to which they are sought to be applied, of course new facts are the indispensable basis to the determination of the validity of specific new legislation. *People* v. *Schweinler Press*, 214 N. Y. 395, 412.

The knowledge obtained by the increasing study of industrial conditions is back of the State's policy, as expressed by the legislature, and sustained by the courts of Oregon. These are facts of common knowledge of which this court will take judicial notice. These facts, we submit, conclusively establish that Oregon was exercising a reasonable judgment as to the public welfare in passing its ten-hour law; and so exercising a reasonable judgment it acted within its rightful and constitutional sphere. The place at which it chose to draw the line was peculiarly for the discretion of its legislature. It is sufficient for the present that the line as now drawn—ten hours a day—is not an unreasonable line. *Miller* v. *Wilson*, 236 U. S. 373, 382; *People* v. *Klinck Packing Co.*, 214 N. Y. 121, 128; *State* v. *Bunting*, 71 Oregon, 259, 273.

[In support of the argument counsel's brief presented an extensive systematic review of facts and statistics dealing with the effects of overtime upon the physical and moral health of the worker and so upon the vitality, efficiency and prosperity of the nation, with additional references to experiences and results abroad since the outbreak of the European War. The good effects following regulation and the extent of regulation as shown in American and foreign legislation were also indicated.]

Mr. Justice McKenna delivered the opinion of the court.

Indictment charging a violation of a statute of the State of Oregon, § 2 of which provides as follows:

"No person shall be employed in any mill, factory or

manufacturing establishment in this State more than ten hours in any one day, except watchmen and employees when engaged in making necessary repairs, or in case of emergency, where life or property is in imminent danger; *provided, however,* employees may work overtime not to exceed three hours in any one day, conditioned that payment be made for said overtime at the rate of time and one-half of the regular wage."

A violation of the act is made a misdemeanor, and in pursuance of this provision the indictment was found. It charges a violation of the act by plaintiff in error, Bunting, by employing and causing to work in a flour mill belonging to the Lakeview Flouring Mills, a corporation, one Hammersly for thirteen hours in one day, Hammersly not being within the excepted conditions, and not being paid the rate prescribed for overtime.

A demurrer was filed to the indictment, alleging against its sufficiency that the law upon which it was based is invalid because it violates the Fourteenth Amendment of the Constitution of the United States and the Constitution of Oregon.

The demurrer was overruled; and the defendant, after arraignment, plea of not guilty and trial, was found guilty. A motion in arrest of judgment was denied and he was fined $50. The judgment was affirmed by the Supreme Court of the State. The Chief Justice of the court then allowed this writ of error.

The consonance of the Oregon law with the Fourteenth Amendment is the question in the case, and this depends upon whether it is a proper exercise of the police power of the State, as the Supreme Court of the State decided that it is.

That the police power extends to health regulations is not denied, but it is denied that the law has such purpose or justification. It is contended that it is a wage law, not a health regulation, and takes the property of plaintiff in

error without due process. The contention presents two questions: (1) Is the law a wage law, or an hours of service law? And (2) if the latter, has it equality of operation?

Section 1 of the law expresses the policy that impelled its enactment to be the interest of the State in the physical well-being of its citizens and that it is injurious to their health for them to work "in any mill, factory or manufacturing establishment" more than ten hours in any one day; and § 2, as we have seen, forbids their employment in those places for a longer time. If, therefore, we take the law at its word there can be no doubt of its purpose, and the Supreme Court of the State has added the confirmation of its decision, by declaring that "the aim of the statute is to fix the maximum hours of service in certain industries. The act makes no attempt to fix the standard of wages. No maximum or minimum wage is named. That is left wholly to the contracting parties."

It is, however, urged that we are not bound by the declaration of the law or the decision of the court. In other words, and to use counsel's language, "the legislative declaration of necessity, even if the act followed such declaration, is not binding upon this court. *Coppage* v. *Kansas*, 236 U. S. 1." Of course, mere declaration cannot give character to a law nor turn illegal into legal operation, and when such attempt is palpable this court necessarily has the power of review.

But does either the declaration or the decision reach such extreme? Plaintiff in error, in contending for this and to establish it, makes paramount the provision for overtime; in other words, makes a limitation of the act the extent of the act—indeed, asserts that it gives, besides, character to the act, illegal character.

To assent to this is to ascribe to the legislation such improvidence of expression as to intend one thing and effect another, or artfulness of expression to disguise illegal purpose. We are reluctant to do either and we think all

the provisions of the law can be accommodated without doing either.

First, as to plaintiff in error's attack upon the law. He says: "The law is not a ten-hour law; it is a thirteen-hour law designed solely for the purpose of compelling the employer of labor in mills, factories and manufacturing establishments to pay more for labor than the actual market value thereof." And further: "It is a ten-hour law for the purpose of taking the employer's property from him and giving it to the employé; it is a thirteen-hour law for the purpose of protecting the health of the employé." To this plaintiff in error adds that he was convicted, not for working an employee during a busy season for more than ten hours, but for not paying him more than the market value of his services.

The elements in this contention it is difficult to resolve or estimate. The charge of pretense against the legislation we, as we have already said, cannot assent to. The assumption that plaintiff in error was convicted for not paying more in a busy season than the market value of the services rendered him or that under the law he will have to do so, he gives us no evidence to support. If there was or should be an increase of demand for his products, there might have been or may be an increase of profits. However, these are circumstances that cannot be measured, and we prefer to consider with more exactness the overtime provision.

There is a certain verbal plausibility in the contention that it was intended to permit 13 hours' work if there be 15½ hours' pay, but the plausibility disappears upon reflection. The provision for overtime is permissive, in the same sense that any penalty may be said to be permissive. Its purpose is to deter by its burden and its adequacy for this was a matter of legislative judgment under the particular circumstances. It may not achieve its end, but its insufficiency cannot change its character

from penalty to permission. Besides, it is to be borne in mind that the legislature was dealing with a matter in which many elements were to be considered. It might not have been possible, it might not have been wise, to make a rigid prohibition. We can easily realize that the legislature deemed it sufficient for its policy to give to the law an adaptation to occasions different from special cases of emergency for which it provided, occasions not of such imperative necessity, and yet which should have some accommodation—abuses prevented by the requirement of higher wages. Or even a broader contention might be made that the legislature considered it a proper policy to meet the conditions long existent by a tentative restraint of conduct rather than by an absolute restraint, and achieve its purpose through the interest of those affected rather than by the positive fiat of the law.

We cannot know all of the conditions that impelled the law or its particular form. The Supreme Court, nearer to them, describes the law as follows: "It is clear that the intent of the law is to make 10 hours a regular day's labor in the occupations to which reference is made. Apparently the provisions for permitting labor for the overtime on express conditions were made in order to facilitate the enforcement of the law, and in the nature of a mild penalty for employing one not more than three hours overtime. It might be regarded as more difficult to detect violations of the law by an employment for a shorter time than for a longer time. This penalty also goes to the employee in case the employer avails himself of the overtime clause."

But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 365. It is enough for our decision if the legislation under review was passed in the exercise of an admitted power of government; and that it is not as complete as

it might be, not as rigid in its prohibitions as it might be, gives perhaps evasion too much play, is lighter in its penalties than it might be, is no impeachment of its legality. This may be a blemish, giving opportunity for criticism and difference in characterization, but the constitutional validity of legislation cannot be determined by the degree of exactness of its provisions or remedies. New policies are usually tentative in their beginnings, advance in firmness as they advance in acceptance. They do not at a particular moment of time spring full-perfect in extent or means from the legislative brain. Time may be necessary to fashion them to precedent customs and conditions and as they justify themselves or otherwise they pass from militancy to triumph or from question to repeal.

But passing general considerations and coming back to our immediate concern, which is the validity of the particular exertion of power in the Oregon law, our judgment of it is that it does not transcend constitutional limits.

This case is submitted by plaintiff in error upon the contention that the law is a wage law not an hours of service law, and he rests his case on that contention. To that contention we address our decision and do not discuss or consider the broader contentions of counsel for the State that would justify the law even as a regulation of wages.

There is a contention made that the law, even regarded as regulating hours of service, is not either necessary or useful "for preservation of the health of employés in mills, factories and manufacturing establishments." The record contains no facts to support the contention, and against it is the judgment of the legislature and the Supreme Court, which said: "In view of the well-known fact that the custom in our industries does not sanction a longer service than 10 hours per day, it cannot be held, as a matter of law, that the legislative requirement is unreasonable or arbitrary as to hours of labor. Statistics

show that the average daily working time among workingmen in different countries is, in Australia, 8 hours; in Great Britain, 9; in the United States, 9¾; in Denmark, 9¾; in Norway, 10; Sweden, France, and Switzerland, 10½; Germany, 10¼; Belgium, Italy, and Austria, 11; and in Russia, 12 hours."

The next contention of plaintiff in error is that the law discriminates against mills, factories and manufacturing establishments in that it requires that a manufacturer, without reason other than the fiat of the legislature, shall pay for a commodity, meaning labor, one and one-half times the market value thereof while other people purchasing labor in like manner in the open market are not subjected to the same burden. But the basis of the contention is that which we have already disposed of, that is, that the law regulates wages, not hours of service. Regarding it as the latter, there is a basis for the classification.

Further discussion we deem unnecessary.

Judgment affirmed.

The Chief Justice, Mr. Justice Van Devanter and Mr. Justice McReynolds, dissent.

Mr. Justice Brandeis took no part in the consideration and decision of the case.

UNITED STATES *v.* KENOFSKEY.

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

No. 649. Submitted March 16, 1917.—Decided April 9, 1917.

A local agent of a life insurance company, whose duty was to verify claims of death and certify and deliver the proofs and certificates to the company's local superintendent, so certified and delivered a false claim, proofs and certificates, for the purpose of defrauding the company, knowing and expecting that in the due course of business and before the claim would be paid the documents, when approved by the superintendent, would be mailed to the company's home office for final approval, as actually occurred. In approving and mailing the documents the superintendent acted innocently.

Held: (1) That the agent *caused* the mailing, within Criminal Code, § 215, providing punishment for those who "place or cause to be placed" matter in a post-office for the purpose of executing a scheme to defraud.

(2) That the scheme was not executed on delivery of the documents to the local superintendent.

235 Fed. Rep. 1019, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Warren for the United States.

No appearance for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Indictment charging a scheme to defraud by use of the mails in violation of § 215 of the Criminal Code.

The indictment is in the usual volume of such instru-

ments but may be sufficiently summarized as presenting the following facts:

Kenofskey was the agent and assistant superintendent at New Orleans, Louisiana, of the Life Insurance Company of Virginia. It was part of his duty to obtain certificates and proofs of death of persons insured in the company and also to view the remains of deceased policy holders, have them identified, and deliver the certificates and proofs of death to the superintendent of the local office at New Orleans, to be forwarded in the usual course of business through the United States mails to the home office of the company at Richmond, Virginia. In pursuance of a fraudulent scheme Kenofskey falsely represented to the insurance company that he had received and obtained a valid and genuine claim, proof of death and certificates executed, signed and presented by Sarah Thompson, the beneficiary in a policy which had been issued upon the life of one Frederick Wicker. Kenofskey signed the certificates as assistant superintendent. Frederick Wicker is still living, and Kenofskey knew that all claims required the approval of the main office and were to be transmitted from the local office through the United States mails and if handed by him to the superintendent would be so transmitted, and, for that purpose, he delivered the proofs to the superintendent. The superintendent examined them and without knowledge of their fraudulent character affixed his signature thereto, inclosed them in an envelope and deposited them, postage paid, in the United States mails.

A demurrer was filed to the indictment, stating as grounds thereof that it was not sufficient to constitute a violation of § 215 of the Criminal Code of the United States properly construed and understood or of any other law of the United States.

The demurrer was sustained, the court giving as its reasons therefor the following:

"The depositing of the letter in the mail for the purpose of executing the scheme is the crime. The defendant did not mail the letter, and the local superintendent of the insurance company was not his agent. It is not charged it was the duty of the defendant either to prepare for mailing or to actually mail the papers. He is sought to be held on the theory that as he knew the claim would be mailed to the home office, in the usual course of the business, for approval before payment, he knowingly caused it to be deposited. This theory is too far-fetched to be tenable. Furthermore, in order to constitute a crime, the mailing of the letter must have been a step in the execution of the fraudulent scheme. The scheme devised by defendant was completely executed when he handed the false claim to the local agent at New Orleans.

"However desirable it may be from the viewpoint of the victim to try all perpetrators of fraudulent schemes in the federal courts, this court can not assume jurisdiction except in clear cases.

"The demurrer will be sustained."

This appeal was then prosecuted under the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246.

Section 215 of the Criminal Code is as follows:

"Whoever, having devised . . . any scheme or artifice to defraud . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, . . . package, writing, . . . in any post-office, . . . to be sent or delivered by the post-office establishment of the United States, . . ." shall be punished, etc.

The short point in the case is whether the facts charged show that Kenofskey offended against the statute. The District Court was of opinion that they did not, for two reasons: (1) The superintendent at New Orleans was not the agent of Kenofskey. (2) Section 215 is directed at steps in the execution of fraudulent schemes and the

scheme devised by Kenofskey was completely executed when he delivered the false claim to the local agent at New Orleans.

We are unable to concur. The words of § 215 are "*place, or cause to be placed,* [italics ours] any letter, . . . package, writing, . . . in any post-office, . . . to be sent or delivered . . ."

"Cause" is a word of very broad import and its meaning is generally known. It is used in the section in its well-known sense of bringing about, and in such sense it is applicable to the conduct of Kenofskey. He deliberately calculated the effect of giving the false proofs to his superior officer; and the effect followed, demonstrating the efficacy of his selection of means. It certainly cannot be said that the superintendent received authority from the insurance company to transmit to it false proofs. He became Kenofskey's agent for that purpose and the means by which he offended against the provisions of the statute. *Demolli* v. *United States* (C. C. A., 8th Circuit), 144 Fed. Rep. 363.

We do not think the scheme ended when Kenofskey handed the false proofs to his superior officer. As said by the Assistant Attorney General, "The most vital element in the transaction both to the insurance company and to Kenofskey remained yet to become an actuality, i. e., the payment and receipt of the money; . . ." Such payment and receipt would indeed have executed the scheme, but they would not have served to "trammel up the consequence" of the fraudulent use of the mails.

Judgment reversed and cause remanded for further proceedings in conformity with this opinion.

LEHIGH VALLEY RAILROAD COMPANY *v.* UNITED STATES.

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

No. 124. Argued March 23, 1917.—Decided April 9, 1917.

Forwarders who under contract with importers of goods look after the transportation from origin abroad to destination in this country, charging the owners amounts agreed upon in advance for the transportation and the services rendered and consigning the goods in their own names to themselves as consignees, are the shippers of the goods so far as concerns their relations with the interstate carrier over whose line the consignments go.

Any allowance by the interstate carrier to the forwarder in reduction of the regular tariff rates on goods shipped by the forwarder over the carrier's line, whether it be by deducting a percentage of the freight or by commissions and salary from carrier to forwarder, is condemned by § 6 of the Act to Regulate Commerce, as amended by the Act of June 29, 1906, c. 3591, § 2, 34 Stat. 586, 587, and also, *semble*, by § 2 of the original act, c. 104, 24 Stat. 379.

Services rendered by the forwarder to the carrier in maintaining offices, advertising the railroad and soliciting traffic over it are not services connected with the transportation for which an allowance may be made by the carrier under § 15 of the Act to Regulate Commerce, as amended by the Act of June 29, 1906, *supra*, § 4, 34 Stat. 589. *Interstate Commerce Commission* v. *Peavey & Co.*, 222 U. S. 42, distinguished.

222 Fed. Rep. 685, affirmed.

THE case is stated in the opinion.

Mr. George T. Buckingham, with whom *Mr. Edgar H. Boles*, *Mr. Stewart C. Pratt* and *Mr. Allan McCulloh* were on the brief, for appellant.

Mr. Assistant to the Attorney General Todd for the United States.

Mr. Joseph W. Folk and *Mr. Charles W. Needham*, by leave of court, filed a brief on behalf of the Interstate Commerce Commission.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a proceeding instituted by direction of the Attorney General at the request of the Interstate Commerce Commission to prevent the appellant railroad from carrying freight at less than its published rates on file. The case was heard upon bill and answer and a stipulation, and the question is whether the facts warrant an injunction, as matter of law.

George W. Sheldon and Company is an Illinois corporation engaged in forwarding, or bringing goods for importers from the place of purchase in Europe to their destination in the United States and charging the importers for the transportation and such other services as it may perform. Of course the expectation is that it will make a profit from the transaction, although from the uncertainty of ocean freight charges it may lose, as the contract is made in advance. By arrangement with the appellant, so far as it is able it sends the goods over the appellant's line, and for doing so receives from it a varying percentage upon the published rates and also a salary of $5,000 a year. These payments by the appellant are the ground of the bill. The District Court issued an injunction as prayed. 222 Fed. Rep. 685.

As toward the railroad, George W. Sheldon and Company is consignor and consignee, and although it may be in no case the owner, that does not concern the appellant. Upon the admitted facts there can be no doubt and it is not denied that it is to all legal intents the shipper of the goods. *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western R. R. Co.*, 220 U. S. 235. *Great Northern Ry. Co.* v. *O'Connor*, 232 U. S. 508. If the shipper

were the owner an allowance to him of a percentage upon the freight as an inducement to ship by that line, however honest and however justifiable on commercial principles, would be contrary to the Act to Regulate Commerce as it now stands. Act of June 29, 1906, c. 3591, § 2, 34 Stat. 586, 587, amending § 6 of the original act, &c. See also the original Act of February 4, 1887, c. 104, § 2, 24 Stat. 379. *Wight* v. *United States*, 167 U. S. 512. But the above cases show that the carrier cannot inquire whether the shipper is the owner and therefore the statute expresses a necessary policy when it forbids in universal terms refunding in any manner any portion of the rates specified in the published tariffs or extending to "any shipper" any privilege not so specified. Of course it does not matter whether the allowance takes the form of a deduction or a crosspayment. Any payment made by a carrier to a shipper in consideration of his shipping goods over the carrier's line comes within the prohibiting words.

It is true no doubt that George W. Sheldon and Company in the performance of the services for which it is paid maintains offices here and abroad, advertises the Railroad, solicits traffic for it, does various other useful things, and, in short, we assume, benefits the road and earns its money, if it were allowable to earn money in that way. It is true also that in *Interstate Commerce Commission* v. *F. H. Peavey & Co.*, 222 U. S. 42, an owner of property transported was held entitled under § 15 of the Act to Regulate Commerce to an allowance for furnishing a part of the transportation that the carrier was bound to furnish. (So *Union Pacific R. R. Co.* v. *Updike Grain Co.*, 222 U. S. 215, and *United States* v. *Baltimore & Ohio R. R. Co.*, 231 U. S. 274.) But that case goes to the verge of what is permitted by the act. The services rendered by George W. Sheldon and Company, although in a practical sense "connected with such transportation," were not connected with it as a necessary part of the carriage—were

not "transportation service," in the language of *Union Pacific R. R. Co.* v. *Updike Grain Co.*, 222 U. S. 215, 220—and in our opinion were not such services as were contemplated in the Act of June 29, 1906, c. 3591, § 4, 34 Stat. 589, amending § 15 of the original act. On the other hand the allowance for them falls within the plain meaning of § 2 of the Act of 1906, to which we referred above.

There is some criticism of the form of the decree, but it prohibits with sufficient plainness all payments to George W. Sheldon and Company, whether by way of salary, commission, or otherwise, in consideration of the shipment of goods by George W. Sheldon and Company over the appellant's line.

Decree affirmed.

THE PULLMAN COMPANY *v.* KNOTT, AS COMPTROLLER OF THE STATE OF FLORIDA.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 262. Motion to dismiss submitted March 19, 1917.—Decided April 9, 1917.

A suit to restrain a state official and his successors in office from estimating, levying and assessing a tax under a state law claimed to be unconstitutional is a suit against him as an individual and, in the absence of a statute otherwise providing, abates when his term of office expires and cannot be revived against his successor. *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 388, distinguished.

Writ of error to review 70 Florida, 9, dismissed.

The case is stated in the opinion.

Mr. Thomas F. West, Attorney General of the State of Florida, for defendant in error, in support of the motion.

Mr. Frank B. Kellogg, Mr. Cordenio A. Severance, Mr. Robert E. Olds, Mr. Gustavus S. Fernald and *Mr. John E. Hartridge* for plaintiff in error, in opposition to the motion.

Mr. Justice Day delivered the opinion of the court.

Suit was brought in the Circuit Court of Leon County, Florida, by the Pullman Company against Knott, Comptroller of the State of Florida, to enjoin him and his successors in office from estimating, levying and assessing a tax on the gross receipts of the Pullman Company, on the ground that the state law authorizing the tax was void under the Constitution of the United States. The Circuit Court held that the law was constitutional and dismissed the bill; that decree was affirmed by the Supreme Court of the State. 70 Florida, 9. The case was then brought here upon writ of error.

It is now before us upon a motion of the defendant in error, by the Attorney General of the State, to dismiss the proceeding in this court upon the ground that there is no proper person defendant to stand in judgment in the action. It is averred, and is not disputed, that Knott, the defendant in error, is no longer Comptroller of the State of Florida, his term of office having expired on January 2, 1917, and that thereupon he retired from the office of Comptroller and has been succeeded by another, who is the duly commissioned and acting Comptroller of the State.

The original suit was against Knott, the bill stating that he was the duly elected, qualified, and acting Comptroller of the State of Florida. The bill sets forth the duties required of him in that connection in levying the tax against the enforcement of which the injunction was sought by the Pullman Company.

While it is true that the duty required concerns the State, the suit is against Knott as an individual, and he

alone can be punished for the failure to obey an injunction, should one issue as prayed for in the bill. Whether the court below was right in refusing the injunction and dismissing the bill against Knott, is the question presented. In such cases, a long line of decisions in this court has settled that the action abates upon the expiration of the defendant's term of office, and cannot be revived against his successor in office, in the absence of a statute so providing.

We had occasion to review and consider these cases in the case of *Pullman Company* v. *Croom, Comptroller of the State of Florida*, 231 U. S. 571, in which this court held, vacating the former order of substitution granted without discussion, that the action for an injunction against the enforcement of the tax abated upon the death of Croom, Comptroller, and there being no statute covering such cases no order of substitution could be made, and thereupon dismissed the appeal for want of a proper party to stand in judgment.

The case upon which the subsequent decisions are rested is *United States* v. *Boutwell*, 17 Wall. 604. In that case the rule and the reasons for it were stated by the court. That was a suit for mandamus against the Secretary of the Treasury, and involved the right to substitute the successor of the Secretary, his term of office having expired since the suit was commenced. The court held that the right to a writ of mandamus ceased to exist upon the defendant retiring from the office of Secretary, and that in the absence of a statute the writ must necessarily abate. The court further held that the duty sought to be enforced was a personal one, and existed only so long as the office was held; that the court could not compel the defendant to perform such duty after his power so to do had ceased; that if the successor in office could be substituted he might be mulcted in costs for the fault of his predecessor, without any delinquency of his own; and that were a demand

made upon him he might discharge the duty rendering the interposition of a court unnecessary, and, in any event, the successor was not in privity with his predecessor, nor was he his personal representative. (17 Wall. 604, 607, 608.)

In *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28, the previous cases were reviewed by Mr. Justice Gray, speaking for the court, and the principle was applied to a suit for an injunction.

In *United States ex rel. Bernardin* v. *Butterworth*, 169 U. S. 600, it was held that the substitution could not be made, even with the consent of the successor in office. In that case it was stated that it seemed desirable that Congress should provide for the difficulty by enacting a statute that would permit the successors of heads of departments who had died or resigned to be brought into the case by a proper method. Congress thereupon passed the Act of February 8, 1899, 30 Stat. 822, under the terms of which successors of officers of the United States may be substituted in suits brought against them in their official capacity. This statute has no application to other than federal officers.

In *Richardson* v. *McChesney*, 218 U. S. 487, an action was brought against McChesney, as Secretary of the Commonwealth of Kentucky. This court took judicial notice that his term of office had expired pending the suit, and that a successor had been inducted into office and held that the former rule applied, and that the only exception to it was where the obligation sought to be enforced devolved upon a corporation or a continuing body. *Marshall* v. *Dye*, 231 U. S. 250. This seems to be the rule in the Florida courts. *County Commissioners* v. *Bryson*, 13 Florida, 281. In the *McChesney Case* this court held that as the official authority of the secretary had terminated, the case, so far as it sought to accomplish its object, was at an end, and there being no statute providing for the substitution of the successor, the writ of error was dis-

missed; citing *United States* v. *Boutwell*, 17 Wall. *supra; United States ex rel. Bernardin* v. *Butterworth*, 169 U. S., *supra; Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 441.

It is argued for the plaintiff in error that this court has held that former judgments adjudicating rights against the State are binding in subsequent actions; that the mere fact that there has been a change of person holding the office does not destroy the effect of the thing adjudged. *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 388, 389. But that argument does not touch the question here. It was held in the *Citizens' Bank Case* that a holding that a contract for exemption from taxation existed, bound subsequent officers of the State. The difficulty here is that this proceeding in error, since the expiration of Knott's term of office, leaves no party defendant in error to stand in judgment.

It is said that this ruling involves great hardship and that official terms will expire so that cases of this sort cannot be reviewed at all in this court. In this case the judgment of the state court was rendered on June 26, 1915; the order allowing the writ of error to this court was filed September 24, 1915; and the record was filed in this court on October 8, 1915. It does not appear that any attempt was made to advance the case in view of the expiration of Knott's term of office as Comptroller in January, 1917. As the law now stands, we have no alternative except to dismiss the writ of error for want of a proper defendant to stand in judgment.

And it is so ordered.

UNITED STATES *v.* WALLER ET AL.

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

No. 697. Argued March 14, 15, 1917.—Decided April 9, 1917.

By force of the Clapp Amendment of 1906–1907, chaps. 3504, 2285, 34 Stat. 353, 1034, lands in the White Earth Reservation allotted and patented in trust to an adult mixed-blood Indian belong to him with all the rights and incidents of full ownership by persons of full capacity, including the right of alienation; and when he conveys them the United States cannot maintain for his benefit a suit to annul the deed upon the ground that it was procured by fraud.

THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful for the United States:

The preëxisting national guardianship over mixed-blood Indians of the White Earth Reservation was not terminated by the Clapp Amendment.

Only those mixed bloods who actually lived the Indian tribal life were recognized as members of the tribe. Treaty of August 2, 1847, 9 Stat. 904, 905; Treaty of March 19, 1867, 16 Stat. 719, 720. The Treaty of 1867 treated full bloods and mixed bloods alike as dependent Indians. Neither the general allotment act of February 8, 1887, 24 Stat. 388, nor the Act of January 14, 1889, 25 Stat. 642, made any distinction between the two, and the Act of April 28, 1904, 33 Stat. 539, preserved the same equality of treatment.

This status was not changed by the Clapp Amendment. The only distinction made therein was in the tenure of the titles to their allotments. In the Indian appropriation acts since 1889, including the Act of 1906 which carries the Clapp Amendment, Congress has recognized the duty of protection owing to both full bloods and mixed bloods

as dependent Indians. Those acts show that the tribal relation and dependent condition of incompetent mixed bloods were not intended to be disturbed by the Clapp Amendment; and in expending the funds appropriated for their relief and civilization the Interior Department has followed the manifest intent of Congress not to discriminate because of blood. See Reports of Commissioner of Indian Affairs, 1912, 1915.

The national guardianship is not affected by the vesting by the Clapp Amendment of the fee simple titles. The grant of citizenship to Indians or their subjection to state laws is not incompatible with a continuance of such guardianship. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 308; *Heckman* v. *United States*, 224 U. S. 413, 437; *United States* v. *Sandoval*, 231 U. S. 28, 39, 47; *United States* v. *Pelican*, 232 U. S. 442, 450; *Perrin* v. *United States*, 232 U. S. 478, 481; *United States* v. *Noble*, 237 U. S. 74, 79; *United States* v. *Nice*, 241 U. S. 591, 598–601. These decisions recognize the power of Congress to determine when and how the national guardianship shall be terminated, but so long as the Indians are maintained in a condition of pupilage or dependency it cannot be said that Congress, by the mere grant of unrestricted title, intended to emancipate them. The cases cited *supra* were not grounded on the fact that the Indians were not vested with such titles in fee. The United States owes to dependent Indians a "duty of protection," and that duty is not to be measured by property interests. *Heckman* v. *United States*, *supra*; *United States* v. *Nice*, *supra*. The mere grant of unrestricted title in fee to helpless Indians does not of itself satisfy the duty.

The *Heff Case*, 197 U. S. 488, was founded upon a misconception of the will of Congress respecting the emancipating of allotted Indians. It was overruled by *United States* v. *Nice*, *supra*, but before this its effect was nullified by the Act of May 8, 1906, 34 Stat. 182, amending § 6

of the general allotment act. The Clapp Amendment, enacted shortly thereafter, contains no indication of an intention to repeal the prior act as to mixed-blood Chippewas. It passed fee simple title to trust allotments held by certain tribal Indians regardless of their competency by declaring that trust deeds "heretofore or hereafter issued to them" should have that effect. The inclusion of trust instruments "hereafter" to be issued could only have come from a desire to grant full title without granting to incompetents the citizenship which would come under the Act of 1906 by allowing a patent in fee.

The clause "or such mixed bloods upon application shall be entitled to receive a patent in fee simple" is not an absolute direction to issue such patents. Under it adult mixed bloods have the option to apply for citizenship and subjection to state laws (Act of May 8, 1906, *supra*), or to remain as tribal Indians subject to the exclusive jurisdiction of the United States (*ibid.*). The clause defining the trust allotments to which fee titles passed to be those "heretofore or hereafter" held by adult mixed bloods is utterly inconsistent with any intention to terminate the guardianship. As no transfer could theretofore have been made, the word "heretofore" referred to allotments of deceased Indians, and the intention was to pass fee title to their heirs. Congress surely did not intend to emancipate such decedents *nunc pro tunc* or emancipate from federal guardianship all full bloods, minors, or tribal relatives on other Chippewa reservations, who might inherit such allotments. The policy of emancipating individual tribal Indians when they have become and are found capable of managing their own affairs has long been settled, and frequently stated in acts of Congress. See Acts of July 1, 1902, 32 Stat. 636, 639; March 2, 1907, 34 Stat. 1221; May 18, 1916, 39 Stat. 123, 128. The Clapp Amendment purporting to do no more than pass fee title, cannot be held to involve a finding that all

mixed bloods are competent. Consistently with its own language, with other parts of the same act, and every annual Indian act since, mixed bloods were and are treated as dependent Indians, with full bloods.

The capacity of the United States to sue for the protection of its Indian wards exists in every justiciable case of wrong suffered by them. *United States* v. *Kagama*, 118 U. S. 375, 384; *United States* v. *Rickert*, 188 U. S. 432, 437, 444; *Heckman* v. *United States*, 224 U. S. 413, 437, 441; *United States* v. *Noble*, 237 U. S. 74, 79; *United States* v. *Nice*, 241 U. S. 591, 597; *United States* v. *Gray*, 201 Fed. Rep. 291, 293; *United States* v. *Fitzgerald*, 201 Fed. Rep. 295, 296. These decisions recognize the right of the United States to sue on behalf of dependent Indians in fulfillment of its obligations springing from its peculiar relation to them.

It is no answer to say that the Indians themselves have a right to sue for the relief to which they are entitled. The same conditions of helpless dependency which operated to deprive them of their property would likewise preclude them from undertaking the litigation necessary to obtain relief. *Heckman* v. *United States*, 224 U. S. 413, 438; *United States* v. *Gray*, 201 Fed. Rep. 291, 294.

Legislation affecting the Indians is to be construed in their interest, *Choate* v. *Trapp*, 224 U. S. 665, 675; *United States* v. *Nice*, 241 U. S. 591, 599; a construction of the Clapp Amendment which would deny all relief to these Indians would not be in their interest but in the interest of unscrupulous speculators. *United States* v. *Thurston County*, 143 Fed. Rep. 287, 289.

Mr. Marshall A. Spooner for Waller *et al.*

Mr. Justice Day delivered the opinion of the court.

This case is here upon a certificate from the Circuit Court of Appeals for the Eighth Circuit, from which it

appears that the United States brought a suit in the District Court of the United States for the District of Minnesota for the purpose of cancelling and annulling a warranty timber deed from Ah-be-daun-ah-quod and Ah-sum, Indian allottees on the White Earth Reservation in Minnesota, to Mamie S. Waller, dated November 4, 1907, and a certain warranty deed from the same Indians to L. S. Waller, dated January 6, 1908. The District Court dismissed the bill on the ground that the plaintiff had no capacity to maintain the suit and upon a further ground that the court had no jurisdiction to hear and consider the same.

The Court of Appeals certifies the bill upon which suit was brought in the District Court, wherein it is alleged that the United States brought the action upon behalf of Ah-be-daun-ah-quod and Ah-sum, Indian allottees in the White Earth Reservation in Minnesota. The acts of Congress under which the allotments were made to the Indians named are set forth, and it is averred that these acts provided that the lands in question should be held in trust by the United States for a period of twenty-five years; that the Indians for whom the suit was brought were Chippewa Indians of the White Earth Reservation, residing on the reservation, and were husband and wife and adult mixed-blood Indians.

It is averred that since the establishment of the White Earth Reservation the United States, in pursuance of its treaties and agreements with the tribes and bands of Chippewa Indians in the State of Minnesota, and in pursuance of its laws, has had and exercised through the Department of the Interior and the Office of Indian Affairs the function of guardian, protecting and defending said tribes and bands and the individual members thereof in the enjoyment and possession of their property rights. That before the commission of the acts of the defendants complained of there were duly allotted to Ah-be-daun-ah-quod and

Ah-sum certain tracts of land in the White Earth Reservation, which are described.

That afterwards, in December, 1907, the defendant, Lucky S. Waller, negotiating with these two Indians for the purchase of a portion of the timber upon their allotments, paid to them $50 as partial payment for such timber, and caused them to sign a certain paper, produced by him, by placing their thumb marks thereon. That as an inducement to procuring the execution of this paper, Waller falsely and fraudulently stated that it was merely a receipt for the payment. That neither Indian could read or write, and each was obliged to rely on Waller for understanding and knowledge of the contents of the instrument, and that so relying upon him and upon his false statements, they believed the instrument to be but a receipt for the money paid.

That in January, 1908, a further payment of $75 was made by Waller to the two Indians, and another paper executed by them under similar circumstances and representations. That in June, 1910, and December, 1911, sums of $10 were paid by Waller to the Indians; that such sums aggregating $145, were all paid with the understanding and belief on the part of the Indians that they were part of the purchase price of a part of the timber upon the lands; and that no other or further moneys have been paid by Waller to the Indians.

That in December, 1911, the Indians for the first time learned, and plaintiff was thereafter advised, that the land records in the offices of the registers of deeds of Mahnomen and Clearwater counties, Minnesota, showed that there had been filed for record in said offices, respectively, two instruments in writing; one, an instrument purporting to be a warranty timber deed from Ah-be-daun-ah-quod and Ah-sum to Mamie S. Waller, dated November 4, 1907, reciting the consideration for the property therein conveyed to be $500, and purporting to convey the timber

upon the lands patented to the Indians with the exception of one parcel, and the other an instrument purporting to be a warranty deed from Ah-be-daun-ah-quod and Ah-sum to L. S. Waller, dated January 6, 1908, reciting the consideration paid to be $200, and purporting to convey all of the lands patented.

That the instruments so recorded were the instruments executed by the Indians, by their thumb marks in the custom of Indians unable to read or write, and that the instruments which the Indians executed in December, 1907, and January, 1908, were not in truth and in fact the receipts which the defendant Waller falsely and fraudulently represented them to be, but were the instruments so recorded, which the Indians signed in ignorance of their contents, nature and effect, and in reliance upon the false and fraudulent representations in regard thereto made by the defendant Waller, all of which was well known to the defendant.

That Mamie S. Waller is the wife of defendant Lucky S. Waller, and the person mentioned as the grantee in the timber deed; that she gave no consideration for the timber deed or the property purporting to be conveyed thereby; that the deed was caused to be taken in her name as grantee for the mutual benefit of the defendants; that she pretends to have and claims the title to the property therein described by virtue of said timber deed, and thereby seeks to avail herself of the benefit of the fraud perpetrated in securing the timber deed from the two Indians.

That the Indians never had any negotiations with either of the defendants directly or indirectly as to the sale of the lands or of any timber thereon or in any respect other than as set forth in the bill; that they never intended to sell the lands and never did sell them or any part thereof; and that they never knowingly signed or executed any instrument conveying or in any manner alienating the

lands or any part thereof or interests or rights therein, or any timber thereon. That the instruments which were executed and recorded had and have the apparent legal effect of vesting the title to the lands and the timber thereon in the defendants, and of divesting the Indians of whatever right, title and interest in and to said lands and timber were intended and provided for them by the laws of the United States. That the sum of $145.00 paid by Waller to the Indians is grossly inadequate and disproportionate to the value of the lands and of the timber thereupon, and that the value of the lands is not less than $2,500.00 and of the timber not less than $2,000.00.

The prayer of the bill is for surrender and cancellation of the warranty timber deed and the warranty deed for the lands.

The case was appealed to the Circuit Court of Appeals for the Eighth Circuit, which court has certified to this court the following question: Has the United States capacity to maintain the suit in question on behalf of the Indians named?

The answer to the question propounded depends upon a consideration of the acts of Congress relating to these Indians. The controlling act is the so-called Clapp Amendment of June 21, 1906, 34 Stat. 325, 353; March 1, 1907, 34 Stat. 1015, 1034.

Before dealing with its interpretation, it is necessary to have in mind certain matters which are well settled by the previous decisions of this court. The tribal Indians are wards of the Government, and as such under its guardianship. It rests with Congress to determine the time and extent of emancipation. Conferring citizenship is not inconsistent with the continuation of such guardianship, for it has been held that even after the Indians have been made citizens the relation of guardian and ward for some purposes may continue. On the other hand, Congress may relieve the Indians from such guardianship and control,

in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property or give to them a partial emancipation if it thinks that course better for their protection. *United States* v. *Nice*, 241 U. S. 591, 598, and cases cited.

To comprehend what Congress intended to accomplish by the act in question, it is necessary to have in view the previous legislation upon this subject. Its history was given in *United States* v. *First National Bank*, 234 U. S. 245, and may be briefly summarized here.

By the treaty of March 19, 1867, 16 Stat. 719, creating the White Earth Reservation, the Chippewas of the Mississippi ceded all their land in Minnesota, except certain described tracts, to the United States, and the Government set apart the White Earth Reservation for their use, and provision was made for the certification to each Indian of not to exceed 160 acres of land in lots of 40 acres each, upon the cultivation of ten acres, provided that the land should be exempt from taxation and sale for debt and should not be alienated except with the approval of the Secretary of the Interior and then only to a Chippewa Indian. Under the general allotment act of February 8, 1887, 24 Stat. 388, provision was made for the allotment of lands in the Indian reservations in severalty, and it was provided that upon the approval of the allotments patent therefor should issue in the name of the allottees, which should have the legal effect and declare that the United States held the land for twenty-five years in trust for the use and benefit of the Indian to whom the allotment was made, or in case of his death for his heirs, according to the laws of the State or Territory where the land was located. At the expiration of that time the United States was required to convey the same to the Indian or his heirs in fee, discharged of the trust and free of encumbrances, provided that the President of the United States might at his discretion extend the period. Conveyances or con-

tracts touching the lands before the expiration of the trust period were declared null and void. The Nelson Act of January 14, 1889, 25 Stat. 642, provided for the relinquishment to the United States of that part of the reservation remaining after the allotment, the act to become operative only upon the assent of a certain number of Indians being obtained. By the Act of February 28, 1891, 26 Stat. 794, the allotments were limited to eighty acres to each Indian, but by the Act of April 28, 1904, 33 Stat. 539, the maximum allotments of the White Earth Reservation were made 160 acres. While the lands were thus held in trust and subject to the provisions of the Act of February 8, 1887, the Clapp Amendment was passed, 34 Stat. 1015, 1034, which provides:

"That all restrictions as to the sale, incumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota, heretofore [amended March 1, 1907, the word 'heretofore' being substituted for the word 'now'] or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to full bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that said adult full-blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application."

As stated in the certificate, the Indians involved are adults of mixed blood, and the lands in question were duly allotted and patented to them (by trust patents, counsel agree,) before the deeds in controversy were made. We cannot escape the conviction that the plain language of this act evidences the intent and purpose of Congress

to make such lands allotted to mixed-blood Indians subject to alienation with all the incidents and rights which inhere in full ownership in persons of full capacity.

The act deals with two classes: First, adult mixed-blood Indians, as to whom all restrictions as to sale or incumbrance are removed and the trust deeds declared to pass title in fee simple, or upon application such mixed bloods are to receive fee simple patents for their allotments; and, Second, full-blood Indians, as to whom the restrictions are to continue until the Secretary of the Interior is satisfied that such Indians "are competent to handle their own affairs," at which time they are to receive patents in fee simple. This distinction between the qualifications of adult mixed and full-blood Indians is one which Congress has not infrequently applied. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 306, 308; *United States* v. *First National Bank*, *supra*, at page 260.

The act thus evidences a legislative judgment that adult mixed-blood Indians are, in the respects dealt with in the act, capable of managing their own affairs, and for that reason they are given full power and authority to dispose of allotted lands. This may be a mistake of judgment as to some cases, and if the allegations of the bill set forth in the certificate in this case are true, it is quite evident that the Indians here involved were incapable of making an intelligent disposition of their lands. But Congress dealt with general conditions, and with these classes of Indians as a whole, and with authority over the subject has given to adult mixed-blood Indians the full right to dispose of the lands in question. It is not for the courts to question this legislative judgment.

In this view of the legislation and the particular act in question, we are unable to find any authority in the United States to maintain this suit in behalf of the Indians named.

In *Heckman* v. *United States*, 224 U. S. 413, it was held

that the United States could maintain a bill to cancel conveyances made by members of the Cherokee Nation in violation of restrictions imposed by acts of Congress. That case differs from the present one, in which there has been no disposition of the lands in violation of restrictions imposed by Congress upon alienation by the Indians. In the case now before us, in whatever other respect the Government of the United States may continue to hold these Indians as wards, needing and receiving protection from its authority over their persons and property, as to the lands in question the United States, in the passage of the Clapp Amendment, evidenced its purpose to grant full power and control to the class named. As to them the Government has no further interest in or control over the lands.

It does not follow that the Indians are without remedy in proper actions brought by themselves or their guardians, if there be such, for the protection of their rights. In *Dickson* v. *Luck Land Co.*, decided at this term and reported in 242 U. S. 371, this court had occasion to deal with rights concerning lands allotted and patented under the Clapp Amendment to adult mixed-blood Chippewa Indians, and speaking of the effect of the removal of the restrictions, this court said, at page 375:

"With those restrictions entirely removed and the fee simple patent issued it would seem that the situation was one in which all questions pertaining to the disposal of the lands naturally would fall within the scope and operation of the laws of the State. And that Congress so intended is shown by the Act of May 8, 1906, c. 2348, 34 Stat. 182, which provides that when an Indian allottee is given a patent in fee for his allotment he 'shall have the benefit of and be subject to the laws, both civil and criminal, of the State.' Among the laws to which the allottee became subject, and to the benefit of which he became entitled, under this enactment were those governing the

transfer of real property, fixing the age of majority and declaring the disability of minors."

We reach the conclusion that in this suit the United States was without capacity to bring the action for the benefit of the Indians named, and it follows that the question propounded must be answered in the negative.

And it is so ordered.

UNITED STATES *v.* ROWELL ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 63. Argued November 2, 3, 1916.—Decided April 9, 1917.

In the exercise of its guardian powers over tribal Indians through allotment of lands of their reservation and conversion of surplus lands into tribal funds, Congress is free to adjust its action to meet new and changing conditions so long as no fundamental right is violated.

Having enrolled a white man as an adopted member of an Indian tribe, and authorized and directed the Secretary of the Interior to issue him a patent in fee for a designated tract of the tribal land as his allotment, to be in lieu of all claim on his part to allotment or to money settlement in lieu thereof, Congress had power to recall the direction before the fee had passed, upon finding that the tract designated had been lawfully devoted to a special use (e. g., school purposes) from which it could not be withdrawn with due regard for the tribe, or that in situation and value it exceeded a fair distributive share of the common property—this without prejudice to the right of the allottee to obtain another allotment in the usual way.

An act of Congress directing the Secretary of the Interior "to issue a patent in fee" to a designated member of an Indian tribe for a designated tract of land set apart as his allotment, but containing no other words indicative of an intention to pass title by the act itself, *Held*, not a grant *in præsenti*.

Such a provision calls for no acceptance other than such as would be implied from taking the patent when issued.

A direction by Congress that a patent be issued an individual for land assigned him as an Indian allotment is to be regarded, not as a proposal by the Government which upon acceptance makes a contract, but as a law amendable and repealable at the will of Congress, subject to the qualification that rights created by the execution of such provision can not be divested or impaired. *Levey* v. *Stockslager, Commissioner*, 129 U. S. 470.

THE case is stated in the opinion.

Mr. Assistant Attorney General Warren, with whom *Mr. S. W. Williams* was on the brief, for the United States.

Mr. Henry E. Asp, with whom *Mr. Henry G. Snyder*, *Mr. Frederick B. Owen* and *Mr. Walter A. Lybrand* were on the briefs, for defendants in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is an action in ejectment brought by the United States against James F. Rowell and two others. The land in controversy is a quarter-section—one hundred sixty acres—in an Indian school reserve in Comanche County, Oklahoma.

Three statutes, all enacted in the same year, must be noticed. The first of these is a provision in the Act of April 4, 1910, c. 140, 36 Stat. 269, 280, authorizing and directing the Secretary of the Interior "to enroll and allot" James F. Rowell as an adopted member of the Kiowa tribe of Indians. The second is the following provision in the Act of June 17, 1910, c. 299, § 3, 36 Stat. 533: "That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee for" the tract in controversy "to James F. Rowell a full member of the Kiowa, Comanche and Apache Tribes of Indians of Oklahoma, who has heretofore received no allotment of land from any

source; this to be in lieu of all claims to any allotment of land or money settlement in lieu of an allotment." And the third is the express repeal of the provision just quoted by the Act of December 19, 1910, c. 3, 36 Stat. 887. The controversy turns chiefly upon the true construction and effect of the provision of June 17 and the constitutional validity of the repealing provision of December 19. These questions are to be solved in the light of the following facts:

A patent was not issued to Rowell. He asked for one, but, at the suggestion of the chairmen of the Committees on Indian Affairs in the Senate and House of Representatives, the President, in whose name such patents are issued, withheld his signature from the patent and directed that nothing be done until Congress could further consider the matter. Congress was not then in session and when it reconvened the matter was again considered, with the result that the provision in the Act of June 17 was repealed.

The tract in controversy was part of a large reservation established by treaties in 1868 as a permanent home for the Kiowa, Comanche and Apache Indians. 15 Stat. 581, 589. In 1901 the members of these tribes were given allotments in severalty in this reservation and the greater part of the remaining lands was disposed of by the United States,—what was deemed to be their fair value being credited to the Indians as a trust fund. 31 Stat. 676, c. 813, § 6. At that time a portion of the reservation, embracing the tract in controversy, was set apart for school purposes for these Indians, and this school reserve is still maintained and used for their benefit. The tribal relation of these Indians has not been terminated. They are still in a state of pupilage and under the control of the United States. It retains the title to their allotments and administers their tribal affairs and property.

James F. Rowell is a white man who went to the large

reservation as an Indian trader in 1899 and has since lived with these Indians. He is a physician and has practiced among them. In 1903 he married a Kiowa woman and in 1909 was adopted as a member of the tribe. His wife received an allotment from the tribal lands in 1900 and some of their children received allotments in 1906 or 1908. 34 Stat. 214, c. 2580, § 6; 35 Stat. 456, c. 216, § 24. But no allotment had been made to him when the provision of June 17, 1910, was enacted. It was enacted at his solicitation, and the Committees on Indian Affairs in the Senate and House of Representatives, in recommending its repeal, reported that it was enacted in the belief that the tract described was of no greater value than the average of those allotted to other members of the tribe, or than other tracts still subject to allotment, when in truth it was of vastly greater value, and that misrepresentation and deception were practiced by Rowell in securing the legislation. Senate Report No. 924 and House Report No. 1741, 61st Cong., 3rd sess. About two years before, the south half of the same section—three hundred and twenty acres—had been sold for townsite purposes under the Act of March 27, 1908, c. 106, 35 Stat. 49, for upwards of $250,000.

In June, 1911, six months after the date of the repealing act, Rowell entered upon the tract in controversy and since then has remained in possession, although promptly notified, through the Indian Agent, that he was a trespasser and must vacate the premises. One of the defendants is Rowell's wife and another is the wife of a lawyer who assisted him in securing the passage of the provision which Congress felt called upon to repeal. She holds a deed from Rowell made after the date of the repealing act and purporting to convey to her an undivided one-half interest in the tract for a recited consideration of $50,000. The three defendants had come to be in possession when the action was begun. In the District Court

there was a directed verdict and a judgment for the defendants.

Congress was here concerned with the affairs of Indians whose tribal relation had not been dissolved—Indians who were still wards of the United States and entitled to look to it for protection. The plan of giving them individual allotments in the reservation theretofore established as a tribal home and of converting the surplus lands into interest-bearing funds was not theirs. But it was obligatory on them, because it was adopted by Congress in the exercise of its control over them. As in other instances, the wish of the ward had to yield to the will of the guardian. And Congress was free to exert this guardianship in any manner which it deemed appropriate, and to adjust its action to new or changing conditions, so long as no fundamental right was violated.[1]

In view of the scope of this power, as reflected by over a century of practice and by the decisions of this court, we think it was quite admissible for Congress to give effect to Rowell's status as an adopted member of the tribe, to recognize his claim to an allotment out of the tribal lands, to designate the land which he should receive and to direct that it be conveyed to him by a patent in fee without awaiting the expiration of the usual trust period of twenty-five years. And if, before that direction was complied with, it was discovered that the land designated was lawfully devoted to a special use from which it could not be withdrawn with due regard for the tribe in general, or that its situation and value were such that to allot or to convey it to him would invest him with much more than a fair distributive share of the common property of the tribe, we think it was equally admissible for Congress

[1] *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 564; *Gritts* v. *Fisher*, 224 U. S. 640, 648; *Choate* v. *Trapp*, 224 U. S. 665, 671; *Sizemore* v. *Brady*, 235 U. S. 441, 449.

to recall that direction in the interest of the tribe as a whole. At most that direction was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect. *Gritts* v. *Fisher*, 224 U. S. 640, 648. If the rule were otherwise and the quarter-section upon which the Indian school buildings are situate had been inadvertently designated as the land which he should receive, the situation might have been one of great embarrassment. See *United States* v. *Des Moines Navigation & Railway Co.*, 142 U. S. 510, 544; *United States* v. *Old Settlers*, 148 U. S. 427, 466; Cooley's Const. Lim., 7th ed. 257–259.

But it is insisted that the provision of June 17, 1910, was a grant *in præsenti* and operated in itself to pass the full title to Rowell, and therefore that he had a vested right in the land which the repealing act could not affect. If the premise be right the conclusion is obviously so. But is the premise right? Of course, a grant may be made by a law as well as by a patent issued pursuant to a law, but whether a particular law operates in itself as a present grant is always a question of intention. We turn, therefore, to the provision relied upon to ascertain whether it discloses a purpose to make such a grant, that is to say, a purpose to pass the title immediately without awaiting the issue of a patent. We find in it no words of present grant, but only a direction to the Secretary of the Interior "to issue a patent in fee" to Rowell for the tract described. Only through this express provision for a patent do we learn that a grant is intended, and if it were eliminated nothing having any force would remain. This, we think, shows that a present statutory grant was not intended, but only such a grant as would result from the issue of a patent as directed. The cases cited as making for a different conclusion are plainly distinguishable in that they deal with laws or treaties making grants and

either containing no provision for a patent or providing for one merely by way of further assurance.

It is also insisted that, by applying for a patent before the provision therefor was repealed, Rowell accepted that provision and thereby acquired a right to have it carried into effect of which he could not be divested by the repealing act consistently with due process of law. But the provision did not call for an acceptance and it is evident that none was contemplated, other than such as would be implied from taking the patent when issued. Besides, statutes of this type are not to be regarded as proposals by the Government to enter into executory contracts, but as laws which are amendable and repealable at the will of Congress, save that rights created by carrying them into effect cannot be divested or impaired. *Gritts* v. *Fisher*, 224 U. S. 640, 648; *Choate* v. *Trapp*, 224 U. S. 665, 671; *Sizemore* v. *Brady*, 235 U. S. 441, 449. A case much in point is *Levey* v. *Stockslager, Commissioner*, 129 U. S. 470. The facts out of which it arose are these: By an Act of March 2, 1867, Congress confirmed to the widow and children of a deceased claimant the one-sixth part, amounting to 75,840 acres, of an old land claim, and then, after reciting that the Government had appropriated the land to other purposes, directed the Commissioner of the General Land Office to issue to the widow and children certificates of location in eighty-acre lots locatable upon public lands at any land office, in lieu of their asserted interest in the old claim. Four days later the widow and children requested the Commissioner to issue the certificates, but the request was not complied with. On the 30th of the same month Congress by a joint resolution, approved by the President, directed that the execution of the act be suspended, and the suspension was not subsequently removed. The widow and children contended that in view of what was done they were entitled, in a contractual sense, to the certificates and had acquired a vested right

to them of which they could not be deprived by the joint resolution without denying them due process of law. But both phases of their contention were denied, it being said in the course of the opinion that "the whole thing remained *in fieri*, and subject to the control of Congress," that "there was here no contract between the United States and the widow and children" in the sense contended, that the joint resolution "did not deprive the widow and children of any property, or right of property, in violation of the Constitution," and that "the transaction was merely the ordinary one of a direction by statute to a public officer to perform a certain duty, and a subsequent direction to him by statute, before he had performed that duty or had entered upon its performance, not to perform it."

For these reasons we conclude that the repealing provision was valid, and that while it did not affect Rowell's status as an adopted member of the tribe or his right to obtain in the usual way an allotment from the tribal lands not specially reserved, it did revoke the special provision made in his behalf in the Act of June 17, 1910.

It results that the verdict, instead of being directed for the defendants, should have been directed for the Government as was requested. This requires that the judgment be reversed and the cause remanded for a new trial.

Judgment reversed.

UNITED STATES *v.* GINSBERG.

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

No. 401. Argued March 15, 1917.—Decided April 9, 1917.

When several questions are certified under Jud. Code, § 239, and answers to part will dispose of the case, answers to the rest may be omitted.

Section 9 of the Naturalization Act, c. 3592, 34 Stat. 596, requires that final hearings upon petitions for naturalization shall be held entirely in open court; a hearing in the judge's chambers adjoining the court room does not satisfy this requirement.

Under § 15 of the act a certificate of citizenship granted by the court or judge on a state of facts showing the petitioner not qualified for citizenship, is subject to be annulled in an independent suit by the United States.

THE case is stated in the opinion.

Mr. Assistant Attorney General Wallace for the United States.

No appearance for Ginsberg.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Four questions have been certified (Judicial Code, § 239); but considering the accompanying statement of facts and our views in respect of the law, answers to the first and fourth will enable the Circuit Court of Appeals properly to determine the issues involved. *United States* v. *Britton*, 108 U. S. 199, 207.

Question "1—Is the final hearing of a petition for naturalization had in open court as required by sec. 9

of the act of June 29, 1906, c. 3592, if after the petition is first presented in open court the hearing thereof is passed to and finally held in the chambers of the judge adjoining the court room, on a subsequent day and at an earlier hour than that to which the court has been regularly adjourned?"

Question "4—May a certificate of citizenship be set aside and canceled in an independent suit brought under section 15 of the act of June 29, 1906, c. 3592, on the ground that it was illegally procured if the uncontradicted evidence at the hearing of the petition showed indisputably that the petitioner was not qualified by residence for citizenship and that the court or judge who heard the petition and ordered the certificate misapplied the law and the facts?"

Prior to 1906 "The Uniform Rule of Naturalization" authorized by the Constitution was found in the Act of 1802 and a few amendments thereto. This enumerated only general controlling principles. Grievous abuses having arisen, Congress undertook by the Act of June 29, 1906, c. 3592, 34 Stat. 596, to prescribe "and fix a uniform system and a code of procedure in naturalization matters." Report Committee on Immigration and Naturalization, H. R. 1789, Feb. 26, 1906. This specifies with circumstantiality the manner ("and not otherwise") in which an alien may be admitted to become a citizen of the United States; what his preliminary declaration shall be; form and contents of his sworn petition to the court and witnesses by which it must be verified; form of oath to be taken in open court; necessary proof concerning residence, character, etc. The clerk is required to post notice of the petition with details concerning applicant, when final hearing will take place, names of witnesses by which alleged facts are to be established, etc. And it is further provided:

Section 9. "That every final hearing upon such petition

shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the presence of the court."

Section 15. "That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought."

* * * * * * * *

In *Johannessen* v. *United States*, 225 U. S. 227, we discussed the purpose and effect of the act.

An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.

Section 9 requires a final hearing upon the petition in

open court. The term open court is used in contradistinction to a judge sitting in chambers. Bouvier's Law Dictionary. The whole statute indicates a studied purpose to prevent well known abuses by means of publicity throughout the entire proceedings. Its plain language repels the idea that any part of a final hearing may take place in chambers, whether adjoining the court room or elsewhere.

No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in § 15 and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact it is illegally procured; a manifest mistake by the judge cannot supply these nor render their existence non-essential.

Question numbered one must be answered in the negative; numbered four in the affirmative.

And it is so ordered.

UNITED STATES *v.* GRADWELL ET AL.

UNITED STATES *v.* HAMBLY ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

UNITED STATES *v.* O'TOOLE ET AL.

UNITED STATES *v.* O'TOOLE ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

Nos. 683, 684, 775, 776. Argued March 16, 1917.—Decided April 9, 1917.

A conspiracy to influence a congressional election by bribery of voters is not a conspiracy to defraud the United States within the meaning of § 37 of the Penal Code, formerly § 5440 of the Revised Statutes.

Quære: Whether the power of Congress to regulate elections of Senators and Representatives, Const., Art. I, § 4, is applicable to a general nominating primary as distinguished from a final election?

The primary election law of West Virginia, Acts 1915, c. 26, pp. 222, 246, provides that only candidates belonging to a political party which polled three per cent. of the vote of the State at the last preceding general election can be voted for, excludes independent and other voters not regular and qualified members and voters of such a party from participation in the primary, and further provides that, after the primary, candidates, including persons who have failed therein, may be nominated by certificate signed by not less than five per cent. of the entire vote of the last preceding election. *Held*, That the rights which candidates for nomination for the office of Senator of the United States may have in such a primary come wholly from the state law; and a conspiracy to deprive them of such rights by debauching the primary with illegal votes for an opposing candidate is not within the scope of § 19 of the Penal Code (formerly Rev. Stats., § 5508) designed for the protection of rights and privileges secured by the Constitution or laws of the United States.

The Federal Corrupt Practices Act, and amendments (c. 392, 36 Stat. 822; c. 33, 37 Stat. 25; c. 349, 37 Stat. 360), recognizing primary elections and limiting the expenditures of candidates for Senator in connection with them, are not in effect an adoption of all state primary laws as acts of Congress.

The temporary measure enacted by Congress for the conduct of the nomination and election of Senators until other provision should be made by state legislation (c. 103, 38 Stat. 384) was superseded as to West Virginia by the primary law of that State of February 20, 1914, effective ninety days after its passage.

234 Fed. Rep. 446; 236 Fed. Rep. 993, affirmed.

THE cases are stated in the opinion.

Mr. Assistant Attorney General Wallace for the United States.

Mr. Alexander L. Churchill for defendants in error in Nos. 683 and 684.

Mr. John W. Cummings, with whom *Mr. James T. Cummings* and *Mr. John J. Fitzgerald* were on the brief, for defendant in error Flynn, in No. 684.

Mr. John H. Holt, with whom *Mr. Luther C. Anderson* was on the brief, for defendants in error in Nos. 775 and 776.

MR. JUSTICE CLARKE delivered the opinion of the court.

These four cases were argued together because the indictments in the first three must be justified, if at all, under the same section (§ 37) of the Criminal Code of the United States, while the fourth involves the application of § 19 of that Code to the same state of facts which we have in the third case.

In the Gradwell case (No. 683) and in the Hambly case (No. 684) the fourteen defendants are charged in the in-

dictments with having conspired together "to defraud the United States," and to commit a wilful fraud upon the laws of the State of Rhode Island, by corrupting and debauching, by bribery of voters, the general election held on the third of November, 1914, at which a Representative in Congress was voted for and elected in the Second Congressional District of Rhode Island in the Gradwell case, and in the First Congressional District in the Hambly case, thereby preventing "a fair and clean" election.

No. 775 relates to the conduct of a primary election held in the State of West Virginia on the sixth of June, 1916, under a law of that State providing for a state wide nomination of candidates for the United States Senate. In the indictment twenty defendants are charged with conspiring "to defraud the United States in the matter of its governmental right to have the candidates of the true choice and preference of said Republican and Democratic parties nominated for said office, and one of them elected," by causing and procuring a large number of persons who had not resided in the State a sufficient length of time to entitle them to vote under the state law, to vote at the primary for a candidate named, and also to procure four hundred of such persons to vote more than once at such primary election.

The indictment in No. 776 charges that the same defendants named in No. 775 conspired together to "*injure and oppress*" White, Sutherland and Rosenbloom, three candidates for the Republican nomination for United States Senator who were voted for at the primary election held in West Virginia on June 6th, 1916, under a law of that State, by depriving them of the "right and privilege of having each Republican voter vote once only, for some one" of the Republican candidates for such nomination, and of not having any votes counted at such election except such as were cast by Republican voters duly qualified

under the West Virginia law. The charge is that the defendants conspired to accomplish this result by procuring a thousand persons, who were not qualified to vote under the state law, because they had not resided in that State a sufficient length of time, to vote for an opposing candidate, William F. Hite, and many of them to vote more than once, and to have their votes cast, counted and returned as cast in favor of such candidate.

A demurrer to the indictment by each of the defendants in each case, on the ground that it fails to set forth any offense under the laws of the United States, was sustained by the District Court of the District of Rhode Island in the first two cases and of the Southern District of West Virginia in the third and fourth. The cases are here on error.

It is plain from the foregoing statement that the indictments in the first three cases are based solely upon the charge that the defendants conspired "to defraud the United States" in violation of § 37 of the Criminal Code, and that the indictment in No. 776 is based upon the charge that three candidates for the nomination for Senator of the United States were "injured and oppressed" within the meaning of § 19 of the Criminal Code, by a conspiracy on the part of the defendants to compass their defeat by causing illegal voting for an opposing party candidate at the primary election.

The applicable portions of §§ 37 and 19 are as follows:

"Section 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, . . . each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

"Section 19. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to

him by the Constitution or laws of the United States, or because of his having so exercised the same, . . . they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

The argument of counsel for plaintiff in error in the first three cases is that the United States Government has the right to honest, free and fair elections, that a conspiracy to corrupt electors by bribery has for its object the denial and defeat of this right and that it therefore is a scheme to defraud the United States within the meaning of § 37. This presents for decision the questions:

Is § 37 of the Criminal Code applicable to congressional elections, and if it is, has the United States such an interest or right in the result of such elections that to bribe electors constitutes a fraud upon the Government within the meaning of this section?

To admit, as it must be admitted, that the people of the United States and so their Government, considered as a political entity, have an interest in and a right to honest and fair elections advances us but little toward determining whether § 37 was enacted to protect that right and whether a conspiracy to bribe voters is a violation of it. Obviously the Government may have this right and yet not have enacted this law to protect it. It may be, as is claimed, that Congress intended to rely upon state laws and the administration of them by state officials to secure honest elections, and that this section was enacted for purposes wholly apart from those here claimed for it.

To answer the questions presented requires that we look to the origin and history of § 37, and that we consider what has been, and is now, the policy of Congress in dealing with the regulation of elections of Representatives in Congress.

Section 37 first appears as § 30 of "An Act to amend existing laws relating to Internal Revenue, and for other purposes," enacted on March 2, 1867, 14 Stat. 471, and, except for an omitted not relevant provision, the section has continued from that time to this, in almost precisely its present form. It was carried into the revision of the United States Statutes of 1873–4 as § 5440 of Chapter 5, the title of which is "Crimes against the Operations of the Government," while another chapter, Chapter 7 of the revision, deals with "Crimes against the Elective Franchise and Civil Rights of Citizens." Forty-two years after its first enactment the section was carried into the Criminal Code (in force on and after January 1st, 1910) where it now appears as § 37, again in a chapter, now Chapter 4, devoted to "Offenses against the Operations of the Government," while Chapter 3 of the Code deals with "Offenses against the Elective Franchise and Civil Rights of Citizens."

The section has been widely applied in the prosecution of frauds upon the revenue, in land cases and to other operations of the Government, and, while no inference or presumption of legislative construction is to be drawn from the chapter headings under which it is found in the Criminal Code (§ 339), nevertheless the history of the origin, classification and use made of the section, which we have just detailed, are not without significance, and taken with the fact that confessedly this is the first time that it has been attempted to extend its application to the conduct of elections, they suggest strongly that it was not intended by Congress for such a purpose.

Further aid in determining the application and construction of the section may be derived from the history of the conduct and policy of the Government in dealing with congressional elections.

The power of Congress to deal with the election of Senators and Representatives is derived from § 4, Article 1

of the Constitution of the United States, providing that:

"The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

Whatever doubt may at one time have existed as to the extent of the power which Congress may exercise under this constitutional sanction in the prescribing of regulations for the conduct of elections for Representatives in Congress or in adopting regulations which States have prescribed for that purpose has been settled by repeated decisions of this court, in *Ex parte Siebold*, 100 U. S. 371, 391 (1879); *Ex parte Clarke*, 100 U. S. 399 (1879); *Ex parte Yarbrough*, 110 U. S. 651 (1884); and in *United States* v. *Mosley*, 238 U. S. 383 (1915).

Although Congress has had this power of regulating the conduct of congressional elections from the organization of the Government, our legislative history upon the subject shows that, except for about twenty-four of the one hundred and twenty-eight years since the Government was organized, it has been its policy to leave such regulations almost entirely to the States, whose representatives Congressmen are. For more than 50 years no congressional action whatever was taken on the subject until 1842 when a law was enacted requiring that Representatives be elected by Districts (5 Stat. 491), thus doing away with the practice which had prevailed in some States of electing on a single state ticket all of the Members of Congress to which the State was entitled.

Then followed twenty-four years more before further action was taken on the subject when Congress provided for the time and mode of electing United States Senators (14 Stat. 243) and it was not until four years later, in 1870, that, for the first time, a comprehensive system for dealing

with congressional elections was enacted. This system was comprised in §§ 19, 20, 21 and 22 of the Act approved May 31, 1870, 16 Stat. 144; in §§ 5 and 6 of the Act approved July 14, 1870, 16 Stat. 254; and in the Act amending and supplementing these acts, approved June 10, 1872, 17 Stat. 347, 348, 349.

These laws provided extensive regulations for the conduct of congressional elections. They made unlawful, false registration, bribery, voting without legal right, making false returns of votes cast, interfering in any manner with officers of election and the neglect by any such officer of any duty required of him by state or federal law; they provided for appointment by Circuit Judges of the United States of persons to attend at places of registration and at elections, with authority to challenge any person proposing to register or vote unlawfully, to witness the counting of votes and to identify by their signatures the registration of voters and election tally sheets; and they made it lawful for the marshals of the United States to appoint special deputies to preserve order at such elections, with authority to arrest for any breach of the peace committed in their view.

These laws were carried into the revision of the United States Statutes of 1873–4, under the title "Crimes against the Elective Franchise and Civil Rights of Citizens," Rev. Stats., §§ 5506 to 5532, inclusive.

It will be seen from this statement of the important features of these enactments that Congress by them committed to federal officers a very full participation in the process of the election of Congressmen, from the registration of voters to the final certifying of the results, and that the control thus established over such elections was comprehensive and complete. It is a matter of general as of legal history that Congress, after twenty-four years of experience, returned to its former attitude toward such elections and repealed all of these laws with the exception

of a few sections not relevant here. Act approved February 8, 1894, 28 Stat. 36. This repealing act left in effect as apparently relating to the elective franchise, only the provisions contained in the eight sections of Chapter 3 of the Criminal Code, §§ 19 to 26, inclusive, which have not been added to or substantially modified during the twenty-three years which have since elapsed.

The policy of thus entrusting the conduct of elections to state laws, administered by state officers, which has prevailed from the foundation of the Government to our day, with the exception, as we have seen, of twenty-four years, was proposed by the makers of the Constitution and was entered upon advisedly by the people who adopted it, as clearly appears from the reply of Madison to Monroe in the debates in the Virginia Convention, saying that:

"It was found impossible to fix the time, place, and manner, of election of representatives in the constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution. . . . Were they exclusively under the control of the state governments, the general government might easily be dissolved. But if they be regulated properly by the state legislatures, the congressional control will very probably never be exercised. The power appears to me satisfactory, and as unlikely to be abused as any part of the constitution." Records of the Federal Convention, Farrand, vol. 3, p. 311.

And, in Essay No. LIX of the Federalist, Hamilton writes:

"They [the convention] have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary

cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety."

With it thus clearly established that the policy of Congress for so great a part of our constitutional life has been, and now is, to leave the conduct of the election of its members to state laws, administered by state officers, and that whenever it has assumed to regulate such elections it has done so by positive and clear statutes, such as were enacted in 1870, it would be a strained and unreasonable construction to apply to such elections this § 37, originally a law for the protection of the revenue and for now fifty years confined in its application to "Offenses against the Operations of the Government" as distinguished from the processes by which men are selected to conduct such operations.

When to all this we add that there are no common-law offenses against the United States (*United States* v. *Hudson*, 7 Cranch, 32; *United States* v. *Eaton*, 144 U. S. 677), that before a man can be punished as a criminal under the federal law his case must be "plainly and unmistakably" within the provisions of some statute (*United States* v. *Lacher*, 134 U. S. 624, 628), and that Congress has always under its control the means of defeating frauds in the election of its members by enacting appropriate legislation and by resort to the constitutional grant of power to judge of the elections, returns and qualifications of its own members, we cannot doubt that the District Court was right in holding that the section was never intended to apply to elections, and that to bribe voters to vote at such an election is not such a fraud upon the United States or upon candidates or the laws of Rhode Island as falls within either the terms or purposes of the section.

There remains to be considered the second West Vir-

ginia case, No. 776. The indictment in this case charges that the defendants conspired to procure and did procure a large number of persons, not legal voters of West Virginia to vote, and a number of them to vote more than once, in favor of one of the four candidates for the Republican nomination for United States Senator at a state primary. The claim is that such illegal voting "injured and oppressed" the three other party candidates, within the meaning of § 19 of the Criminal Code of the United States, by depriving them of a right, which it is argued they had "by the Constitution and laws of the United States," to have only qualified Republican voters of the state vote, not more than once for some one of the candidates of that party for Senator at such election.

Here again, confessedly, an attempt is being made to make a new application of an old law to an old type of crime, for § 19 has been in force, in substance, since 1870, but has never before been resorted to as applicable to the punishment of offenses committed in the conduct of primary elections or nominating caucuses or conventions, and the question presented for decision is:

Did the candidates named in the indictment have such a right under the applicable West Virginia law that a conspiracy to corrupt the primary election held under that law on the sixth day of last June "injured and oppressed" them within the meaning of § 19 of the Federal Criminal Code?

That this § 19 of the Criminal Code is applicable to certain conspiracies against the elective franchise is decided by this court in *United States* v. *Mosley*, 238 U. S. 383, but that decision falls far short of making the section applicable to the conduct of a state nominating primary, and does not advance us far toward the claimed conclusion that illegal voting for one candidate at such a primary so violates a right secured to the other candidates by the United States Constitution and laws as to consti-

tute an offense within the meaning and purpose of the section.

The constitutional warrant under which regulations relating to congressional elections may be provided by Congress is in terms applicable to the "times, places and manner of holding elections [not nominating primaries] for Senators and Representatives." Primary elections, such as it is claimed the defendants corrupted, were not only unknown when the Constitution was adopted but they were equally unknown for many years after the law, now § 19, was first enacted. They are a development of comparatively recent years, designed to take the place of the nominating caucus or convention, as these existed before the change, and even yet the new system must be considered in an experimental stage of development, under a variety of state laws.

The claim that such a nominating primary, as distinguished from a final election, is included within the provision of the Constitution of the United States applicable to the election of Senators and Representatives is by no means indisputable. Many state supreme courts have held that similar provisions of state constitutions relating to elections do not include a nominating primary. *Ledgerwood* v. *Pitts*, 122 Tennessee, 570; *Montgomery* v. *Chelf*, 118 Kentucky, 766; *State ex rel. Von Stade* v. *Taylor*, 220 Missouri, 619; *State* v. *Nichols*, 50 Washington, 508; *Gray* v. *Seitz*, 162 Indiana, 1; *State* v. *Erickson*, 119 Minnesota, 152.

But even if it be admitted that in general a primary should be treated as an election within the meaning of the Constitution, which we need not and do not decide, such admission would not be of value in determining the case before us, because of some strikingly unusual features of the West Virginia law under which the primary was held out of which this prosecution grows. By its terms this law provided that only candidates for Congress belonging

to a political party which polled three per cent. of the vote of the entire State at the last preceding general election could be voted for at this primary, and thereby, it is said at the bar, only Democratic and Republican candidates could be and were voted for, while candidates of the Prohibition and Socialist parties were excluded, as were also independent voters who declined to make oath that they were "regular and qualified members and voters" of one of the greater parties. Even more notable is the provision of the law that after the nominating primary, candidates, even persons who have failed at the primary, may be nominated by certificate signed by not less than five per cent. of the entire vote polled at the last preceding election. Acts West Virginia, 1915, c. 26, pp. 222, 246.

Such provisions as these, adapted though they may be to the selection of party candidates for office, obviously could not be lawfully applied to a final election at which officers are chosen, and it cannot reasonably be said that rights which candidates for the nomination for Senator of the United States may have in such a primary under such a law are derived from the Constitution and laws of the United States. They are derived wholly from the state law and nothing of the kind can be found in any federal statute. Even when Congress assumed, as we have seen, to provide an elaborate system of supervision over congressional elections no action was taken looking to the regulation of nominating caucuses or conventions, which were the nominating agencies in use at the time such laws were enacted.

What power Congress would have to make regulations for nominating primaries or to alter such regulations when made by a State we need not inquire. It is sufficient to say that as yet it has shown no disposition to assume control of such primaries or to participate in them in any way, and that it is not for the courts, in the absence of such legislation, to attempt to supply it by stretching old

statutes to new uses, to which they are not adapted and for which they were not intended. In this case, as in the others, we conclude that the section of the Criminal Code relied upon, originally enacted for the protection of the civil rights of the then lately enfranchised negro, cannot be extended so as to make it an agency for enforcing a state primary law, such as this one of West Virginia.

The claim that the Federal Corrupt Practices Act (June 25, 1910, c. 392, 36 Stat. 822, amended August 19, 1911, c. 33, 37 Stat. 25, and August 23, 1912, c. 349, 37 Stat. 360), recognizing primary elections and limiting the expenditures of candidates for Senator in connection with them is, in effect, an adoption by Congress of all state primary laws is too unsubstantial for discussion; and the like claim that the temporary measure (Act of June 4, 1914, 38 Stat. 384), enacted by Congress for the conduct of the nomination and election of Senators until other provision should be made by state legislation cannot be entertained, because this act was superseded by the West Virginia primary election law, passed February 20th, 1914, effective ninety days after its passage.

It results that the judgments of the District Court in each of these cases must be

Affirmed.

STRAUS ET AL., COMPOSING THE FIRM OF R. H. MACY & COMPANY, *v.* VICTOR TALKING MACHINE COMPANY.

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

No. 374. Argued January 12, 1917.—Decided April 9, 1917.

The monopoly of use granted by the patent law can not be made a means of controlling the prices of the patented articles after they have been, in reality even though not in form, sold and paid for.

An attempt by means of "license contracts" with dealers and "license notices" attached to patented machines to retain title in the manufacturer and patent owner until the expiration of the latest patent referred to in such notice, and to limit until the expiration of such period the right of the public to a mere license to use dependent upon observance of conditions in the "license notices," including conditions as to price, will not be regarded as a legitimate exercise of the patent owner's control over the use where, plainly, from the terms of the "license notices" and from the relations established between the patent owner and the dealers through whom the machines are distributed, the object of such reservations and restrictions is to enable the patent owner to fix and maintain the prices at which the machines may be disposed of after they have passed from its possession into the possession of the dealers and the public and after it has received from the dealers the full price which it asks or expects for the machines.

In such case, as to purchasers not in privity with the patent owner, the restrictions of the "license notices" are to be treated as void attempts to control prices after sale, and in buying from the dealers and reselling to the public at prices lower than the notices prescribe such purchasers do not violate the rights secured to the patent owner by the patent law.

230 Fed. Rep. 449, reversed.

THE case is stated in the opinion.

Mr. Edmond E. Wise and *Mr. Walter C. Noyes* for petitioners.

Mr. Hector T. Fenton, with whom *Mr. Frederick A. Blount* was on the brief, for respondent:

The manner by which the plaintiff obtains the benefit of its patent is by delivering the physical thing, accompanied by a specifically limited use license affixed thereto, on payment by the licensee of a certain initial or cash royalty as a *sine qua non* to the passing of any title or right of possession or use. The licensee thus obtains a qualified title only in the physical thing with a specific and limited license to use under the patents. He acquires possession with full knowledge of the limitations. The paramount license between plaintiff and its distributors passes no title or authority save to act as intermediaries of the plaintiff in delivery of machine or record, and of the specific license for and attached to each machine or record so delivered, to the user. The specific license controlling the title and permitted use is between the plaintiff and the user. A privity of relation between them is created when the intended licensee by paying the initial royalty gains lawful possession of the machine with the license right given therewith, because such license affixed to the machine or record, issuing directly from, signed by, and as the act of the plaintiff, and the acceptance of the machine or record, with such license specific to and affixed to it, and with full knowledge of its terms and limitations, creates such privity of relation.

Defendants, having covertly obtained possession of the physical thing and the limited license to use, without having paid the full initial cash portion of the consideration required by the terms of the license as a condition precedent, acquired no lawful right of possession or limited right to use. The injury to plaintiff in destroying its market and its standard royalty rates for its machines and records by their reselling at even lower rates, is merely an incident in aggravation of the tort of infringing its patents. The action is *ex delicto* and jurisdiction of

the federal courts exists. *Fair* v. *Kohler Die Co.*, 228 U. S. 22; *Healy* v. *Sea Gull Co.*, 237 U. S. 479, 480; *Geneva Furniture Co.* v. *Karpen*, 238 U. S. 254, 260; *Henry* v. *Dick Co.*, 224 U. S. 1.

The Anti-Trust Acts have no applicability. *Standard Sanitary Co.* v. *United States*, 226 U. S. 20, 39–40.

The defendants had full knowledge of the license restrictions and of the portion of the patent monopoly reserved. *Henry* v. *Dick Co.*, *supra; Wood* v. *Carpenter*, 101 U. S. 135, 142; *Shauer* v. *Alterton*, 151 U. S. 607, 622; *American Cotton Tie Co.* v. *Bullard*, 4 Ban. & A. 520.

To qualify the exclusive rights granted by the patent law is to deprive the patentee unjustly of part of the consideration for which he parted with his disclosure. Under the patent laws the patentee may maintain a close monopoly of the rights granted or separately exercise the distinct rights to make, to use, and to sell. He may limit a license to use for specific purposes only, may charge what he thinks proper for permitting invasion of his monopoly, and may contract for his consideration either in money, or by way of conditions on the use, or both. He may impose any conditions "not definitely illegal." *Bement* v. *Harrow Co.*, 186 U. S. 70, 91; *Bauer* v. *O'Donnell*, 229 U. S. 1. The distinction is plain between the property right in the materials composing a machine or the machine as a physical thing, and the right to use it for the purpose and in the manner pointed out by the patent. *Henry* v. *Dick Co.*, *supra*. The rights to make, sell, and use are each substantive, distinct rights, and may be granted or conferred separately by the patentee. *Bauer* v. *O'Donnell*, *supra*. Any invasion of a reserved control over the use is an invasion of the patent. Cases last cited.

The law relating to attempted conditions on resale of unpatented chattels (*Miles Medical Co.* v. *Park*, 220 U. S. 375, 401) has no bearing, nor has the question whether

the transaction amounts to a conditional sale at common law. For there is no "absolute and unconditional sale which operates to pass the patented thing outside the boundaries of the patent," or indeed any sale at all. Plainly the license restrictions qualify not only the right to use but also the otherwise unlimited title to and right of possession in the machine considered as the physical embodiment of the invention patented and licensed as distinguished from the materials composing it. There is no unconditional passing of the title. *Henry* v. *Dick Co.*, *supra*. Indeed, there is no sale whatever, and the defendants having never acquired either title or right of possession, cannot set up the license affixed to the machine in justification of their infringement.

The decision in the *Dick Case* properly holds that the patented article sold by a patentee with a condition as to use exemplifies two severable rights of property, one arising under the common law, to the physical thing as such, and the other an incorporeal property right in it as the embodiment of a patented invention the exclusive right to use which belongs to the *same* owner. Hence a sale of the physical thing with a qualification of the right to use it, by a patentee or licensee possessing *both* rights of property, operates not alone as an exercise of the right "to use," conferred by the patent grant, but, in the very nature of things, operates to qualify the title and free right of disposition, of the physical thing which is an exemplification or embodiment of the *invention* so *specifically* licensed. If the transaction be such that, to use the language of Judge Lowell in *Porter Needle Co.* v. *National Needle Co.*, 17 Fed. Rep. 536, it is clear "the patentee has chosen to dissever the ownership and right of use, and that his intent is not doubtful," then (as found by the majority opinion in the *Dick Case*) it was "the kind of limitation which may lawfully be imposed (by a patentee) upon a purchaser" of his patented machine; and a "law-

ful qualification" upon the use thereof, binding upon the licensee and his assigns with notice.

There is no conflict between the *Dick Case* and *Bauer* v. *O'Donnell.* The ground of dissent in the former had to do with the confining of the use of the machine to materials wholly unpatented. In this case both machines and records are the subject of independent patents. In the *Bauer Case* the patented articles were absolutely sold and an attempt made to limit resale. In the opinion it is so distinguished from the *Dick Case.*

Mr. Elisha K. Camp, Mr. Daniel N. Kirby and *Mr. Taylor E. Brown,* by leave of court, filed a brief on behalf of the American Graphophone Company and the Columbia Graphophone Company, as *amici curiæ.*

Mr. Justice Clarke delivered the opinion of the court.

It will contribute to brevity to designate the parties to this proceeding as they were in the trial court—the respondent as plaintiff and the petitioners as defendants.

The plaintiff in its bill alleges: That it is a corporation of New Jersey; that for many years it has been manufacturing sound-reproducing machines embodying various features covered by patents of which it is the owner, and that, for the purpose of marketing these machines to the best advantage, about August 1st, 1913, it adopted a form of contract which it calls a "License Contract" and a form of notice called a "License Notice," under which it alleges all of its machines have, since that date, been furnished to dealers and to the public.

This "License Notice," which is attached to each machine and is set out in full in the bill, declares that the machine to which it is attached is manufactured under patents, is licensed for the term of the patent under which it is licensed having the longest time to run and may be

used only with sound records, sound boxes and needles manufactured by the plaintiff; that only the right to use the machine "for demonstrating purposes" is granted to "distributors" (wholesale dealers), but that these "distributors" may assign a like right "to the public" or to "regularly licensed Victor dealers" (retailers) "at the dealers' regular discount royalty"; that the "dealers" may convey the "license to use the machine" only when a "royalty" of not less than $200 shall have been paid, and upon the "consideration" that all of the conditions of the "license" shall have been observed; that the title to the machine shall remain in the plaintiff which shall have the right to repossess it upon breach of any of the conditions of the notice, by paying to the user the amount paid by him less five per cent. for each year that the machine has been used. The notice in terms reserves the right to the plaintiff to inspect, adjust and repair the machine at all times and to instruct the user in its use, "but assumes no obligation so to do;" it provides that "any excess use, or violation of the conditions, will be an infringement of the said patents," and that any erasure or removal of the notice will be considered as a violation of the license. Finally, it provides that at the expiration of the patent "under which it is licensed" having the longest time to run the machine shall become the property of the licensee provided all the conditions recited in the notice shall have been complied with and the acceptance of the machine is declared to be "an acceptance of these conditions."

The contract between the plaintiff and its dealers is not set out in full in the bill but it is alleged that since August 1st, 1913, the plaintiff has had with each of its 7,000 licensed dealers a written contract in which all the terms of the "License Notice" are in substance repeated and in addition it is alleged that each dealer "if he has signed the assent thereto" is authorized to dispose of any machines received from "the plaintiff either directly or through a

paramount distributing dealer," but subject to all of the conditions expressed in the "License Notice." It is alleged that this contract contains the provision that "a breach of any of the conditions on the part of the distributor will render him also liable not only for infringement of the patents but for an action on the contract, or other proper remedy."

As to the defendants the bill alleges that they conduct a large mercantile business in New York City; that with full knowledge of the terms of the contract, as described, between the plaintiff and its distributors and of the "License Notice" attached to each machine, the defendants "being members of the general unlicensed public," and having no contract relation with the plaintiff or with any of its licensed distributors or licensed dealers, induced "covertly and on various pretenses," one or more of plaintiff's licensed distributors or dealers to violate his or their contracts with the plaintiff, providing that no machines should be delivered to any unlicensed member of the general public until "the full license price" stated in the "License Notice" affixed to each machine was paid, and thereby obtained possession of a large number of such machines at much less than the prices stated in the "License Notice"; that under the terms of the said license agreement and notice, they have no title to the same, and that they have sold large numbers thereof to the public and are proposing and threatening to dispose of the remainder of those which they have acquired to "the unlicensed general public," at much less than the price stated in the notice affixed to each machine.

The prayer is for an injunction restraining the defendants from selling any of the machines, possession of which they have acquired, from other and further violation of plaintiff's rights under its letters patent and for the usual accounting and for damages.

The District Court regarded the transaction described

in the "License Notice" as in substance a sale which exhausted the interest of the plaintiff in the machine, except as to the right to have it used with records and needles as provided for therein, and this right not being involved in this case it dismissed the bill. 222 Fed. Rep. 524.

On appeal, the Circuit Court of Appeals affirmed this judgment and remanded the case, but with instructions to allow the plaintiff to amend its bill "if it be so advised." 225 Fed. Rep. 535.

The bill was thereafter so amended as to allege that the defendants had in their possession a large number of machines which they had obtained from plaintiff's distributors and dealers at much less in each case than the price stated in the "License Notice," and that they were proposing to dispose of these machines to the "unlicensed general public" at less than the prices stated in the "License Notice" in disregard of plaintiff's rights.

Again the District Court, on the same ground as before, sustained a motion to dismiss the bill, but the Circuit Court of Appeals reversed this holding (230 Fed. Rep. 449) and the case is here for review on certiorari.

The abstract of the bill which we have given, makes it plain: That whatever rights the plaintiff has against the defendants must be derived from the "License Notice" attached to each machine, for no contract rights existed between them, the defendants being only "members of the unlicensed general public;" and that the sole act of infringement charged against the defendants is that they exceeded the terms of the license notice by obtaining machines from the plaintiff's wholesale or retail agents and by selling them at less than the price fixed by the plaintiff.

It is apparent from the foregoing statement that we are called upon to determine whether the system adopted by the plaintiff was selected as a means of securing to the owner of the patent that exclusive right to use its invention which is granted through the patent law, or whether,

under color of such a purpose, it is a device unlawfully resorted to in an effort to profitably extend the scope of its patent at the expense of the general public. Is it the fact, as is claimed, that this "License Notice" of the plaintiff is a means or agency designed in candor and good faith to enable the plaintiff to make only that full, reasonable and exclusive use of its invention which is contemplated by the patent law or is it a disguised attempt to control the prices of its machines after they have been sold and paid for?

First of all it is plainly apparent that this plan of marketing adopted by the plaintiff is, in substance, the one dealt with by this court in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, and in *Bauer* v. *O'Donnell*, 229 U. S. 1, adroitly modified on the one hand to take advantage, if possible, of distinctions suggested by these decisions, and on the other hand to evade certain supposed effects of them.

If we look through the words and forms, with which the plaintiff has most elaborately enveloped its purpose, to the substance and realities of the transaction contemplated, we shall discover several notable and significant features. First, while as if looking to the future, the notice, in terms, imposes various restrictions as to title and as to the "use" of the machines by plaintiff's agents, wholesale and retail, and by the "unlicensed members of the public," for itself, the plaintiff makes sure, that the future shall have no risks, for it requires that all that it asks or expects at any time to receive for each machine must be paid in full before it parts with the possession of it.

Second, while in terms the "use" of each machine is restricted and forfeiture for failure to strictly comply with the many conditions and requirements of the notice is provided for, this system, elaborate to the extent of confusion, fails utterly to provide for entering any evidence of a qualified title in any public office or in any public

record, and no requirement is found in it for reporting by users or licensees, who may remove from one place to another taking the machine with them, as would very certainly be required if the plaintiff intended to enforce the rights so elaborately asserted in this notice;—if the system were really a genuine provision designed to protect through many years to come the restricted right to "use" and the seemingly qualified title which it purports to grant to dealers and to the public, from being exceeded or departed from.

Third. The fact that under this system "at different times" "large numbers" of machines, as is alleged in the plaintiff's bill, have been "covertly" sold to the defendants by the plaintiff's wholesale and retail agents at less than the price fixed for them is persuasive evidence that the transaction is not what it purports on its face to be. If it were a reasonably guarded plan, really intended to keep the plaintiff in touch with each of its machines until the expiration of the patent of latest date, for the purpose of insisting upon its being used in the manner provided for in the "License Notice" the plaintiff's prompt and sufficient remedy for such an invasion of its right as is claimed in this case would be found in its sales department or rather in its "license" department, and not in the courts. That the plaintiff comes into court with a bill to enjoin the defendants from reselling machines secretly sold to them in large numbers by the plaintiff's agents indicates very clearly that at least until the exigency out of which this case grew, arose, the scheme was regarded by the plaintiff itself and by its agents simply as one for maintaining prices by holding a patent infringement suit *in terrorem* over the ignorant and the timid.

And finally, while the notice permits the use of the machines, which have been fully paid for, by the "unlicensed members of the general public," significantly called in the bill "the ultimate users," until "the expira-

tion of the patent having the longest term to run" (which, under the copy of the notice set out in the bill, would be July 22nd, 1930) it provides that if the licensee shall not have failed to observe the conditions of the license, and the Victor Company shall not have previously taken possession of the machine, as in the notice provided, then, perhaps sixteen years or more after he has paid for it and in all probability long after it has been worn out or become obsolete and worthless "it shall become the property of the licensee."

It thus becomes clear that this "License Notice" is not intended as a security for any further payment upon the machine, for the full price, called a "royalty," was paid before the plaintiff parted with the possession of it; that it is not to be used as a basis for tracing and keeping the plaintiff informed as to the condition or use of the machine, for no report of any character is required from the "ultimate user" after he has paid the stipulated price; that, notwithstanding its apparently studied avoidance of the use of the word "sale" and its frequent reference to the word "use," the most obvious requirements for securing a *bona fide* enforcement of the restrictions of the notice as to "use" are omitted; and that, even by its own terms, the title to the machines ultimately vests in the "ultimate users," without further payment or action on their part, except patiently waiting for patents to expire on inventions, which, so far as this notice shows, may or may not be incorporated in the machine. There remains for this "License Notice" so far as we can discover, the function only, of fixing and maintaining the price of plaintiff's machines to its agents and to the public, and this we cannot doubt is the purpose for which it really was designed.

Courts would be perversely blind if they failed to look through such an attempt as this "License Notice" thus plainly is to sell property for a full price, and yet to place

restraints upon its further alienation, such as have been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest. The scheme of distribution is not a system designed to secure to the plaintiff and to the public a reasonable use of its machines, within the grant of the patent laws, but is in substance and in fact a mere price-fixing enterprise, which, if given effect, would work great and widespread injustice to innocent purchasers, for it must be recognized that not one purchaser in many would read such a notice, and that not one in a much greater number, if he did read it, could understand its involved and intricate phraseology, which bears many evidences of being framed to conceal rather than to make clear its real meaning and purpose. It would be a perversion of terms to call the transaction intended to be embodied in this system of marketing plaintiff's machines a "license to use the invention." *Bauer* v. *O'Donnell*, 229 U. S. 1, 16.

Convinced as we are that the purpose and effect of this "License Notice" of plaintiff, considered as a part of its scheme for marketing its product, is not to secure to the plaintiff any use of its machines, and as is contemplated by the patent statutes, but that its real and poorly-concealed purpose is to restrict the price of them, after the plaintiff had been paid for them and after they have passed into the possession of dealers and of the public, we conclude that it falls within the principles of *Adams* v. *Burke*, 17 Wall. 453, 456; and of *Bauer* v. *O'Donnell*, 229 U. S. 1; that it is, therefore, invalid, and that the District Court properly held that the bill must fail for want of equity.

It results that the decree of the Circuit Court of Appeals will be reversed and that of the District Court affirmed.

Reversed.

Dissenting:

Mr. Justice McKenna, Mr. Justice Holmes and Mr. Justice Van Devanter.

MOTION PICTURE PATENTS COMPANY *v.* UNIVERSAL FILM MANUFACTURING COMPANY ET AL.

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

No. 715. Argued January 12, 15, 1917.—Decided April 9, 1917.

Under the patent law the grant by patent of the exclusive right to use, like the grant of the exclusive right to vend, is limited to the invention described in the claims of the patent, and that law does not empower the patent owner by notices attached to the things patented to extend the scope of the patent monopoly by restricting their use to materials necessary for their operation but forming no part of the patented invention, or to send such articles forth into the channels of trade subject to conditions as to use or royalty, to be imposed thereafter, in the vendor's discretion. *The Button-Fastener Case*, 77 Fed. Rep. 288, and *Henry* v. *Dick Company*, 224 U. S. 1, overruled.

In determining how far the owner of a patent may restrict the use after sale of machines embodying the invention, weight must be given to the rules long established that the scope of every patent is limited to the invention as described in the claims, read in the light of the specification, that the patentee receives nothing from the patent law beyond the right to restrain others from manufacturing, using or selling his invention, and that the primary purpose of that law is not to create private fortunes but is to promote the progress of science and the useful arts.

The extent to which the use of a patented machine may validly be restricted to specific supplies or otherwise by special contract between the owner of the patent and a purchaser or licensee, is a question outside of the patent law and not involved in this case.

235 Fed. Rep. 398, affirmed.

THE case is stated in the opinion.

Mr. Melville Church for petitioner:

The restrictions on the right to use the machine were fully brought home to the Prague Amusement Company

and were binding. This is settled by *Henry* v. *Dick Co.*, 224 U. S. 1, and no doubt is cast upon that case by *Bauer* v. *O'Donnell*, 229 U. S. 1, which did not involve the right to impose restrictions on use.

In the present case there were two distinct restrictions: First, that the machine should be used only with motion pictures leased from a manufacturer licensed by the plaintiff; and second, that the machine could not be used at all without compliance with terms previously fixed by the plaintiff. The first restriction is not repugnant to the Clayton Act of October 15, 1914, § 3, 38 Stat. 730; but even if it were, the lawfulness of the second restriction, which the Prague Company admittedly violated if it had notice, would not be affected. *Oregon R. & U. Co.* v. *Windsor*, 20 Wall. 64–72; *U. S. &c. Co.* v. *Griffen*, 126 Fed. Rep. 364–370. The two are independent and severable and the latter will support the plaintiff's right to exact a license agreement providing for a continuing royalty, which it might lawfully reserve and rely upon. *St. Paul Plow Works* v. *Sparling*, 140 U. S. 184. The $5.00 received from the licensed manufacturer was but a paltry 3½ per cent. of the selling price, and utterly inadequate. The nameplate gave notice of the facts in relation to patent ownership and that restrictions were placed by the plaintiff upon the use. The Prague Company was under a duty to inquire of the Precision Machine Company the terms of the license under which the machine was put out, or to make like inquiry of the plaintiff. Inquiry of the former would have shown that the Precision Company was inhibited from selling except for use "upon other terms" to be fixed by the licensor and relating to the payment of royalty. The same information would have been obtained by inquiry of plaintiff. Either line of inquiry, properly followed up (*Shauer* v. *Alterton*, 151 U. S. 607–622; *Wood* v. *Carpenter*, 101 U. S. 135–141), would have revealed the details of these "other terms" and resulted in the fixing of a royalty

for use, to be paid only during use—a most reasonable arrangement.

Having failed to arrange for terms of royalty with the petitioner, the Prague Amusement Company never had a license to use and was and is, therefore, an infringer while using.

The distinction between the property rights conferred by patent and property rights in the machine, must be borne clearly in mind. The former are incorporeal, the latter corporeal, personal property. *De La Vergne Machine Co.* v. *Featherstone*, 147 U. S. 209–222. Under the patent laws, R. S. § 4898, the incorporeal rights are susceptible of infinite subdivision without impairment. Besides assignments and grants, the separate substantive, exclusive privileges of making, using, and selling may be parceled out by licenses with a wide variety of choice and combination as to time, place, method. Any such license may be granted for a lump sum or upon agreement for a continuing royalty. The patent owner can neither be required to make, use, or sell, nor to license others to do so. *Paper Bag Patent Case*, 210 U. S. 405, 425, 429. Upon a sale of the thing patented there is a transfer of the property in the thing itself but of only so much of the incorporeal patent rights as the owner chooses to relinquish. A sale outright without restriction passes both kinds of rights absolutely, but if, when selling, the patent owner restricts the purchaser's enjoyment of the incorporeal right of use conferred by the patent, any use by the purchaser beyond what is specifically authorized is an infringement upon the patent owner's reserved rights and may be restrained by the courts.

In the present case the machine proclaimed through the notice upon it that the right to use was restricted, and notified the purchaser to go to the plaintiff and make terms for the use, else it would be unlawful.

It is no objection that the notice itself did not state

the terms. Plainly and unmistakably it showed that the machine was not free but under the domination of the named patent owner who must be applied to. If the notice had been followed up, a reasonable royalty contract would have undoubtedly resulted. In ignoring the notice out of a desire to escape any royalty, the purchaser took its chances of being stopped for infringement.

There is no question but that plaintiff's remedy is on the patent for the tort. There was no contract. Respondent, having deliberately refused to make one, is estopped to claim a contract or that the plaintiff has mistaken its remedy.

The liability of the other respondents is that of contributory infringers who knowingly coöperated in carrying on an unlicensed use. All the respondents are jointly and severally liable in tort. *Lovejoy* v. *Murray*, 3 Wall. 1–11; Walker on Patents, 4th ed., § 406, p. 343.

The patent in suit is valid. Plaintiff is not estopped, as claimed, by proceedings in the Patent Office.

Mr. Oscar W. Jeffery, with whom *Mr. Edmund Wetmore* and *Mr. John B. Stanchfield* were on the brief, for respondents.

Mr. Justice Clarke delivered the opinion of the court.

In this suit relief is sought against three defendant corporations as joint infringers of claim number seven of United States letters patent No. 707,934 granted to Woodville Latham, assignor, on August 26, 1902, for improvements in Projecting-Kinetoscopes. It is sufficient description of the patent to say that it covers a part of the mechanism used in motion picture exhibiting machines for feeding a film through the machine with a regular, uniform and accurate movement and so as not to expose the film to excessive strain or wear.

The defendants in a joint answer do not dispute the title

of the plaintiff to the patent but they deny the validity of it, deny infringement, and claim an implied license to use the patented machine.

Evidence which is undisputed shows that the plaintiff on June 20, 1912, in a paper styled "License Agreement" granted to The Precision Machine Company a right and license to manufacture and sell machines embodying the inventions described and claimed in the patent in suit, and in other patents, throughout the United States, its territories and possessions. This agreement contains a covenant on the part of the grantee that every machine sold by it, except those for export, shall be sold "under the restriction and condition that such exhibiting or projecting machines shall be used solely for exhibiting or projecting motion pictures containing the inventions of reissued letters patent No. 12,192, *leased by a licensee of the licensor while it owns said patents, and upon other terms to be fixed* by the licensor and complied with by the user while the said machine is in use and *while the licensor owns said patents* (which other terms shall only be the payment of a royalty or rental to the licensor while in use)."

The grantee further covenants and agrees that to each machine sold by it, except for export, it will attach a plate showing plainly not only the dates of the letters patent under which the machine is "licensed," but also the following words and figures:

"Serial No.———.

"Patented No.

"The sale and purchase of this machine gives only the right to use it solely with moving pictures containing the invention of reissued patent No. 12,192, leased by a licensee of the Motion Picture Patents Company, the owner of the above patents and reissued patent, while it owns said patents, and upon other terms to be fixed by the Motion Picture Patents Company and complied with by the user while it is in use and while the Motion Picture

Patents Company owns said patents. The removal or defacement of this plate terminates the right to use this machine."

The agreement further provides that the grantee shall not sell any machine at less than the plaintiff's list price, except to jobbers and others for purposes of resale and that it will require such jobbers and others to sell at not less than plaintiff's list price. The price fixed in the license contract for sale of machines after May 1st, 1909, is not less than $150 for each machine and the licensee agrees to pay a royalty of $5 on some machines and a percentage of the selling price on others.

It is admitted that the machine, the use of which is charged to be an infringement of the patent in suit, was manufactured by The Precision Machine Company and was sold and delivered under its "License Agreement" to the Seventy-second Street Amusement Company, then operating a playhouse on Seventy-second Street, in New York, and that when sold it was fully paid for and had attached to it a plate with the inscription which we have quoted as required by the agreement.

Reissued patent 12,192, referred to in the notice attached to the machine, expired on August 31, 1914. The defendant Prague Amusement Company on November 2, 1914, leased the Seventy-second Street playhouse from the Seventy-second Street Amusement Company, and acquired the alleged infringing machine as a part of the equipment of the leased playhouse. Subsequent to the expiration of reissued patent 12,192 the defendant, Universal Film Manufacturing Company, made two films or reels, which, between March 4th and 17th, 1915, were sold to the defendant the Universal Film Exchange and on March 17, 1915, were supplied to the defendant Prague Amusement Company for use on the machine, acquired as we have stated, and were used upon it at the Seventy-second Street playhouse on March 18th, 1915.

On January 18, 1915, the plaintiff sent a letter to the Seventy-second Street Amusement Company, notifying it in general terms that it was using without a license a machine embodying the invention of patent No. 707,934 and warning it that such use constituted an infringement of the patent, and on the same day the plaintiff addressed a letter to the defendant Universal Film Exchange notifying it that it also was infringing the same patents by supplying films for use upon the machine of the Seventy-second Street playhouse and elsewhere. The bill in this case was filed on March 18, 1915.

The District Court held that the limitation on the use of the machine attempted to be made by the notice attached to it, after it had been sold and paid for, was invalid, and that the Seventy-second Street Amusement Company, the purchaser, and its lessee, the Prague Amusement Company, had an implied license to use the machine as it had been used, and it dismissed the bill without passing on the question raised in the pleadings as to the validity of the patent. The Circuit Court of Appeals affirmed the District Court (235 Fed. Rep. 398) and the case is here for review on certiorari.

It was admitted at the bar that 40,000 of the plaintiff's machines are now in use in this country and that the mechanism covered by the patent in suit is the only one with which motion picture films can be used successfully.

This state of facts presents two questions for decision:

First. May a patentee or his assignee license another to manufacture and sell a patented machine and by a mere notice attached to it limit its use by the purchaser or by the purchaser's lessee, to films which are no part of the patented machine, and which are not patented?

Second. May the assignee of a patent, which has licensed another to make and sell the machine covered by it, by a mere notice attached to such machine, limit the

use of it by the purchaser or by the purchaser's lessee to terms not stated in the notice but which are to be fixed, after sale, by such assignee in its discretion?

It is obvious that in this case we have presented anew the inquiry, which is arising with increasing frequency in recent years, as to the extent to which a patentee or his assignee is authorized by our patent laws to prescribe by notice attached to a patented machine the conditions of its use and the supplies which must be used in the operation of it, under pain of infringement of the patent.

The statutes relating to patents do not provide for any such notice and it can derive no aid from them. Revised Statutes, § 4900, requiring that patented articles shall be marked with the word "Patented" affects only the damages recoverable for infringement, *Dunlap* v. *Schofield*, 152 U. S. 244, and Rev. Stats., § 4901, protects by its penalties the inventor, but neither one contemplates the use of such a "License Notice" as we have here and whatever validity it has must be derived from the general and not from the patent law.

The extent to which the use of the patented machine may validly be restricted to specific supplies or otherwise by special contract between the owner of a patent and the purchaser or licensee is a question outside the patent law and with it we are not here concerned. *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659.

The inquiry presented by this record, as we have stated it, is important and fundamental, and it requires that we shall determine the meaning of Congress when in Rev. Stats., § 4884, it provided that "Every patent shall contain . . . a grant to the patentee, his heirs or assigns, for the term of seventeen years, *of the exclusive right to* make, *use*, and vend *the invention or discovery* throughout the United States, and the Territories thereof." We are concerned only with the right to "use," authorized to be granted by this statute, for it is under warrant of this

right only that the plaintiff can and does claim validity for its warning notice.

The words used in the statute are few, simple and familiar, they have not been changed substantially since they were first used in the Act of 1790, c. 7, 1 Stat. 109; *Bauer* v. *O'Donnell*, 229 U. S. 1, 9, and their meaning would seem not to be doubtful if we can avoid reading into them that which they really do not contain.

In interpreting this language of the statute it will be of service to keep in mind three rules long established by this court, applicable to the patent law and to the construction of patents, viz:

1st. The scope of every patent is limited to the invention described in the claims contained in it, read in the light of the specification. These so mark where the progress claimed by the patent begins and where it ends that they have been aptly likened to the description in a deed, which sets the bounds to the grant which it contains. It is to the claims of every patent, therefore, that we must turn when we are seeking to determine what the invention is, the exclusive use of which is given to the inventor by the grant provided for by the statute,—"He can claim nothing beyond them." *Keystone Bridge Co.* v. *Phœnix Iron Co.*, 95 U. S. 274; *Railroad Co.* v. *Mellon*, 104 U. S. 112, 118; *Yale Lock Mfg. Co.* v. *Greenleaf*, 117 U. S. 554, 559; *McClain* v. *Ortmayer*, 141 U. S. 419, 424.

2nd. It has long been settled that the patentee receives nothing from the law which he did not have before, and that the only effect of his patent is to restrain others from manufacturing, using or selling that which he has invented. The patent law simply protects him in the monopoly of that which he has invented and has described in the claims of his patent. *United States* v. *American Bell Telephone Co.*, 167 U. S. 224, 239; *Paper Bag Patent Case*, 210 U. S. 405, 424; *Bauer* v. *O'Donnell*, 229 U. S. 1, 10.

3rd. Since *Pennock* v. *Dialogue*, 2 Pet. 1, was decided in

1829 this court has consistently held that the primary purpose of our patent laws is not the creation of private fortunes for the owners of patents but is "to promote the progress of science and useful arts" (Constitution, Art. I, § 8), an object and purpose authoritatively expressed by Mr. Justice Story, in that decision, saying:

"While one great object [of our patent laws] was, by holding out a reasonable reward to inventors, and giving them an exclusive right to their inventions for a limited period, to stimulate the efforts of genius; the main object was 'to promote the progress of science and useful arts.'"

Thirty years later this court, returning to the subject, in *Kendall* v. *Winsor*, 21 How. 322, again pointedly and significantly says:

"It is undeniably true, that the limited and temporary monopoly granted to inventors was never designed for their exclusive profit or advantage; the benefit to the public or community at large was another and doubtless the primary object in granting and securing that monopoly."

This court has never modified this statement of the relative importance of the public and private interests involved in every grant of a patent, even while declaring that in the construction of patents and the patent laws, inventors shall be fairly, even liberally, treated. *Grant* v. *Raymond*, 6 Pet. 218, 241; *Winans* v. *Denmead*, 15 How. 330; Walker on Patents, § 185.

These rules of law make it very clear that the scope of the grant which may be made to an inventor in a patent, pursuant to the statute, must be limited to the invention described in the claims of his patent (104 U. S. 118, *supra*) and to determine what grant may lawfully be so made we must hold fast to the language of the act of Congress providing for it, which is found in two sections of the Revised Statutes. Section 4886 provides that "Any person who has invented or discovered any new and useful art, ma-

chine, manufacture or composition of matter, or any new and useful improvement thereof, . . . may . . . obtain a patent therefor"; and § 4884 provides that such patent when obtained "shall contain . . . a grant to the patentee, his heirs or assigns . . . of the exclusive right to . . . use . . . the invention or discovery."

Thus the inventor may apply for, and, if he meets the required conditions, may obtain, a patent for the new and useful invention which he has discovered, which patent shall contain a grant of the right to the exclusive use of his discovery.

Plainly, this language of the statute and the established rules to which we have referred restrict the patent granted on a machine, such as we have in this case, to the mechanism described in the patent as necessary to produce the described results. It is not concerned with and has nothing to do with the materials with which or on which the machine operates. The grant is of the exclusive right to use the mechanism to produce the result with any appropriate material, and the materials with which the machine is operated are no part of the patented machine or of the combination which produces the patented result. The difference is clear and vital between the exclusive right to use the machine which the law gives to the inventor and the right to use it exclusively with prescribed materials to which such a license notice as we have here seeks to restrict it. The restrictions of the law relate to the useful and novel features of the machine which are described in the claims of the patent, they have nothing to do with the materials used in the operation of the machine; while the notice restrictions have nothing to do with the invention which is patented but relate wholly to the materials to be used with it. Both in form and in substance the notice attempts a restriction upon the use of the supplies only and it cannot with any regard to pro-

priety in the use of language be termed a restriction upon the use of the machine itself.

Whatever right the owner may have to control by restriction the materials to be used in operating the machine must be derived through the general law from the ownership of the property in the machine and it cannot be derived from or protected by the patent law, which allows a grant only of the right to an exclusive use of the new and useful discovery which has been made—this and nothing more.

This construction gives to the inventor the exclusive use of just what his inventive genius has discovered. It is all that the statute provides shall be given to him and it is all that he should receive, for it is the fair as well as the statutory measure of his reward for his contribution to the public stock of knowledge. If his discovery is an important one his reward under such a construction of the law will be large, as experience has abundantly proved, and if it be unimportant he should not be permitted by legal devices to impose an unjust charge upon the public in return for the use of it. For more than a century this plain meaning of the statute was accepted as its technical meaning, and that it afforded ample incentive to exertion by inventive genius is proved by the fact that under it the greatest inventions of our time, teeming with inventions, were made. It would serve no good purpose to amplify by argument or illustration this plain meaning of the statute. It is so plain that to argue it would obscure it.

It was not until the time came in which the full possibilities seem first to have been appreciated of uniting, in one, many branches of business through corporate organization and of gathering great profits in small payments, which are not realized or resented, from many, rather than smaller or even equal profits in larger payments, which are felt and may be refused, from a few, that it came to be thought that the "right to use . . . the invention"

of a patent gave to the patentee or his assigns the right to restrict the use of it to materials or supplies not described in the patent and not by its terms made a part of the thing patented.

The construction of the patent law which justifies as valid the restriction of patented machines, by notice, to use with unpatented supplies necessary in the operation of them, but which are no part of them, is believed to have originated in *Heaton-Peninsular Button-Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. Rep. 288 (which has come to be widely referred to as the *Button-Fastener Case*), decided by the Circuit Court of Appeals of the Sixth Circuit in 1896. In this case the court, recognizing the pioneer character of the decision it was rendering, speaks of the "novel restrictions" which it is considering and says that it is called upon "to mark another boundary line around the patentee's monopoly, which will *debar him from engrossing the market for an article not the subject of a patent*," which it declined to do.

This decision proceeds upon the argument that, since the patentee may withhold his patent altogether from public use he must logically and necessarily be permitted to impose any conditions which he chooses upon any use which he may allow of it. The defect in this thinking springs from the substituting of inference and argument for the language of the statute and from failure to distinguish between the rights which are given to the inventor by the patent law and which he may assert against all the world through an infringement proceeding and rights which he may create for himself by private contract which, however, are subject to the rules of general as distinguished from those of the patent law. While it is true that under the statutes as they were (and now are) a patentee might withhold his patented machine from public use, yet if he consented to use it himself or through others, such use immediately fell within the terms of the

statute and as we have seen he is thereby restricted to the use of the invention as it is described in the claims of his patent and not as it may be expanded by limitations as to materials and supplies necessary to the operation of it imposed by mere notice to the public.

The high standing of the court rendering this decision and the obvious possibilities for gain in the method which it approved led to an immediate and widespread adoption of the system, in which these restrictions expanded into more and more comprehensive forms until at length the case at bar is reached, with a machine sold and paid for yet claimed still to be subject not only to restriction as to supplies to be used but also subject to any restrictions or conditions as to use or royalty which the company which authorized its sale may see fit, after the sale, from time to time to impose. The perfect instrument of favoritism and oppression which such a system of doing business, if valid, would put into the control of the owner of such a patent should make courts astute, if need be, to defeat its operation. If these restrictions were sustained plainly the plaintiff might, for its own profit or that of its favorites, by the obviously simple expedient of varying its royalty charge, ruin anyone unfortunate enough to be dependent upon its confessedly important improvements for the doing of business.

Through the twenty years since the decision in the *Button-Fastener Case* was announced there have not been wanting courts and judges who have dissented from its conclusions, as is sufficiently shown in the division of this court when the question involved first came before it in *Henry* v. *Dick Co.*, 224 U. S. 1, and in the disposition shown not to extend the doctrine in *Bauer* v. *O'Donnell*, 229 U. S. 1.

The exclusive right to "vend" a patented article is derived from the same clause of the section of the statute which gives the exclusive right to "use" such an article

and following the decision of the *Button-Fastener Case*, it was widely contended as obviously sound, that the right existed in the owner of a patent to fix a price at which the patented article might be sold and resold under penalty of patent infringement. But this court, when the question came before it in *Bauer* v. *O'Donnell*, 229 U. S. 1, rejecting plausible argument and adhering to the language of the statute from which all patent right is derived, refused to give such a construction to the act of Congress, and decided that the owner of a patent is not authorized by either the letter or the purpose of the law to fix, by notice, the price at which a patented article must be sold after the first sale of it, declaring that the right to vend is exhausted by a single, unconditional sale, the article sold being thereby carried outside the monopoly of the patent law and rendered free of every restriction which the vendor may attempt to put upon it. The statutory authority to grant the exclusive right to "use" a patented machine is not greater, indeed it is precisely the same, as the authority to grant the exclusive right to "vend," and, looking to that authority, for the reasons stated in this opinion we are convinced that the exclusive right granted in every patent must be limited to the invention described in the claims of the patent and that it is not competent for the owner of a patent by notice attached to its machine to, in effect, extend the scope of its patent monopoly by restricting the use of it to materials necessary in its operation but which are no part of the patented invention, or to send its machines forth into the channels of trade of the country subject to conditions as to use or royalty to be paid to be imposed thereafter at the discretion of such patent owner. The patent law furnishes no warrant for such a practice and the cost, inconvenience and annoyance to the public which the opposite conclusion would occasion forbid it.

It is argued as a merit of this system of sale under a

license notice that the public is benefited by the sale of the machine at what is practically its cost and by the fact that the owner of the patent makes its entire profit from the sale of the supplies with which it is operated. This fact, if it be a fact, instead of commending, is the clearest possible condemnation of, the practice adopted, for it proves that under color of its patent the owner intends to and does derive its profit, not from the invention on which the law gives it a monopoly but from the unpatented supplies with which it is used and which are wholly without the scope of the patent monopoly, thus in effect extending the power to the owner of the patent to fix the price to the public of the unpatented supplies as effectively as he may fix the price on the patented machine.

We are confirmed in the conclusion which we are announcing by the fact that since the decision of *Henry* v. *Dick Co.*, 224 U. S. 1, the Congress of the United States, the source of all rights under patents, as if in response to that decision, has enacted a law making it unlawful for any person engaged in interstate commerce "to lease or make a sale or contract for sale of goods . . . machinery, supplies or other commodities, *whether patented or unpatented*, for use, consumption or resale . . . or fix a price charged therefor . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use . . . the goods . . . machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 730.

Our conclusion renders it unnecessary to make the application of this statute to the case at bar which the Circuit Court of Appeals made of it but it must be accepted by us as a most persuasive expression of the public

policy of our country with respect to the question before us.

It is obvious that the conclusions arrived at in this opinion are such that the decision in *Henry* v. *Dick Co.*, 224 U. S. 1, must be regarded as overruled.

Coming now to the terms of the notice attached to the machine sold to the Seventy-second Street Amusement Company under the license of the plaintiff and to the first question as we have stated it.

This notice first provides that the machine, which was sold to and paid for by the Amusement Company may be used only with moving picture films containing the invention of reissued patent No. 12,192, so long as the plaintiff continues to own this reissued patent.

Such a restriction is invalid because such a film is obviously not any part of the invention of the patent in suit; because it is an attempt, without statutory warrant, to continue the patent monopoly in this particular character of film after it has expired, and because to enforce it would be to create a monopoly in the manufacture and use of moving picture films, wholly outside of the patent in suit and of the patent law as we have interpreted it.

The notice further provides that the machine shall be used only upon other terms (than those stated in the notice) to be fixed by the plaintiff, while it is in use and while the plaintiff "owns said patents." And it is stated at the bar that under this warrant a charge was imposed upon the purchaser graduated by the size of the theater in which the machine was to be used.

Assuming that the plaintiff has been paid an average royalty of $5 on each machine sold, prescribed in the license agreement, it has already received over $200,000 for the use of its patented improvement, which relates only to the method of using the films which another had invented, and yet it seeks by this device to collect during the life of the patent in suit what would doubtless aggre-

gate many times this amount for the use of this same invention, after its machines have been sold and paid for.

A restriction which would give to the plaintiff such a potential power for evil over an industry which must be recognized as an important element in the amusement life of the nation, under the conclusions we have stated in this opinion, is plainly void, because wholly without the scope and purpose of our patent laws and because, if sustained, it would be gravely injurious to that public interest, which we have seen is more a favorite of the law than is the promotion of private fortunes.

Both questions as stated must be answered in the negative and the decree of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE MCREYNOLDS concurs in the result.

MR. JUSTICE HOLMES, dissenting.

I suppose that a patentee has no less property in his patented machine than any other owner, and that in addition to keeping the machine to himself the patent gives him the further right to forbid the rest of the world from making others like it. In short, for whatever motive, he may keep his device wholly out of use. *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, 422. So much being undisputed, I cannot understand why he may not keep it out of use unless the licensee, or, for the matter of that, the buyer, will use some unpatented thing in connection with it. Generally speaking the measure of a condition is the consequence of a breach, and if that consequence is one that the owner may impose unconditionally, he may impose it conditionally upon a certain event. *Ashley* v. *Ryan*, 153 U. S. 436, 443. *Lloyd* v. *Dollison*, 194 U. S. 445, 449. *Non debet, cui plus licet, quod minus est non licere.* D. 50, 17, 21.

No doubt this principle might be limited or excluded in cases where the condition tends to bring about a state of things that there is a predominant public interest to prevent. But there is no predominant public interest to prevent a patented tea pot or film feeder from being kept from the public, because, as I have said, the patentee may keep them tied up at will while his patent lasts. Neither is there any such interest to prevent the purchase of the tea or films, that is made the condition of the use of the machine. The supposed contravention of public interest sometimes is stated as an attempt to extend the patent law to unpatented articles, which of course it is not, and more accurately as a possible domination to be established by such means. But the domination is one only to the extent of the desire for the tea pot or film feeder, and if the owner prefers to keep the pot or the feeder unless you will buy his tea or films, I cannot see in allowing him the right to do so anything more than an ordinary incident of ownership, or at most, a consequence of the *Paper Bag Case*, on which, as it seems to me, this case ought to turn. See *Grant* v. *Raymond*, 6 Pet. 218, 242.

Not only do I believe that the rule that I advocate is right under the *Paper Bag Case*, but I think that it has become a rule of property that law and justice require to be retained. For fifteen years, at least since *Bement* v. *National Harrow Co.*, 186 U. S. 70, 88–93, if not considerably earlier, the public has been encouraged by this court to believe that the law is as it was laid down in *Heaton-Peninsular Button-Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. Rep. 288, 25 C. C. A. 267, and numerous other decisions of the lower courts. I believe that many and important transactions have taken place on the faith of those decisions, and that for that reason as well as for the first that I have given, the rule last announced in *Henry* v. *Dick Co.*, 224 U. S. 1, should be maintained.

I will add for its bearing upon *Straus* v. *Victor Talking*

Machine Co., ante, 490, that a conditional sale retaining the title until a future event after delivery, has been decided to be lawful again and again by this court. *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, 272. I confine myself to expressing my views upon the general and important questions upon which I have the misfortune to differ from the majority of the court. I leave on one side the question of the effect of the Clayton Act, as the court has done, and also what I might think if the *Paper Bag Case* were not upheld, or if the question were upon the effect of a combination of patents such as to be contrary to the policy that I am bound to accept from the Congress of the United States.

MR. JUSTICE MCKENNA and MR. JUSTICE VAN DEVANTER concur in this dissent.

MARSHALL *v.* GORDON, SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES.

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

No. 606. Argued December 11, 12, 1916.—Decided April 23, 1917.

Appellant, while United States Attorney for the Southern District of New York, conducted a grand jury investigation which led to the indictment of a member of the House of Representatives. Acting on charges of misfeasance and nonfeasance made by the member against appellant in part before the indictment and renewed with additions afterward, the House by resolution directed its Judiciary Committee to make inquiry and report concerning appellant's liability to impeachment. Such inquiry being in progress through a sub-committee, appellant addressed to the sub-committee's chairman and gave to the press a letter, charging the sub-committee with

an endeavor to probe into and frustrate the action of the grand jury, and couched in terms calculated to arouse the indignation of the members of that committee and those of the House generally. Thereafter, appellant was arrested in New York by the sergeant-at-arms pursuant to a resolution of the House whereby the letter was characterized as defamatory and insulting and as tending to bring that body into public contempt and ridicule, and whereby appellant in writing and publishing such letter was adjudged to be in contempt of the House in violating its privileges, honor and dignity. He applied for *habeas corpus*.

Held: (1) That the proceedings concerning which the alleged contempt was committed were not impeachment proceedings.

(2) That, whether they were impeachment proceedings or not, the House was without power by its own action, as distinct from such action as might be taken under criminal laws, to arrest or punish for such acts as were committed by appellant.

No express power to punish for contempt was granted to the House of Representatives save the power to deal with contempts committed by its own members. Constitution, Art. I, § 5.

The possession by Congress of the commingled legislative and judicial authority to punish for contempts which was exerted by the House of Commons is at variance with the view and tendency existing in this country when the Constitution was adopted, as evidenced by the manner in which the subject was treated in many state constitutions, beginning at or about that time and continuing thereafter.

Such commingling of powers would be destructive of the basic constitutional distinction between legislative, executive and judicial power, and repugnant to limitations which the Constitution fixes expressly; hence there is no warrant whatever for implying such a dual power in aid of other powers expressly granted to Congress.

The House has implied power to deal directly with contempt so far as is necessary to preserve and exercise the legislative authority expressly granted.

Being, however, a power of self-preservation, a means and not an end, the power does not extend to infliction of punishment, as such; it is a power to prevent acts which in and of themselves, inherently, prevent or obstruct the discharge of legislative duty and to compel the doing of those things which are essential to the performance of the legislative functions.

As pointed out in *Anderson* v. *Dunn*, 6 Wheat. 204, this implied power, in its exercise, is limited to imprisonment during the session of the body affected by the contempt.

The authority does not cease when the act complained of has been committed, but includes the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence, i. e., the continued existence of the interference or obstruction to the exercise of legislative power.

In such case, unless there be manifest an absolute disregard of discretion, and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference.

The power is the same in quantity and quality whether exerted on behalf of the impeachment powers or of the others to which it is ancillary.

The legislative power to provide by criminal laws for the prosecution and punishment of wrongful acts—not here involved.

THE case is stated in the opinion.

Mr. Charles P. Spooner and *Mr. Jesse C. Adkins*, with whom *Mr. John C. Spooner* was on the brief, for appellant:

No express power is given by the Constitution to the House of Representatives to punish for contempt; the House has no general power to punish any act as a crime. Constitution, Art. I, § 5; *Kilbourn* v. *Thompson*, 103 U. S. 168, 182.

A contempt proceeding is either civil or criminal. *Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418, 441; *Gompers* v. *United States*, 233 U. S. 604, 610. A civil proceeding is merely process and may be enforced by the House of Representatives when necessary to the performance of its functions. A criminal contempt proceeding is punishment for crime and may be exercised only by the judiciary. Constitution, Art. III, §§ 1, 2; Amendments V, VI. The Continental Congress suffered many indignities, 5 Elliott's Debates, 2d ed., pp. 92–94; 1 Curtis Const. Hist., p. 149; 1 McMaster's History of U. S., pp. 133, 183; but the States were jealous of the powers of the Federal Government, 1 Curtis Const. Hist., pp. 153, 154, 159. Congress was given ample power of self-protection by exclu-

sive jurisdiction over the District of Columbia, and power to pass all necessary laws to carry into execution express powers. Constitution, Art. I, § 8, cl. 17, 18; Federalist, No. 42; 2 Story Const., § 1218; 1 Curtis Const. Hist., p. 487; 1 Tucker Const., § 205.

The power to punish for contempt is not impliedly conferred on Congress, either by analogy to the House of Commons or by necessity. While the House of Commons has such a power, it was derived from the fact that Parliament was originally a court. The House of Representatives was never a court, and does not derive this power by analogy. *Kilbourn* v. *Thompson*, 103 U. S. 168, 183, 184, 188, 189; *Kielley* v. *Carson*, 4 Moore P. C. 63. Such a power is not necessary to enable it to perform its duties or to exercise the powers expressly conferred by the Constitution.

The power claimed is exceedingly broad. It might result in conflict between the judiciary and Congress, as actually happened in England. *Stockdale* v. *Hansard*, 9 Ad. & El. 1; *Sheriff of Middlesex*, 11 Ad. & El. 273. Such a power would practically destroy the freedom of the press and of public discussion, for every critic of either body of Congress or any member thereof might be imprisoned at the whim of Congress, and without trial by the courts. If Congress exercises such power, it will have little time left in which to legislate. On the other hand, Congress must have some power of self-help; the line of demarcation is logical and plain. The principle is that applicable to all grants of powers, *McCulloch* v. *Maryland*, 4 Wheat. 316; *Ex parte Yarbrough*, 110 U. S. 651, 658; and is embodied in the maxim *Quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non potest*, 5 Coke, 47. Congress may preserve decorum in its deliberations, compel attendance of its members, admit and expel them, and punish them for disorder. Possibly it may imprison its own members

in the execution of these duties, but compulsory attendance or expulsion would be sufficient punishment. Congress has all power, by removal from its halls and by coercive imprisonment, necessary to self-preservation, but no power to punish for crime. That is for the judiciary.

Anderson v. *Dunn*, 6 Wheat. 204, held that the House had implied power to punish for contempt. The Privy Council declined to follow it in *Kielley* v. *Carson*, *supra*. It was overruled in *Kilbourn* v. *Thompson*, 103 U. S. 168, where it was held that the Constitution conferred no express power on either House to punish for contempts, and no such right was derived by analogy to Parliament. The court declined to decide whether any such power was implied from necessity, but said that little aid for that proposition was found in the late English cases, which are quoted from approvingly. The trend of the opinion is against the existence of such power. The power sustained in *In re Chapman*, 166 U. S. 661, was that of coercion to compel testimony and was merely process. *Ib.* 8 App. Cas. D. C. 315. See also *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447.

The English cases support the proposition. *Kielley* v. *Carson*, 4 Moore P. C. 63; *Fenton* v. *Hampton*, 11 Moore P. C. 347; *Doyle* v. *Falconer*, L. R., 1 P. C. 328; *Hill* v. *Weldon*, 5 New Brunswick, 1.

Administrative tribunals perform functions closely akin to the judicial, without this power; e. g., The Interstate Commerce Commission, The Patent Office, The General Land Office.

Not all courts have the power to punish for contempt. *Rinehart* v. *Lance*, 43 N. J. L. 311; *In re Mason*, 43 Fed. Rep. 510, 515; *Queen* v. *Lefroy*, L. R., 8 Q. B. 134.

The fact that the House was investigating a charge of impeachment does not alter the case. The legislative power is of greater importance; such a distinction would be difficult of application. The House, when sitting in an

impeachment inquiry is not a court, nor has it power to punish criminal contempts by analogy to courts. Impeachment in the United States is a political and not a judicial act; its object is to remove from office, not to punish for crime; that is left to the courts. See 26 Harv. Law Rev., p. 684.

A court renders judgment, usually reviewable, and the judges may be impeached. The House charges that a man is unfit to hold office, and there is no review of its action. Judges are appointed as experts in law, and are sworn to do impartial justice; a court proceeds according to settled rules of law and upon adequate evidence; the House proceeds in its ordinary legislative capacity, and need not take evidence; its members are not selected as lawyers and take no judicial oath.

The House is not to be likened to a grand jury. The true analogy is to the prosecuting attorney; his functions are identical with those of the House; but neither is judicial.

Not every court has power to punish for contempt committed out of its presence. The King originally was personally present with the *curia regis*, and any insult to the court was an offense against the sovereign. 1 Hawk. P. C. c. 6, § 3; 4 Black. Com., pp. 121–126. It was prosecuted only by ordinary criminal procedure. *Gompers* v. *United States*, 233 U. S. 604; 3 Trans. Royal Hist. Soc., N. S., p. 147. The first summary prosecution for a contempt for libelling a court occurred in 1720, 24 L. Q. R., pp. 184, 266, article by John Charles Fox. In Pennsylvania the state courts as early as 1809 were forbidden to prosecute libel as contempt. Thomas, Constructive Contempt, p. 26.

The Act of 1831, which became § 725, Rev. Stats., and is now § 268, Judicial Code, forbids the federal courts to punish indirect contempts in a summary way. *Ex parte Poulston*, 19 Fed. Cas. 1205; *In re Daniels*, 131 Fed. Rep. 95. *Contra: United States* v. *Toledo Newspaper Co.*, 220

Fed. Rep. 458; *United States* v. *Huff*, 206 Fed. Rep. 715; *In re Independent Pub. Co.*, 228 Fed. Rep. 787.

The most strained doctrine of implied powers will not grant a power to one tribunal by analogy to another when there is grave doubt of the existence of such power in the analogous tribunal.

Mr. D-Cady Herrick, with whom *Mr. Henry M. Goldfogle* and *Mr. Martin W. Littleton* were on the brief, for appellee:

The only question open in *habeas corpus* is that of jurisdiction. *In re Chapman*, 156 U. S. 211, 215; *In re Taylor*, 149 U. S. 164; *Kingsley* v. *Anderson*, 171 U. S. 101–106; *Ex parte Kearney*, 7 Wheat. 29, 42, 43. If the House of Representatives had jurisdiction no court can review its action, and it must be treated as sole judge of the question whether the facts constituted a contempt of its power, dignity and authority. *In re Debs*, 158 U. S. 564, 595–600. Each department of the government is supreme within its own sphere and immune from intrusion by the others. See *Henry* v. *Henkel*, 235 U. S. 219, 227, 228. For the court to review the action of the House would be to draw to itself, in the first instance, the control of all proceedings relative to contempts by either branch of Congress. *Kilbourn* v. *Thompson*, 103 U. S. 168, is distinguishable in that it was an action for damages, brought after the House had acted and punished complainant for contempt, wherein the legality of its action was directly questioned.

Congress has power to punish for contempts committed against it when engaged in any matter within its jurisdiction.

The English cases touching the power of Parliament having been so fully considered in the *Kilbourn Case*, and in the *Nugent Case*, 18 Fed. Cas. 471, we deem it unnecessary to discuss them or consider whether Congress in

either branch can trace the power back to Parliament. We confine ourselves to what Congress has done and what the courts of this country have decided.

The power was exercised in the cases of Randall (1795) and Duane (1800). Hinds' Precedents, pp. 1047–1052; Story Const., § 848. These were followed by a number of others. Hinds' Precedents, vols. 2 and 3, pp. 1047 *et seq.* It was sustained in *Anderson* v. *Dunn*, 6 Wheat. 204; Hinds' Precedents, pp. 1056 *et seq.;* and the *Nugent Case, supra;* Hinds' Precedents, pp. 1110 *et seq.*

The law as settled by *Anderson* v. *Dunn* was followed by courts and text-writers in this country and remained unquestioned until *Kilbourn* v. *Thompson.* See *Ex parte Dalton*, 44 Ohio St. 142; Story Const., § 847, pp. 614–615; Rawle Const., c. 4, p. 48; Hare's Am. Const. Law, vol. 2, pp. 850–851.

Kilbourn v. *Thompson* is authority only for the proposition that where the matter under investigation is beyond the jurisdiction of the House there is no authority in either House to compel a witness to testify as to the subject under investigation; and the opinion clearly indicates (p. 193) that if it had been an impeachment proceeding Kilbourn could have been punished for contempt for refusing to answer questions propounded to him as a witness before the committee conducting the investigation. The question whether the power exists as one necessary to enable either House to exercise successfully its function of legislation was not decided.

Either House may punish disorderly behavior of its members, compel attendance of witnesses, and the production of papers in election and impeachment cases and in any case that may involve the existence of those bodies. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 485. Refusal to answer pertinent questions in a matter of inquiry within the jurisdiction of the Senate constitutes a contempt of that body, and by statute is also

punishable as an offense against the United States. *In re Chapman*, 166 U. S. 661.

If the House through its committee was engaged in a judicial proceeding at the time of the commission of the alleged contempt, then within the reasoning of *Kilbourn* v. *Thompson* it had power and jurisdiction to punish for contempt. The committee was considering charges that appellant had committed impeachable offenses and impeaching him therefor, and was engaged in taking evidence in relation thereto. Impeachments are judicial proceedings. Wilson's Works, vol. 2, p. 45, citing 2 Hale, P. C., p. 150; 4 Black. Com., p. 256; Hare's Am. Const. Law, p. 855; *Kilbourn* v. *Thompson*, *supra*, pp. 190, 191. The House of Representatives and the Judiciary Committee acting for it and as a part of it is as much a portion of the court of impeachment as a grand jury is a part of the court to which it is attached. A publication in relation to the grand jury is punishable as a contempt. *Percival* v. *State*, 50 Am. St. Rep. (note) 575. In matters over which the House has jurisdiction it may subpœna witnesses and punish for contempt for not appearing, or refusing to testify; and the writing and publication of letters attacking the honesty of the motives and integrity of the House is a matter much more likely to discredit Congress and bring it into contempt than merely disobeying its subpœna.

If the power exists at all, it must exist for all kinds of contempts, and once conceded it is not divisible. The courts will not interfere (the House having jurisdiction in the premises) to say that it can punish for one kind of contempt and not for another.

The House has jurisdiction to punish, as an exercise of power necessary to enable it to fully exercise the powers expressly conferred. Congress has power to "make all laws which shall be necessary and proper for carrying into execution" the powers expressly granted by Article I

of the Constitution—legislative powers; but it is the fundamental law that in addition, by implication, in the absence of any express limitations thereon, it possesses those necessary to enable it to discharge the duties and obligations expressly conferred upon it. *United States* v. *Fisher*, 2 Cranch, 358, 396; *McCulloch* v. *Maryland*, 4 Wheat. 316, 413, 421; *Legal Tender Cases*, 12 Wall. 457, 533, 534, 538; *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668, 681.

In the light of the interpretations given to the word "necessary" in the clause of the Constitution above quoted, it can hardly be denied that the power to punish for contempt is a power necessary to enable Congress to perform the functions allotted to it by the Constitution. In exercising legislative functions, or when considering charges of impeachment, its members should be free from assaults upon their integrity or the honesty of their motives; they should be as uninfluenced in their deliberations as should the courts, and to that end they should have the same means of protecting themselves from disturbing influences. The power to punish for contempt is inherent in all courts of justice and legislative bodies. *Yates* v. *Lansing*, 9 Johns. 385, 416; *Anderson* v. *Dunn*, 6 Wheat. 204, 226–228; *In re Chapman*, *supra*, p. 668.

For Congress, or either branch of it, when acting within its jurisdiction, to itself summarily punish those guilty of contempt is to proceed by direction and not by indirection to a legitimate end by means not prohibited by the Constitution (*McCulloch* v. *Maryland*, *supra*, p. 421), and by a method peculiarly appropriate and plainly adapted to its protection.

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

These are the facts: A member of the House of Representatives on the floor charged the appellant, who was the

district attorney of the Southern District of New York, with many acts of misfeasance and nonfeasance. When this was done the grand jury in the Southern District of New York was engaged in investigating alleged illegal conduct of the member in relation to the Sherman Anti-Trust Law and asserted illegal activities of an organization known as Labor's National Peace Council to which the member belonged. The investigation as to the latter subject not having been yet reported upon by the grand jury, that body found an indictment against the member for a violation of the Sherman Law. Subsequently calling attention to his previous charges and stating others, the member requested that the judiciary committee be directed to inquire and report concerning the charges against the appellant in so far as they constituted impeachable offenses. After the adoption of this resolution a subcommittee was appointed which proceeded to New York to take testimony. Friction there arose between the subcommittee and the office of the district attorney based upon the assertion that the subcommittee was seeking to unlawfully penetrate the proceedings of the grand jury relating to the indictment and the investigations in question. In a daily newspaper an article appeared charging that the writer was informed that the subcommittee was endeavoring rather to investigate and frustrate the action of the grand jury than to investigate the conduct of the district attorney. When called upon by the subcommittee to disclose the name of his informant the writer declined to do so and proceedings for contempt of the House were threatened. The district attorney thereupon addressed a letter to the chairman of the subcommittee avowing that he was the informant referred to in the article, averring that the charges were true and repeating them in amplified form in language which was certainly unparliamentary and manifestly ill-tempered and which was well calculated to arouse the indignation not only of the members of the

subcommittee but of those of the House generally. This letter was given to the press so that it might be published contemporaneously with its receipt by the chairman of the subcommittee. The judiciary committee reported the matter to the House and a select committee was appointed to consider the subject. The district attorney was called before that committee and re-asserted the charges made in the letter, averring that they were justified by the circumstances and stating that they would under the same conditions be made again. Thereupon the select committee made a report and stated its conclusions and recommendations to the House as follows:

"We conclude and find that the aforesaid letter written and published by said H. Snowden Marshall to Hon. C. C. Carlin, chairman of the subcommittee of the Judiciary Committee of the House of Representatives, on March 4, 1916 . . . , is as a whole and in several of the separate sentences defamatory and insulting and tends to bring the House into public contempt and ridicule, and that the said H. Snowden Marshall, by writing and publishing the same, is guilty of contempt of the House of Representatives of the United States because of the violation of its privileges, its honor and its dignity."

Upon the adoption of this report under the authority of the House a formal warrant for arrest was issued and its execution by the Sergeant-at-Arms in New York was followed by an application for discharge on *habeas corpus* and the correctness of the judgment of the court below refusing the same is the matter before us on this direct appeal.

Whether the House had power under the Constitution to deal with the conduct of the district attorney in writing the letter as a contempt of its authority and to inflict punishment upon the writer for such contempt as a matter of legislative power, that is, without subjecting him to the

statutory modes of trial provided for criminal offenses protected by the limitations and safeguards which the Constitution imposes as to such subject, is the question which is before us. There is unity between the parties only in one respect, that is, that the existence of constitutional power is the sole matter to be decided. As to all else there is entire discord, every premise of law or authority relied upon by the one side being challenged in some respects by the other. We consider, therefore, that the shortest way to meet and dispose of the issue is to treat the subject as one of first impression, and we proceed to do so.

Undoubtedly what went before the adoption of the Constitution may be resorted to for the purpose of throwing light on its provisions. Certain is it that authority was possessed by the House of Commons in England to punish for contempt directly, that is, without the intervention of courts, and that such power included a variety of acts and many forms of punishment including the right to fix a prolonged term of imprisonment. Indubitable also is it, however, that this power rested upon an assumed blending of legislative and judicial authority possessed by the Parliament when the Lords and Commons were one and continued to operate after the division of the Parliament into two houses either because the interblended power was thought to continue to reside in the Commons, or by the force of routine the mere reminiscence of the commingled powers led to a continued exercise of the wide authority as to contempt formerly existing long after the foundation of judicial-legislative power upon which it rested had ceased to exist. That this exercise of the right of legislative-judicial power to exert the authority stated prevailed in England at the time of the adoption of the Constitution and for some time after has been so often recognized by the decided cases relied upon and by decisions of this court, some of which are in the

margin,[1] as to make it too certain for anything but statement.

Clear also is it, however, that in the state governments prior to the formation of the Constitution the incompatibility of the intermixture of the legislative and judicial power was recognized and the duty of separating the two was felt, as was manifested by provisions contained in some of the state constitutions enacted prior to the adoption of the Constitution of the United States, as illustrated by the following articles in the constitutions of Maryland and Massachusetts.

"That the House of Delgates may punish, by imprisonment, any person who shall be guilty of a contempt in their view, by any disorderly or riotous behavior, or by threats to, or abuse of their members, or by any obstruction to their proceedings. They may also punish, by imprisonment, any person who shall be guilty of a breach of privilege, by arresting on civil process, or by assaulting any of their members, during their sitting, or on their way to, or return from the House of Delegates, or by any assault of, or obstruction to their officers, in the execution of any order or process, or by assaulting or obstructing any witness, or any other person, attending on, or on their way to or from the House, or by rescuing any person committed by the House: and the Senate may exercise the same power, in similar cases." Constitution of Maryland, 1776, Article XII.

"They [the house of representatives] shall have authority to punish by imprisonment every person, not a member, who shall be guilty of disrespect to the house, by any disorderly or contemptuous behavior in its presence; or who, in the town where the general court is sitting, and during the time of its sitting, shall threaten harm to the

[1] *Brass Crosby's Case*, 3 Wils. 188; *Burdett* v. *Abbot*, 14 East, 1; *Stockdale* v. *Hansard*, 9 Ad. & El. 1; *Anderson* v. *Dunn*, 6 Wheaton, 204; *Kilbourn* v. *Thompson*, 103 U. S. 168.

body or estate of any of its members, for anything said or done in the house; or who shall assault any of them therefor; or who shall assault or arrest any witness, or other person, ordered to attend the house, in his way in going or returning; or who shall rescue any person arrested by the order of the house.

"And no member of the house of representatives shall be arrested, or held to bail on mesne process, during his going unto, returning from, or his attending the general assembly.

"The senate shall have the same powers in the like cases; and the governor and council shall have the same authority to punish in like cases: *Provided*, That no imprisonment, on the warrant or order of the governor, council, senate, or house of representatives, for either of the above-described offences, be for a term exceeding thirty days." Constitution of Massachusetts, 1780, part second, chapter 1, § 3, Articles X and XI.

The similarity of the provisions points to the identity of the evil which they were intended to reach. Clearly they operate to destroy the admixture of judicial and legislative power as prevailing in the House of Commons since the provisions in both the state constitutions and the limitations accompanying them are wholly incompatible with judicial authority. Moreover, as under state constitutions all governmental power not denied is possessed, the provisions were clearly not intended to give legislative power as such, for full legislative power to deal with the enumerated acts as criminal offenses and provide for their punishment accordingly already obtained. The object, therefore, of the provisions could only have been to recognize the right of the legislative power to deal with the particular acts without reference to their violation of the criminal law and their susceptibility of being punished under that law because of the necessity of such a legislative authority to prevent or punish the acts independently

because of the destruction of legislative power which would arise from such acts if such authority was not possessed.

How dominant these views were can be measured by the fact that in various other States almost contemporaneously with the adoption of the Constitution similar provisions were written into their constitutions and continued to be adopted until it is true to say that they became if not universal, certainly largely predominant in the States.[1]

No power was expressly conferred by the Constitution of the United States on the subject except that given to the House to deal with contempt committed by its own members. Article I, § 5. As the rule concerning the Constitution of the United States is that powers not delegated were reserved to the people or the States, it follows that no other express authority to deal with contempt can be conceived of. It comes then to this, was such an authority implied from the powers granted? As it is unthinkable that in any case from a power expressly granted there can be implied the authority to destroy the grant made, and as the possession by Congress of the commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive and judicial authority which is interwoven in the very fabric of the Constitution and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any implication as to such a power may be deduced from any grant of authority made to Congress by the Constitution. This conclusion has long since been

[1] 1790, South Carolina, Article I, § 13; 1792, New Hampshire, Part second, §§ 22 and 23; 1796, Tennessee, Article I, § 11; 1798, Georgia, Article I, § 13; 1802, Ohio, Article I, § 14; 1816, Indiana, Article III, § 14; 1817, Mississippi, Article III, § 20; 1818, Illinois, Article II, § 13; 1820, Maine, Article IV, Part third, § 6; 1820, Missouri, Article III, § 19.

authoritatively settled and is not open to be disputed. *Anderson* v. *Dunn*, 6 Wheat. 204; *Kilbourn* v. *Thompson*, 103 U. S. 168. Whether the right to deal with contempt in the limited way provided in the state constitutions may be implied in Congress as the result of the legislative power granted, must depend upon how far such limited power is ancillary or incidental to the power granted to Congress,—a subject which we shall hereafter approach.

The rule of constitutional interpretation announced in *McCulloch* v. *Maryland*, 4 Wheat. 316, that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it. And as there is nothing in the inherent nature of the power to deal with contempt which causes it to be an exception to such rule, there can be no reason for refusing to apply it to that subject.

Thus in *Anderson* v. *Dunn*, *supra*, which was an action for false imprisonment against the Sergeant-at-Arms of the House for having executed a warrant for arrest issued by that body in a contempt proceeding, after holding as we have already said, that the power possessed by the House of Commons was incompatible with the Constitution and could not be exerted by the House, it was yet explicitly decided that from the power to legislate given by the Constitution to Congress there was to be implied the right of Congress to preserve itself, that is, to deal by way of contempt with direct obstructions to its legislative duties. In *Kilbourn* v. *Thompson*, *supra*, which was also a case of false imprisonment for arrest under a warrant issued by order of the House in a contempt proceeding, although the want of right of the House of Representatives to exert the judicial-legislative power possessed by the House of Commons was expressly reiterated, the question was reserved as to the right to imply an authority in the House of Representatives to deal with contempt as to a

subject-matter within its jurisdiction, the particular case having been decided on the ground that the subject with which the contempt proceedings were concerned was totally beyond the jurisdiction of the House to investigate. But in *In re Chapman*, 166 U. S. 661, the principle of the existence of an implied legislative authority under certain conditions to deal with contempt was again considered and upheld. The case was this: Chapman had refused to testify in a Senate proceeding and was indicted under § 102 of the Revised Statutes making such refusal criminal. He sued out a *habeas corpus* on the ground that the subject of the refusal was exclusively cognizable by the Senate and that therefore the statute was unconstitutional as a wrongful delegation by the Senate of its authority and because to subject him to prosecution under the statute might submit him to double jeopardy, that is, leave him after punishment under the statute to be dealt with by the Senate as for contempt. After demonstrating the want of merit in the argument as to delegation of authority, the proposition was held to be unsound and the contention as to double jeopardy was also adversely disposed of on the ground of the distinction between the implied right to punish for contempt and the authority to provide by statute for punishment for wrongful acts and to prosecute under the same for a failure to testify, the court saying that "the two being *diverso intuito* and capable of standing together," they were susceptible of being separately exercised.

And light is thrown upon the right to imply legislative power to deal directly by way of contempt without criminal prosecution with acts the prevention of which is necessary to preserve legislative authority, by the decision of the Privy Council in *Kielley* v. *Carson*, 4 Moo. P. C. 63, which was fully stated in *Kilbourn* v. *Thompson*, *supra*, but which we again state. The case was this: Kielley was adjudged by the House of Assembly of Newfoundland

guilty of contempt for having reproached a member "in coarse and threatening language" for words spoken in debate in the House. A warrant was issued and Kielley was arrested. When brought before the House he refused to apologize and indulged in further violent language toward the member and was committed. Having been discharged on *habeas corpus* proceedings, he brought an action for false imprisonment against the Speaker and other members of the House. As a justification the defendants pleaded that they had acted under the authority of the House. A demurrer to the plea was overruled and there was a judgment for the defendants. The appeal was twice heard by the Privy Council, the court on the second argument having been composed of the Lord Chancellor (Lyndhurst), Lords Brougham, Denman, Abinger, Cottenham and Campbell, the Vice Chancellor (Shadwell), the Lord Chief Justice of the Common Pleas (Tindal), Mr. Justice Erskine, Lushington and Baron Parke.

The opinion on reversal was written by Parke, B., who said:

"The main question raised by the pleadings, . . . was whether the House of Assembly had the power to arrest and bring before them, with a view to punishment, a person charged by one of its Members with having used insolent language to him out of the doors of the House, in reference to his conduct as a Member of the Assembly—in other words, whether the House had the power, such as is possessed by both Houses of Parliament in England, to adjudicate upon a complaint of contempt or breach of privilege."

After pointing out that the power was not expressly granted to the local legislature by the Crown, it was said the question was "whether by law, the power of committing for a contempt, not in the presence of the Assembly, is incident to every local Legislature."

"The Statute Law on this subject being silent, the

Common Law is to govern it; and what is the Common Law, depends upon principle and precedent.

"Their Lordships see no reason to think, that in the principle of the Common Law, any other powers are given them, than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment, an act which on both sides, it is admitted, it was competent for the Crown to perform. This is the principle which governs all legal incidents." And after quoting the aphorism of the Roman law to the effect that the conferring of a given power carried with it by implication the right to do those things which were necessary to the carrying out of the power given, the opinion proceeded: "In conformity to this principle we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their Legislative functions, they are justified in acting by the principle of the Common Law. But the power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local Legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions."

There can be no doubt that the ruling in the case just stated upheld the existence of the implied power to punish for contempt as distinct from legislative authority and yet flowing from it. It thus becomes apparent that from a

doctrinal point of view the English rule concerning legislative bodies generally came to be in exact accord with that which was recognized in *Anderson* v. *Dunn*, *supra*, as belonging to Congress, that is, that in virtue of the grant of legislative authority there would be a power implied to deal with contempt in so far as that authority was necessary to preserve and carry out the legislative authority given. While the doctrine of *Kielley* v. *Carson* was thus in substantive principle the same as that announced in *Anderson* v. *Dunn*, we must not be understood as accepting the application which was made of the rule to the particular case there in question since, as we shall hereafter have occasion to show, we think that the application was not consistent with the rule which the case announced and would, if applied, unwarrantedly limit the implied power of Congress to deal with contempt.

What does this implied power embrace? is thus the question. In answering, it must be borne in mind that the power rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred. The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end and not the end itself. Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted.

These principles are plainly the result of what was decided in *Anderson* v. *Dunn*, *supra*, since in that case in answering the question what was the rule by which the extent of the implied power of legislative assemblies to deal with contempt was controlled, it was declared to be "*the least possible power adequate to the end proposed*," (6 Wheat. 231), which was but a form of stating that as it resulted from implication and not from legislative will, the legislative will was powerless to extend it further

than implication would justify. The concrete application of the definition and the principle upon which it rests were aptly illustrated in *In re Chapman, supra*, where, because of the distinction existing between the two which was drawn, the implied power was decided not to come under the operation of a constitutional limitation applicable to a case resting upon the exercise of substantive legislative power.

Without undertaking to inclusively mention the subjects embraced in the implied power, we think from the very nature of that power it is clear that it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation, that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed. And the essential nature of the power also makes clear the cogency and application of the two limitations which were expressly pointed out in *Anderson* v. *Dunn, supra*, that is, that the power even when applied to subjects which justified its exercise is limited to imprisonment and such imprisonment may not be extended beyond the session of the body in which the contempt occurred. Not only the adjudged cases but congressional action in enacting legislation as well as in exerting the implied power conclusively sustain the views just stated. Take for instance the statute referred to in *In re Chapman* where, not at all interfering with the implied congressional power to deal with the refusal to give testimony in a matter where there was a right to exact it, the substantive power had been exerted to make such refusal a crime, the two being distinct the one from the other. So also when the difference between the judicial and legislative powers are considered and the divergent elements which in the nature of things enter into the determination of

what is self-preservation in the two cases, the same result is established by the statutory provisions dealing with the judicial authority to summarily punish for contempt, that is, without resorting to the modes of trial required by constitutional limitations or otherwise for substantive offenses under the criminal law. Act of March 2, 1831, 4 Stat. 487. The legislative history of the exertion of the implied power to deal with contempt by the Senate or House of Representatives when viewed comprehensively from the beginning points to the distinction upon which the power rests and sustains the limitations inhering in it which we have stated. The principal instances are mentioned in the margin [1] and they all except two or three deal with either physical obstruction of the legislative body in the discharge of its duties, or physical assault upon its members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of members from attending so that their duties might be performed, or finally with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel. In the two or three instances not embraced in the classes we think it plainly appears that for the moment the distinction was overlooked which existed between the legislative power to make criminal every form of act which can constitute a contempt to be pun-

[1] 1795, attempt to bribe members of the House; 1800, publication of criticism of the Senate; 1809, assault on a member of the House; 1818, attempt to bribe a member of the House; 1828, assault on the Secretary to the President in the Capitol; 1832, assault on a member of the House; 1835, assault on a member of the House; 1842, contumacious witness; 1857, contumacious witness; 1858, contumacious witness; 1859, contumacious witness; 1865, assault on a member of the House; 1866, assault on a clerk of a committee of the House; 1870, assault on a member of the House; 1871, contumacious witness; 1874, contumacious witness; 1876, contumacious witness; 1894, contumacious witness; 1913, assault on a member of the House.

ished according to the orderly process of law and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority. And in the debates which ensued when the various cases were under consideration it would seem that the difference between the legislative and the judicial power was also sometimes forgotten, that is to say, the legislative right to exercise discretion was confounded with the want of judicial power to interfere with the legislative discretion when lawfully exerted. But these considerations are accidental and do not change the concrete result manifested by considering the subject from the beginning. Thus we have been able to discover no single instance where in the exertion of the power to compel testimony restraint was ever made to extend beyond the time when the witness should signify his willingness to testify, the penalty or punishment for the refusal remaining controlled by the general criminal law. So again we have been able to discover no instance, except the two or three above referred to, where acts of physical interference were treated as within the implied power unless they possessed the obstructive or preventive characteristics which we have stated, or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration. And this latter statement causes us to say, referring to *Kielley* v. *Carson*, *supra*, that where a particular act because of its interference with the right of self-preservation comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions and therefore without resort to judicial proceedings under the general criminal law, we are of opinion that authority does not cease to exist because the act complained of had been committed

when the authority was exerted, for to so hold would be to admit the authority and at the same time to deny it. On the contrary when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject and therefore there necessarily results from this power the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence, that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. And of course in such case as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference.

It remains only to consider whether the acts which were dealt with in the case in hand were of such a character as to bring them within the implied power to deal with contempt, that is, the accessory power possessed to prevent the right to exert the powers given from being obstructed and virtually destroyed. That they were not, would seem to be demonstrated by the fact that the contentions relied upon in the elaborate arguments at bar to sustain the authority were principally rested not upon such assumption, but upon the application and controlling force of the rule governing in the House of Commons. But aside from this, coming to test the question by a consideration of the conclusion upon which the contempt proceedings were based as expressed in the report of the select committee which we have previously quoted and the action of the House of Representatives based on it, there is room only for the conclusion that the contempt was deemed to result from the writing of the letter not because of any obstruction to the performance of legis-

lative duty resulting from the letter or because the preservation of the power of the House to carry out its legislative authority was endangered by its writing, but because of the effect and operation which the irritating and ill-tempered statements made in the letter would produce upon the public mind or because of the sense of indignation which it may be assumed was produced by the letter upon the members of the committee and of the House generally. But to state this situation is to demonstrate that the contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties, but was extrinsic to the discharge of such duties and related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee on the subject. But these considerations plainly serve to mark the broad boundary line which separates the limited implied power to deal with classes of acts as contempts for self-preservation and the comprehensive legislative power to provide by law for punishment for wrongful acts.

The conclusions which we have stated bring about a concordant operation of all the powers of the legislative and judicial departments of the Government, express or implied, as contemplated by the Constitution. And as this is considered, the reverent thought may not be repressed that the result is due to the wise foresight of the fathers manifested in state constitutions even before the adoption of the Constitution of the United States by which they substituted for the intermingling of the legislative and judicial power to deal with contempt as it existed in the House of Commons a system permitting the dealing with that subject in such a way as to prevent the obstruction of the legislative powers granted and secure their free exertion and yet at the same time not substantially interfere with the great guarantees and limitations con-

cerning the exertion of the power to criminally punish,—a beneficent result which additionally arises from the golden silence by which the framers of the Constitution left the subject to be controlled by the implication of authority resulting from the powers granted.

It is suggested in argument that whatever be the general rule, it is here not applicable because the House was considering and its committee contemplating impeachment proceedings. The argument is irrelevant because we are of opinion that the premise upon which it rests is unfounded. But indulging in the assumption to the contrary we think it is wholly without merit as we see no reason for holding that if the situation suggested be assumed it authorized a disregard of the plain purposes and objects of the Constitution as we have stated them. Besides it must be apparent that the suggestion could not be accepted without the conclusion that under the hypothesis stated the implied power to deal with contempt as ancillary to the legislative power had been transformed into judicial authority and become subject to all the restrictions and limitations imposed by the Constitution upon that authority,—a conclusion which would frustrate and destroy the very purpose which the proposition is advanced to accomplish and would create a worse evil than that which the wisdom of the fathers corrected before the Constitution of the United States was adopted. How can this be escaped, since it is manifest that if the argument were to be sustained those things which, as pointed out in *In re Chapman, supra,* were distinct and did not therefore the one frustrate the other—the implied legislative authority to compel the giving of testimony and the right criminally to punish for failure to do so—would become one and the same and the exercise of one would therefore be the exertion of, and the exhausting of the right to resort to, the other. Again, accepting the proposition, by what process of reasoning could the

conclusion be escaped that the right to exert implied authority by way of contempt proceedings in so far as essential to preserve legislative power would become itself an exertion of legislative power and thus at once be subject to the limitations as to modes of trial exacted by the guarantee of the Constitution on that subject. We repeat, out of abundance of precaution, we are called upon to consider not the legislative power of Congress to provide for punishment and prosecution under the criminal laws in the amplest degree for any and every wrongful act, since we are alone called upon to determine the limits and extent of an ancillary and implied authority essential to preserve the fullest legislative power, which would necessarily perish by operation of the Constitution if not confined to the particular ancillary atmosphere from which alone the power arises and upon which its existence depends.

It follows from what we have said that the court below erred in refusing to grant the writ of *habeas corpus* and its action must be and it is, therefore reversed, and the case remanded with directions to discharge the relator from custody.

And it is so ordered.

OREGON & CALIFORNIA RAILROAD COMPANY ET AL. *v.* UNITED STATES.

ON CERTIFICATE FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 492. Argued March 8, 9, 1917.—Decided April 23, 1917.

The Oregon-California Railroad Grants (Acts of July 25, 1866, as amended, and May 4, 1870) made no distinction between land covered with timber and other land, nor between the timber or other incidents and the land itself; title to all was vested in the railroad company for transmission to actual settlers upon the terms prescribed by the acts. The substantial interest granted the company was the right to exact not more than $2.50 per acre in so disposing of the lands. *Oregon & California R. R. Co.* v. *United States*, 238 U. S. 393, discussed and followed.

While the railroad company could use the lands as a basis of credit, it could not by trust deed convey an interest in either land or timber exempt from the obligations imposed by the granting acts or the power of the Government to compel their performance.

The granting acts being not mere instruments of conveyance but laws reserving the right of alteration or repeal, Congress, to overcome a situation largely due to breaches of obligation by the railroad company which made the original scheme impracticable, had power without the company's consent to resume the title and provide for disposition of the land by the Government under conditions assuring the company the equivalent of its interest in the grants—not more than $2.50 per acre.

The "Chamberlain-Ferris Act" of June 9, 1916, c. 137, 39 Stat. 218, examined and found to accord with the power of Congress and the principles laid down by this court in *Oregon & California R. R. Co.* v. *United States*, 238 U. S. 393.

The former decision of this court having directed an injunction to hold the land and timber intact until Congress should have reasonable opportunity to make new provisions for disposing of them consistently with the interest of the railroad company, and an act having been passed accordingly after entry of the decree in the District Court, this court, upon a review of the decree based on an alleged

departure from its former mandate, may properly determine the validity of the act as a matter involved in the decree's execution.

Under Rule 24, costs in this court are not allowable in cases where the United States is a party.

Where the United States obtained a decree declaring railroad land grants forfeited for breaches of obligation by the railroad company and upon appeal the decree was reversed because the obligations broken were not conditions subsequent but statutory covenants and relief against the company by injunction was decreed accordingly, costs of the litigation in the District Court were properly awarded by that court to the United States.

THE case is stated in the opinion.

Mr. P. F. Dunne, with whom *Mr. Wm. F. Herrin*, *Mr. Wm. D. Fenton* and *Mr. Frank C. Cleary* were on the brief, for the Oregon & California Railroad Company *et al.*

Mr. Perry D. Trafford for the Union Trust Company of New York.

Mr. Constantine J. Smyth, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States.

Mr. Francis J. Heney, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is the second appearance of the case in this court. It is on certificate from and certiorari to the Circuit Court of Appeals for the Ninth Circuit, to which court it was taken by appeal to review a decree of the District Court for the District of Oregon entered in fulfillment of the mandate of this court.

The decree of the District Court was reversed and the

present controversy is as to what our mandate required. As expressing their different views of it the Government and the railroad company—we shall so refer to the defendants, except where a distinction is necessary—submitted forms of decrees to the District Court. The court adopted the decree submitted by the Government, and that action is assigned as error.

The case as made in this court on its first appearance is reported in 238 U. S. 393–438, and contains all of the elements for the decision of the questions now presented. Before detailing those elements we may say preliminarily that the difference between the decree entered and that proposed by the railroad company was in the extent of the restraint upon the company in the disposition of lands granted in aid of the construction of certain railroads and telegraph lines. The acts making the grants contained the provision that the lands granted should be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents an acre.

The decree restrained the railroad company from selling "to any person not an actual settler on *the land* sold to him," with limitation of quantity and price stated, "and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits."

The decree as proposed by the railroad company omitted the injunction against selling the timber and mineral deposits.

Upon these differences in the proposed and entered decree the railroad company bases its contention that the latter is not in accordance with the mandate of this court, and in support of it it has presented elaborate arguments to establish a distinction between *lands* and the timber on them and the mineral deposits in them, and that the command of the acts of Congress to sell the lands did not include the timber or deposits. In other words, it is contended that the acts of Congress gave the railroad company "the right of an owner by absolute grant to the use of the timber on his land" and to avail himself of the minerals therein; and that, therefore, the restraint that the District Court put upon the railroad company was in excess of the mandate. "It was what this court has termed an 'intermeddling' with matters outside of the scope of the mandate. It proceeded to determine that the railroad had no right to use the timber upon its own lands while they were still unsold and in its possession and occupancy; it determined that the railroad company could not even make a clearing in anticipation of a sale to some settler, or dig out a ton of coal; and it adjudged that the owner of the land had no right in the timber or the coal except to pass it, as part of the realty, when it sold the land to a settler at $2.50 an acre."

The complaint is graphic. Its attempted justification is the assertion of a grant in absolute ownership. Such ownership is the foundation of the railroad company's contention and on this foundation it builds its argument and upon the insistence that the lands having been granted, necessarily as incidents to them the timber and minerals on and within them were granted. An immediate and sufficient answer to the contention would seem to be that the grant was not absolute but was qualified by a condition in favor of settlers and that if the "lands" granted had such incidents the "lands" directed to be sold to actual settlers were intended to have such incidents. That is,

if the "lands" granted carried by necessary implication all that was above the surface and all below the surface to the railroad company, they carried such implication to the actual settler. In other words, what "lands" meant to the railroad company they meant to the settler, embraced within his right to purchase and acquire. We are not disposed, however, to rest upon this summary answer but will consider with more particularity our mandate.

It is not necessary to trace the title of the lands to the railroad company. It is sufficient to say that the source of the title was an Act of Congress approved July 25, 1866, c. 242, 14 Stat. 239, as amended by the Acts approved June 25, 1868, c. 80, 15 Stat. 80; April 10, 1869, c. 27, 16 Stat. 47; and May 4, 1870, c. 69, 16 Stat. 94, which acts granted lands to aid in the construction of certain railroads and telegraph lines. The Act of 1869 contained this proviso: "*And provided further*, That the lands granted by the act aforesaid [Act of 1866] shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre." There was a like provision in the Act of 1870.

The Government brought suit against the railroad company, alleging that these provisos constituted conditions subsequent, charging breaches of the conditions by the company and praying for a forfeiture of the unsold lands.

The railroad company denied that the provisos were to be so construed and alleged that they constituted restrictive and unenforceable covenants and set up other defenses.

The District Court adopted the view of the Government as to the provisos and entered a decree forfeiting the lands and the case came here for review.

The contentions of the Government and the railroad company were repeated in this court, and it was, besides,

contended that the provisos only applied to lands susceptible of actual settlement and cultivation and did not include timber lands.[1]

We rejected the contention of the Government; we rejected in part the contention of the railroad company, saying: "Our conclusions, then, on the contentions of the Government and the railroad company are that the provisos are not conditions subsequent; that they are covenants, and enforceable."

But how enforceable? And what was the remedy for breaches?—and breaches there were, many, gross and determined. It was certainly not intended to be decided that these breaches, with all of their consequences, were to be put out of view and the railroad company only enjoined against future breaches. Yet this, in effect, is the contention, and it is attempted to be supported by certain language in the opinion. Before quoting it we may say in general that much that is cited from it must be considered in reference to the controversies which were presented, and that the granting acts and their provisos were necessarily construed as of the time of their passage. Action under them and the breaches of them came afterwards, and a consideration of the remedies to which the Government was entitled. Keeping this comment in mind we can more easily understand the language of the opinion in description of the grant and in regard to the relief that was awarded the Government.

As to the grant this was said—and it is much insisted on—"There was a complete and absolute grant to the railroad company with power to sell, limited only as pre-

[1] There were cross-complainants and interveners, the first asserting that the provisos created trusts in favor of actual settlers, and the second that the trust had the scope of including all persons who desired to make actual settlements upon the lands. The decree of the District Court and the decision here were adverse to both contentions and this case has no further concern with them or with those who made them.

scribed, and we agree with the Government that the company 'might choose the actual settler; might sell for any price not exceeding $2.50 an acre; might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres.'" And we added, "it might choose the time for selling or its use of the grants as a means of credit, subject ultimately to the restrictions imposed; and we say 'restrictions imposed' to reject the contention of the railroad company that an implication of the power to mortgage the lands carried a right to sell on foreclosure divested of the obligations of the provisos."

This declares the meaning of the words of the acts taken by themselves. It points out the power of the railroad company and that it was "limited only as prescribed." It does not point out the remedy of the Government if the limit prescribed was transcended. For that we must look to other parts of the opinion. We took pains to declare that the principles of the case were "not in great compass," that circumstances had given "perplexity and prolixity to discussion," but had not confused the simple words of the acts of Congress regarded either as grants or as laws, and that they were both, and, as both, they conferred rights quite definite and imposed obligations as much so—the first having the means of acquisition; the second, of performance. And we gave emphasis to them as laws and the necessity of obedience to them as such, the remission of their obligation to be obtained "through appeal to Congress" and not by an evasion of them or a defiance of them.

The evasions and defiance we showed, and the extent to which they transcended the policy and purpose of the Government expressed in the covenants. We contrasted the requirement of the grants of a sale to an actual settler of 160 acres (maximum amount) with sales of 1,000, 2,000, 20,000 and 45,000 acres to single purchasers, and the use of the lands for homes with their use for immediate

or speculative enterprises. The relief the Government was entitled to, we said, was not satisfied by preserving its rights to the lands sold and we further said that "an injunction simply against future violations of the covenants, or, to put it another way, simply mandatory of their requirements, will not afford the measure of relief to which the facts of the case entitle the Government."

The reason was expressed. The Government alleged, to show a disregard of the covenants, that more than 1,000 persons had applied to purchase lands from the railroad company in conformity with the covenants. The company, replying, said the applications were not made in good faith for settlement, but for speculation, the lands being valuable only for their timber and not being fit for settlement, and further alleged that at no time had the lands fit for actual settlement exceeded 300,000 acres, in widely separated tracts, and had been sold during the construction of the road and prior to its completion to actual settlers in the prescribed quantities and at the prescribed price.

We have seen that other sales were made in quantities in excess of that prescribed by the statute, and not for settlement, at prices from $5.00 to $40.00 an acre, and that at the time the answer was filed there remained unsold over two million acres, the reasonable value of which was $30,000,000. There was no intimation that the lands did not include the timber and it was not only recognized but asserted that the lands were more valuable for the timber than for settlement.

Our judgment took care of the situation. It preserved the remedies of the Government for past violations of the granting acts and recognized that new dispositions were necessary to secure the rights that had accrued to the Government. We said that owing to the "conditions now existing, incident, it may be, to the prolonged disregard of the covenants by the railroad company, the lands

invite now more to speculation than to settlement, and we think, therefore, that the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever *or of the timber thereon and from cutting or authorizing the cutting or removal of any of the timber thereon,* until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances and at the same time secure to the defendants all the value the granting acts conferred upon the railroads."

The design of this and its adequacy would seem to need no comment. It was intended to be a guide to the District Court—indeed, a direction of the decree of the court. The decree complied with the direction. See *Southern Oregon Co.* v. *United States* (Circuit Court of Appeals, Ninth Circuit, decided February 13, 1917).

Congress, in the execution of the policy it deemed fitting under the circumstances, as expressed in our opinion, enacted what is called the Chamberlain-Ferris Act of June 9, 1916, c. 137, 39 Stat. 218.[1] The validity of the

---

[1] The provisions of the act, so far as they affect the railroad, may be summarized as follows:

It recites, among other things, that this court had ordered that the railroad company be enjoined from "making further sales of lands in violation of the law," and further enjoined from "making any sales whatever of either the lands or the timber thereon until Congress should have a reasonable opportunity to provide for the disposition of said lands," etc., and enacts that the title to so much of the lands as had not been sold by the railroad prior to July 1, 1913, be and the same is hereby revested in the United States, excepting right of way and lands in actual use by the railroad for depots, side-tracks, etc. (§ 1). The lands shall be divided into three classes: power sites, timber lands, and agricultural lands (§ 2). The timber shall be sold by the Secretary of the Interior at such times and in such manner as may seem best, and the lands from which it is removed shall thereafter be classed as agricultural lands (§ 4). The lands classed as agricultural shall be sub-

act is challenged and both sides invite a determination of the challenge. The validity of the law may be said not to be involved. The appeal is from the decree, and, that being determined to be right, the appeal, it may be urged, is satisfied, the questions it presents decided. It, however, may be considered important in the execution of the decree, for we have seen that the granting acts were laws as well as grants, had the strength and operation of laws,

---

ject to entry under the homestead laws but patents shall not issue until the lands have been cultivated for three years (§ 5). The Attorney General is authorized to institute proceedings against the railroad company and others to have determined the amount of moneys already received by the railroad company or its predecessors on account of sales, etc., of the granted lands and which should be charged against it as part of the "full value" secured to the grantees under the granting acts as heretofore interpreted by this court. In making such determination the court shall take into consideration all moneys received from sales of lands or timber, forfeited contracts, rent, timber depredations and interest on contracts, or from any source relating to the lands, and also the value of the timber from the lands and used by the grantees or their successors. In such suits the court shall also determine the amount of taxes on the lands paid by the United States as provided in § 9 of the act and which should have been paid by the railroad, and the amounts thus determined shall be treated as money received by the railroad company (§ 7). The title to all moneys arising out of the granted lands and now on deposit to await the final outcome of the suit commenced by the United States in pursuance of the joint resolution of April 30, 1908, is hereby vested in the United States and the United States is subrogated to all the rights and remedies of the obligee or obligees under any contract for the purchase of timber on the grant lands (§ 8). Provision is made for the payment by the United States of accrued taxes on the lands revested by the act (§ 9). The proceeds of the timber and the lands shall be deposited in the Treasury of the United States and be paid to the railroad or the lien holders as the fund accumulates, and at the end of ten years an appropriation shall be made from the general funds of the Treasury of the United States to pay any balance which may be due to the railroad (§ 10). The profits derived from the transaction shall be paid one-quarter to the State of Oregon and one-quarter to the counties where the lands are situated, while one-half shall be retained by the Government (§ 10).

subject to amendment if the right of amendment existed or accrued. There was a reservation in them of the right of alteration or repeal and if it could not be exerted to take back what had been granted and had vested, it could be exerted to accomplish the remedy which the court adjudged to the Government for the violation by the railroad company of the provisions of the grants. It is no answer to the exertion of the power and remedy to say that the acts of Congress were initially complete and absolute grants. It is to be borne in mind that they carried with them covenants to be performed and necessarily an obligation to perform them, with remedies for breaches of performance. Such was our judgment, as we have seen, and the judgment was adapted to the conditions created by the breaches, and for this legislation was deemed necessary.

But the railroad company says that the legislation directed was to have its consent and that such consent "was essential to a valid resumption or alteration of its vested rights," and that this was what this court meant when it said "that any legislation in the premises by Congress should 'secure to the defendants all the value the granting acts conferred upon the railroads.'"

We have already answered the contentions. The railroad company, by pushing into view the rights conferred by the granting acts and putting out of view the wrongs committed by it, can easily build an argument upon and invoke the inviolability of vested rights; and to say that its consent was necessary to legislation is to say that it could dictate the remedy for its wrongs, preclude or embarrass the policy of the Government.

The interest that the granting acts conferred upon the railroad company was $2.50 an acre. That secured to it, "all the value the granting acts conferred" upon it was secured. It is true it had the right of sale, selection of time and settler. If these were rights, they were also aids

to the duty of transmitting the lands to settlers; and, the duty having been violated, they became unsuitable to the conditions resulting and obstructions to the relief which had accrued to the Government. In other words, by the conduct of the railroad company the policy of the granting acts had become impracticable of performance and the new conditions—the lands inviting more to speculation than to settlement—demanded other provision than that prescribed by the granting acts. This was the declaration and direction of our judgment, and the Chamberlain-Ferris Act is the execution of it.

The Union Trust Company was one of the defendants in the suit and is one of the parties here. It was heard by its own counsel at the bar and through brief. In the main its argument is the same as that of the railroad company, varied somewhat in detail, and asserts that it has not only the rights of the railroad but, "in *addition* and *especially*, that even if it is possible for the Government now to take away rights once conveyed to the railroad, *it cannot take them except subject to the lien of the mortgage.*"

So far as the rights of the trust company coincide with those of the railroad company we have considered them, and they cannot be greater than those of that company. The railroad company, it is true, could use the lands as a basis of credit, but only to the extent of its interest in them, subject to the performance of its obligations and the power of the Government to exact their performance.

We were careful to observe this subordination. We expressed the extent of the interest that the railroad company received and that "it might choose the time for selling or its use of the grants as a means of credit," but, we also said, "subject ultimately to the restrictions imposed." And, further, we said "'restrictions imposed' to reject the contention that an implication of the power to mortgage the lands carried a right to sell on foreclosure divested of the obligations of the provisos."

The case was responded to as it was presented and no phase of it was omitted in presentation or response that could influence its judgment. Of what was in the minds of counsel, determining and urging their contentions, of what was in the mind of the court in response to the contentions, the opinion leaves no doubt, and that after the fullest consideration of all that was involved of rights and remedies the judgment was pronounced.

A distinction is now attempted to be made between a sale of the lands and the use of the lands, including in the use of them the right to cut the timber upon them and extract minerals (coal and iron) from them. Such use, it is asserted, is a necessary incident of ownership and that such use was not intended to be taken away nor could it have been taken away by our judgment.

To answer the contentions would be mere repetition of what we have said. The distinction now made between the lands and their use is but the contention urged on the first appeal and rejected—that the provisos only applied to lands susceptible of actual settlement and not to timber lands. The distinction then was between the lands, now between their constituting elements, and for the same reason: to give to the railroad company and the trust company what the granting acts did not give, or, rather, gave for the purpose of transmission to actual settlers. This transmission becoming impracticable, other disposition of the lands, including all that is signified by the word, was adjudged.

The trust company also attacks the Chamberlain-Ferris Act and is assisted in the attack by a "friend of the court." The attacks have the same basis as that which we have noticed—that is, the rights of the railroad company are asserted to be vested and inviolable. The contention gets a semblance of strength from the ability of counsel. To yield to it would be in effect to declare that covenants violated are the same as covenants performed—

wrongs done the same as rights exercised—and, by confounding these essential distinctions, give to the transgression of the law what its observance is alone entitled to.

The decree of the District Court taxed costs against the railroad company, and this is assigned as error. The amount is stated to be $6,249.02. So far as this sum includes costs on the former appeal we think there was error. The railroad company was compelled to appeal from the decree against it. The decree was reversed and no costs were awarded for or against it, and could not have been under Rule 24 of this court. The rule gives costs to the prevailing party in certain cases. The provision, however, does not "apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States." Our mandate was in accordance with the rule and the decree should not have awarded costs to the United States. To that extent it is erroneous and should be modified by deducting the costs which were incurred in this court; and, so modified, it is

Affirmed.

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

HENDERSONVILLE LIGHT & POWER COMPANY ET AL. *v.* BLUE RIDGE INTERURBAN RAILWAY COMPANY.

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

No. 497. Argued April 10, 1917.—Decided April 23, 1917.

Where the answer in a state condemnation case attacked the taking as a taking for private use in violation of the Fourteenth Amendment and a dissenting opinion in the state Supreme Court bore evidence that the Federal Constitution was invoked against a construction of the state laws by which the taking was justified, *Held*, that this court had jurisdiction to review.

Charter and state laws authorized a corporation to build and operate an electric railroad, to condemn water power and employ it in generating electricity for use in running the road, to sell the surplus of current so generated and, in connection with these objects, to construct buildings and factories, and operate machinery. In condemnation proceedings whereby the corporation took water rights of a riparian owner, the state court found that the purpose was in good faith to carry on the business of building and operating the road, that the taking of all the water power was necessary for that purpose, and that the purpose was public.

Held: (1) That in the absence of definite proof that a surplus would result this court could not say that sale of surplus power was the real object of the enterprise or anything more than a possible incident, necessary to prevent waste, of the railway use.

(2) Even if sale of surplus power were likely to occur, the taking, upon the case as made, would be justified by *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30, 32.

171 N. Car. 314, affirmed.

THE case is stated in the opinion.

Mr. Michael Schenck, with whom *Mr. C. P. Sanders*, *Mr. J. C. Martin*, *Mr. Thomas S. Rollins* and *Mr. George H. Wright* were on the briefs, for plaintiffs in error:

The Laws of North Carolina (Laws 1907, c. 302; 1913, c. 94; 1907, c. 74; Pell's Revisal, 1908, § 1573) as construed by the Supreme Court of the State authorize the defendant in error to take private property for a private use in violation of the Fourteenth Amendment. This defense was set up in the answer and is necessarily involved in the decision of the Supreme Court of the State.

Necessity to condemn the property for the operation of the railroad was not alleged. Proof without allegation is ineffective. *McKee* v. *Lineberger*, 69 N. Car. 217, 239; *Abernathy* v. *Seagle*, 98 N. Car. 553, 556. Condemnation is not allowed if not necessary. Curtis on the Laws of Electricity, § 81; *State* v. *White River Power Co.*, 39 Washington, 648. The testimony refutes the idea that so much water power was needed for the railroad; the real object shown is to develop a large water power, to supply electric current for the private uses of the mills and properties owned by the stockholders of the defendant in error, and in which they are interested. Condemnation is not sought solely for public purposes. There is neither allegation, proof nor finding that the electric current is to be sold, generally, for public uses, and the case therefore does not come, as we insist, under the ruling of this court in the case of *Mt. Vernon-Woodberry Cotton Co.* v. *Alabama Power Co.*, 240 U. S. 30. Where the charter of a corporation authorizes it to exercise the power of eminent domain for both public and private purposes, the power of eminent domain cannot be exercised for the private purpose, but it may be exercised for the public purpose. *Kaukauna Co.* v. *Green Bay &c. Canal Company*, 142 U. S. 254; *Walker* v. *Shasta Power Co.*, 160 Fed. Rep. 856.

Where both private purposes and public uses are contemplated in the articles of incorporation, the question whether the right to condemn is to be denied or allowed is not tested solely by the objects and purposes set forth in the articles of incorporation, but may be governed by

evidence *aliunde* showing the actual purpose in view. *Lake Koen Nav. R. & I. Co.* v. *Klein*, 63 Kansas, 484; *Cole* v. *County Commissioners*, 78 Maine, 532; *Brown* v. *Gerald*, 100 Maine, 351; *Fallsberg Power & Mfg. Co.* v. *Alexander*, 101 Virginia, 98; *Berien Springs Water Power Co.* v. *Berien Circuit Judge*, 133 Michigan, 48; *Attorney General* v. *Eauclaire*, 37 Wisconsin, 400; *State ex rel. Harris* v. *Superior Court*, 42 Washington, 660; *Matter of Niagara Falls and Whirlpool Ry. Co.*, 108 N. Y. 375.

If a private use is combined with a public one in such a way that the two cannot or are not sought to be separated, then unquestionably the right of eminent domain could not be invoked to aid in the enterprise [citing many cases].

If it appear that the real purpose of the corporation is to acquire lands and streams needful, and to be used in carrying out a private enterprise, though a public use may be served, then the taking cannot be permitted. *Thom* v. *Georgia Mfg. & Public Service Co.*, 128 Georgia, 187; *Lorenz* v. *Jacob*, 63 California, 73; *In re Eureka Basin Warehouse & Mfg. Co.*, 96 N. Y. 42; *Lake Koen Nav. R. & I. Co.* v. *Klein*, 63 Kansas, 484.

The judgment of the state court on the question of public use should not be accepted in this case. We insist that the power to condemn cannot be exercised for the private purposes mentioned in the certificate of incorporation of the defendant in error, and in the petition for condemnation in this case, and that there is no separation of such purposes in this case. *State* v. *White River Power Co.*, 39 Washington, 648; *Varner* v. *Martin*, 21 W. Va. 548; *Board of Health* v. *Van Hoesen*, 87 Michigan, 533; *Gilmer* v. *Lime Point*, 18 California, 229.

As in *State* v. *White River Power Co.*, *supra*, so here, there is nothing to show that there is any present demand for 50,000 horse-power; the defendant in error has acquired no franchise to operate a street railway in any town; not one inch of the proposed line of railway has been sur-

veyed, staked out or located; it is under no obligation to furnish electricity to any person, or for any purpose, and for all that appears, it may take the property of the plaintiffs in error, generate electricity and do absolutely as it pleases with the power thus created. It is obvious that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned. This court cannot be bound by the decisions of state courts on what constitutes public use. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 159.

Mr. Charles W. Tillett, with whom *Mr. Horace L. Bomar*, *Mr. William A. Smith*, *Mr. James E. Shipman* and *Mr. Thomas C. Guthrie* were on the briefs, for defendant in error:

The fact that the Chief Justice certifies that federal questions are involved will not control, when the opinion of the court shows that no such question was involved. *Biddle* v. *Bellingham Co.*, 163 U. S. 63.

Whether the water right was available to the respondent for water power, and whether it was subject to condemnation, are purely questions of state law and not reviewable here. *Rundle* v. *Delaware & Raritan Canal Co.*, 14 How. 79; *St. Louis* v. *Rutz*, 138 U. S. 226; *St. Anthony Falls Waterpower Co.* v. *Water Commissioners*, 168 U. S. 349.

It was distinctly found, without objection or exception, that the Blue Ridge Company proposed to carry on a business of a public nature, and by turning to the original petition it will be found that this was the construction and operation of an interurban railway, and also the selling of electricity. It is difficult to see how it could be more clearly or conclusively shown that the purposes for which the power of eminent domain was invoked were public purposes and not private.

In North Carolina it is expressly held that a corporation may condemn for the public purposes of its charter, and if it applies the property to private uses the remedy is by *quo warranto*. *Wadsworth Land Co.* v. *Piedmont Traction Co.*, 162 N. Car. 314. See also *Walker* v. *Shasta Power Co.*, 160 Fed. Rep. 856; *Lake Koen Nav. R. & I. Co.* v. *Klein*, 63 Kansas, 484; *Cole* v. *County Commissioners*, 78 Maine, 532; *Brown* v. *Gerald*, 100 Maine, 351.

State ex rel. Harris v. *Superior Court*, 42 Washington, 660, in holding that sale of electricity is not a public business is overruled by *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Power Co.*, 240 U. S. 30.

In not a single instance has this court ever overruled or reversed the decision of a state court where any such court has held that a certain purpose was a public purpose, in the carrying out of which a corporation had the right to exercise the power of eminent domain. *Hairston* v. *Danville & Western R. R. Co.*, 208 U. S. 598. For a clear statement of the elements of public use see *Talbot* v. *Hudson*, 16 Gray, 417.

The regulation of the use of non-navigable streams is for the States. *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690; *Clark* v. *Nash*, 198 U. S. 361; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 159; *Head* v. *Amoskeag Co.*, 113 U. S. 9.

Where this stream flows the waters can only be used for power purposes, and to deny the right would block the development of that part of the State. The local conditions are to be considered in passing on the reasonableness and validity of the law allowing condemnation. *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527; *Wurts* v. *Hoagland*, 114 U. S. 229; *O'Neill* v. *Leamer*, 239 U. S. 244.

The mere fact that the use may be in part private does not prevent condemnation. *Hairston* v. *Danville & Western R. R. Co., supra.*

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a special proceeding to condemn the water rights incident to land belonging to the plaintiffs in error upon a bow of Green River. It has resulted in a judgment of condemnation subject to the payment of $10,000. The petitioner, the defendant in error, owns land on the side of the stream opposite to that of the plaintiffs in error, the respondents, and on both sides of the stream above and below that land. It proposes to cut off the bow by a dam above, and a steel flume that reënters the river below, that land, all upon its own ground. The respondents in their answer set up that the condemnation in this manner and for the purpose alleged would be the taking of private property without due process of law in violation of the Fourteenth Amendment, and we assume that the record discloses a technical right to come to this court. *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 193 U. S. 53, 62. *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 91. The decision of the Supreme Court in sustaining the condemnation discusses only matters of state law, but the Chief Justice, dissenting, intimated that the taking infringed the Constitution of the United States. 171 N. Car. 314.

The defendant in error, the Blue Ridge Interurban Railway Company, seems to have been incorporated with power to build and operate a street and interurban railway from Hendersonville through Saluda to a point on Green River, and to extend its lines to any other points not exceeding fifty miles from Saluda; also with power to maintain a water power plant on Green River for the purpose of generating electricity to be used in operating the railway; and with all other powers granted by the laws of the State to corporations of that character, including all rights of condemnation and the right to sell and dispose of the surplus electric power generated at its plant. It

has also a somewhat general authority to construct buildings and factories, operate machinery, &c., but limited, as we understand it, to acts expedient for the proper prosecution of the objects for which the corporation was created.

This taking, according to the findings before us, was with intent in good faith to carry on the public business authorized by the charter—that is to build and operate a street and interurban railway between points named. It is found further that it was necessary to generate electric power on Green River in order to operate the railway; that the present proceeding was for a public use, and that in order fully to develop the Blue Ridge Company's water power on Green River for the above-mentioned purposes, it was necessary to condemn the rights in question. Subject to provisos that were held to have been satisfied and that are not in question here, a statute of 1907 as amended in 1913 authorized street and interurban railways situated as the petitioner was to condemn water power. The objection that is urged against this statute and the charter as applied in the present case is that taking the whole water power is unnecessary for the purposes of the railway, that the plan is a covert device for selling the greater part of the power to mills, that this last is a private use, and that the two objects being so intermingled the taking must fall.

We are asked to go behind the finding that the taking was for a public use, on the ground that the charter authorizes the sale of surplus power, that the contemplated works will produce fifty thousand horse-power and that this, according to the evidence, is much more than will be needed for the railway. But the surplus is a matter of estimate and no reason is shown for our not accepting the findings below. We are in no way warranted in assuming that the sale of surplus power, if there is any, is the real object of the enterprise, or anything more than a

possible incident, necessary to prevent waste, of the primary public use. Furthermore if there are likely to be such sales, nothing appears sufficient to take the case out of the scope of a recent decision of this court. *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30, 32.

Judgment affirmed.

UNITED STATES *v.* DAVIS.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF HAWAII.

No. 621. Submitted April 11, 1917.—Decided April 23, 1917.

When the trial court besides holding the indictment defective for not following the language of the statute bases its decision also upon the ground that the statute does not apply to the facts alleged the decision as to the latter ground is reviewable under the Criminal Appeals Act.

A deputy clerk of the District Court of Hawaii who converts to his own use fees deposited by litigants to secure the payment of costs in bankruptcy and other cases is punishable under § 97 of the Penal Code.

THE case is stated in the opinion.

Mr. Assistant Attorney General Warren for the United States.

No brief filed for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment of a deputy clerk of the District Court of Hawaii for converting to his own use moneys of

persons other than the United States, deposited with the clerk to secure the payment of costs, by parties to proceedings other than proceedings in bankruptcy (counts 1, 3, 4, 7, 8) or by parties to proceedings in bankruptcy (counts 2, 5, 9). The sixth count charges the defendant, as clerk, with a like conversion. A demurrer to the indictment was sustained and the United States brings the case here. The judge assumed that the costs referred to in the several counts were fees of the clerk and, we presume, in case of proceedings in bankruptcy, fees collected for the referee and trustee, and also that the funds were funds to be accounted for by the clerk as debtor, not as trustee, under the decision in *United States* v. *Mason*, 218 U. S. 517, 531. He therefore was of opinion that the money was not within the purview of § 99 of the Penal Code, punishing the embezzlement of money belonging in the registry of the court, etc. The same reasoning led him to the conclusion that § 97 did not apply and it is the latter proposition that the United States seeks to have revised.

The judge objected that the charges in the indictment did not follow the language of § 97, but as he went on to consider whether the statute applied to the facts alleged we shall deal with the latter question. Concerning the sufficiency of the indictment in other aspects of course we have nothing to say. By § 97 "any officer of the United States, or any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, . . . whether the same shall be the money or property of the United States or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States," be fined or imprisoned or both. If, as assumed, the defendant was not punishable under § 99 he was punishable under this.

As pointed out by the Government the court below seems to have overlooked the fact that except in the sixth count the defendant is alleged to have been an assistant clerk, not the clerk. Whether it belonged to the United States or to the clerk the money was not his and the case is within the words just quoted from the act. We confine our decision to the point raised by the assignment of error; upon that the decision was wrong.

Judgment reversed.

MR. JUSTICE MCKENNA dissents for the reasons given by Judge Morrow.

SEABOARD AIR LINE RAILWAY *v.* LORICK.

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

No. 762. Argued April 10, 1917.—Decided April 23, 1917.

In an action in a state court under the Federal Employers' Liability Act, it was in evidence that the employee, in the line of his duty, was injured in an effort to raise a coupler without the aid of a jack; that a jack was the proper appliance for such work; that he had requested one of his superior repeatedly on former like occasions and that it had been promised him a few weeks before the accident. The court below having affirmed the action of the trial court in refusing to direct a verdict for defendant upon the grounds of assumption of risk and absence of negligence, *Held*, that there was no clear and palpable error such as would justify this court in disturbing the verdict for the plaintiff. *Baltimore & Ohio R. R. Co.* v. *Whitacre*, 242 U. S. 169, 171.

THE case is stated in the opinion.

Mr. J. B. S. Lyles for plaintiff in error.

Mr. Frank G. Tompkins, with whom *Mr. Geo. Bell Timmerman* was on the brief, for defendant in error.

Mr. Justice Brandeis delivered the opinion of the court.

The Federal Safety Appliance Acts (as supplemented by Act of April 14, 1910, c. 160, 36 Stat. 298, 299) prohibit a carrier engaged in interstate commerce from hauling a car with a defective coupler, if it can be repaired at the place where the defect is discovered. *United States* v. *Erie R. R. Co.,* 237 U. S. 402, 409. The Seaboard Air Line Railway received such a car at one of its yards. Lorick, the local car inspector and repairer, who discovered the defect, undertook to make the repairs, as was in the line of his duty. To do so it was necessary to raise the coupler; and for this a jack was the appropriate appliance. None having been furnished him, he sat down under the coupler and raised it with his shoulder which was thereby seriously strained. Occasion to make similar repairs had previously arisen at this yard at short intervals. Lorick had for this purpose repeatedly asked the chief car inspector for a jack; and a few weeks before the accident had been promised one. Lorick sued the company under the Federal Employers' Liability Act in a state court of South Carolina and testified to the facts above stated.

The case was tried twice before a jury and was twice reviewed by the Supreme Court of South Carolina. At the first trial the court directed a nonsuit on the ground that Lorick had assumed the risk. The Supreme Court set aside the nonsuit (102 S. Car. 276) holding that in view of the promise to supply a jack, the question of assumption of risk should have been left to the jury, citing *McGovern* v. *Philadelphia & Reading Ry. Co.,* 235 U. S. 389. At the second trial defendant asked for a directed verdict on the grounds both that Lorick had assumed the

risk and that there was no evidence of negligence on defendant's part. This request being refused, the case was submitted to the jury under instructions which were not objected to; and a verdict was rendered for plaintiff. Defendant's exceptions to the refusal to direct a verdict were overruled by the Supreme Court. The case comes here on writ of error where only these same alleged errors may be considered.

The appellate court was unanimous in holding that the trial court had properly left the case to the jury. No clear and palpable error is shown which would justify us in disturbing that ruling. *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464, 466; *Baltimore & Ohio R. R. Co.* v. *Whitacre*, 242 U. S. 169, 171. The judgment is

Affirmed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS dissent.

PENNSYLVANIA RAILROAD COMPANY *v.* OLIVIT BROTHERS.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

No. 577. Argued April 9, 10, 1917.—Decided April 30, 1917.

In an action against an interstate carrier for damage to goods shipped on a through bill of lading, the questions, (1) whether under the Carmack Amendment the lawful holder of the bill of lading may sue without proving ownership of the goods, (2) whether in view of stipulations in the bill of lading limiting liability there was evidence of negligence upon the part of the carrier sufficient to go to the jury, and (3) whether a recovery of freight paid the carrier by the shipper

was allowable,—are questions which this court may review in a case coming from a state court.

Under the Carmack Amendment the lawful holder of the bill of lading may sue the carrier for loss or damage to the goods without proving ownership of the goods; § 8 of the Interstate Commerce Act, 24 Stat. 382, in providing generally for liability of the carrier to "the person or persons injured" is not in conflict with this specific meaning of the amendment.

In an action against a carrier for damage to goods caused by delay in forwarding and delivery, where the carrier proves a strike and resulting congestion of traffic which, under the bill of lading, exempts it from liability if due care was observed to meet the situation, a refusal of the court to charge that the burden is on plaintiff to prove that such care was not exercised is at most harmless error when followed by instructions properly explaining that the carrier is not responsible for delay resulting from the strike, nor liable if not negligent in forwarding and delivering the goods, that such negligence is not presumed, and that the burden of proving it is on the plaintiff.

Where a carrier defended upon the ground that delay in forwarding and delivering goods was due to proven conditions of traffic beyond its control due to a strike, evidence that the goods were received for shipment after the strike was over and that the delay was caused by preferring other goods in delivery, *Held*, sufficient evidence of negligence to go to the jury.

When carrier and shipper agree that the basis for measuring damages for loss or damage to goods shall be their value at place and time of shipment, the amount of freight paid upon delivery may be added to the depreciation of such value caused by the carrier's default.

Allowing the shipper to recover the freight paid is not objectionable as a rebate, preference or discrimination, where there is no attempt to evade the Interstate Commerce Act.

Where goods are brought to destination in a damaged condition and sold at less than their value at shipment, the carrier is liable to refund freight paid if the damage resulted from its negligence.

88 N. J. L. 376, affirmed.

THE case is stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. Albert C. Wall*, *Mr. John A. Hartpence* and *Mr. John Spalding Flannery* were on the briefs, for plaintiff in error:

The case is governed by the Act to Regulate Commerce,

with amendments. The rights and immunities, duties and obligations of the parties, are therefore determined by federal law. *St. Louis &c. Ry. Co.* v. *McWhirter*, 229 U. S. 265, 274–277; *Norfolk Southern R. R. Co.* v. *Ferebee*, 238 U. S. 269–273; *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632; *Cincinnati &c. Ry. Co.* v. *Rankin*, 241 U. S. 319.

The right to sue follows the title to the goods. *Klesea* v. *Mfg. Co.*, 55 N. J. L. 320, 323; 3 Hutchinson on Carriers, 3d ed., §§ 1304, 1305, 1315, 1316; 6 Thomp. on Negligence, 2d ed., 1905, § 7422, p. 461; 4 Elliott on Railroads, 2d ed., § 1692, p. 755; *Levy* v. *Weir*, 77 N. Y. Supp. 917.

Under § 8 of the Act to Regulate Commerce it is to the person "injured" that the carrier is liable. This can only mean the owner, and the expression "lawful holder" in the Carmack Amendment should be interpreted accordingly.

The trial court erred as to the burden of proof.

There was no evidence of negligence to submit to the jury. The issue was confined to neglect in transporting the goods. This eliminates any inference of negligence from receipt of the goods after the strike was over. It was the right and indeed the duty of defendant to deliver the more perishable freight, peaches, as well as the watermelons. 2 Hutchinson on Carriers, 3d ed., § 649.

After the defendant had proved the excepted cause in the bill of lading as the proximate cause of the delay, the burden was on the plaintiff to show negligence of the defendant in the handling under that excepted cause, or that the damage could have been averted, notwithstanding the existence of the excepted cause, by the use of reasonable skill and diligence. *Clark* v. *Barnwell*, 12 How. 272; *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 427; *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632; *Michaels* v. *Adams Express Co.*, 71 N. J. L. 41; *Transportation Co.* v. *Downer*, 11 Wall. 130; *The Glenlochy*, 226 Fed. Rep. 971, 972. In *New Orleans & Northeastern R. R. Co.* v. *National Rice Milling*

Co., 234 U. S. 80, there was a distinct finding of negligence by the state court based on evidence.

Mr. Edward P. Stout, with whom *Mr. George S. Hobart* was on the briefs, for defendant in error:

There is no federal question. As to proof of ownership the Carmack Amendment is decisive. As to negligence, the verdict supported by the decision of the state Supreme Court is a conclusive finding of fact binding on this court. *Baltimore & Ohio R. R. Co.* v. *Whitacre*, 242 U. S. 169; *Baugham* v. *New York, Phila. & Norfolk R. R. Co.*, 241 U. S. 237; *Seaboard Air Line Ry.* v. *Renn*, 241 U. S. 290; *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464; *New Orleans & Northeastern R. R. Co.* v. *National Rice Milling Co.*, 234 U. S. 80, and other cases.

The contrary cases cited by defendant involve construction of federal law, infringement of federal right by a rule of practice, etc. As to plaintiff's right to sue as lawful holder of the bills of lading, see *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 506; *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639.

Section 8 of the Commerce Act creates liability for violations of that act; the Carmack Amendment creates liability for loss or damage to goods. The two things are distinct and § 8 has no application to this case. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186, 208.

There was no error as to burden of proof.

If there is any evidence of negligence which should have been submitted to the jury, it is immaterial whether the testimony came from the defendant's or the plaintiff's witnesses. *New Orleans & Northeastern R. R. Co.* v. *National Rice Milling Co.*, 234 U. S. 80, 86.

The strike was not the proximate cause of the plaintiff's damages.

When a carrier relies upon the excepted cause, either at common law or under contract, it must show, in order to

excuse itself, that the excepted cause is the sole and proximate cause of the injury. *New Brunswick Steamboat Co.* v. *Tiers*, 24 N. J. L. 697; *Reid* v. *Evansville &c. R. Co.*, 10 Ind. App. 385; *Merritt* v. *Earle*, 29 N. Y. 115; *King* v. *Shepard*, 3 Story (U. S.) 349, 14 Fed. Cas. No. 7804.

The negligence of the defendant was clearly established.

It is obvious from the acts and conduct of the defendant that it was for the jury to say whether the defendant performed the duty imposed upon it by law to deliver the watermelons within a reasonable time. *Carr* v. *D., L. & W. R. R. Co.*, 81 N. J. L. 532; *Burr* v. *Adams Express Co.*, 71 N. J. L. 263, 269.

It was the defendant's duty to inform the shippers that it would not deliver the watermelons within a reasonable time. Having failed to do this, it must answer for the consequences of the delay. *Helliwell* v. *Grand Trunk Ry. Co.*, 7 Fed. Rep. 68; *Tierney* v. *N. Y. C. & H. R. R. Co.*, 76 N. Y. 305; *Carr* v. *D., L. & W. R. R. Co.*, 81 N. J. L. 532.

Plaintiffs were entitled to recover the freight paid by them as a part of their damages. The true meaning of a stipulation in a bill of lading limiting the value of the property to the place and time of shipment is discussed in the following cases and the courts held that where the property was injured by the carrier the freight paid by the shipper should be recovered as part of the damages. *Pearse* v. *Quebec S. S. Co.*, 24 Fed. Rep. 285; *Brown* v. *Cunard S. S. Co.*, 147 Massachusetts, 58; *Pierce* v. *Southern Pacific Co.*, 120 California, 156; *Horner* v. *Missouri Pacific Ry. Co.*, 70 Mo. App. 285; *Kelly* v. *Southern Ry. Co.*, 84 S. Car. 252; *New York, Phila. & Norfolk R. R. Co.* v. *Peninsula Produce Exchange*, 240 U. S. 34.

Mr. Justice McKenna delivered the opinion of the court.

This is a consolidation of actions, each action expressed in a number of counts and each count praying for the re-

covery of the sum of $500 for a carload of watermelons received, as it is alleged, and accepted by the railroad company to be transported and delivered within a reasonable time to plaintiff at Jersey City, New Jersey, and that by reason of the failure so to transport and deliver a large number of the melons were wholly lost and the remainder delivered in a bad and damaged condition.

The car numbers are given, the places of receipt, all of which were in North Carolina, and the dates all between July 26 and August 2, 1912, both dates inclusive.

The answers of defendant denied the allegations of the complaint and set up besides the following defenses: If the property came into the hands of defendant for the purpose of transportation it did so as to each and every count of the complaint under the terms and conditions of a certain bill of lading issued to plaintiff by the initial carrier of the property pursuant to the provisions of the Interstate Commerce Act constituting an express agreement whereby the defendant was to be relieved from any and all liability for damage to the property resulting from delay in transportation and delivery if the delay was caused by (a) a strike or strikes among defendant's employees; (b) an accumulation of freight at any point; (c) or by any other cause or causes over which defendant had no control.

It is alleged that a strike did take place among defendant's employees and continued from July 9, 1912, to the twenty-first of that month, which strike was the cause of the alleged delay; also that an accumulation of freight did occur at Jersey City which continued from July 9 to August 15 and beyond.

It is further alleged as a defense that no claim for the loss or damage to the property was made in writing, as required by the respective bills of lading, of defendant at the point of delivery of the property within ten days after its delivery, or after due time for its delivery to plaintiff,

though it was agreed between plaintiff and defendant that such claim should be made at the time, place and in the manner mentioned.

Nor was there any claim for such loss or damage made in writing to defendant at the point of delivery or point of origin within four months after the delivery of the property or after a reasonable time for delivery, though it was expressly agreed that such claim should be made at the time, place and in the manner mentioned and if not so made defendant should not be liable.

It will be observed, therefore, that the basis of the action is that certain carloads of watermelons were received for shipment by defendant at certain places in North Carolina for transportation to and delivery at Jersey City, New Jersey, and that defendant failed to transport and deliver the same within a reasonable time, in consequence of which a large number of the melons were lost and the others delivered in a bad condition.

In point of fact the melons were not delivered to defendant in North Carolina but in such State to a carrier with which defendant had connections and were delivered to defendant at Edgemoor, Delaware, to be transported from there to Jersey City, and were so transported.

The melons were transported on through bills of lading issued by the initial carrier, which contained the stipulations upon which the defenses are based, to-wit: (1) That the delay in transportation and delivery was caused by a strike accompanied by demonstrations of violence over which defendant had no control and against which it could not contend; (2) that there was a congestion of freight due to causes beyond its control; and (3) that claims for damages were not made within the time required by the bills of lading—that is, within ten days in some cases, thirty days in others, and four months in others.

The ultimate basis of these defenses is the Carmack

Amendment to the Interstate Commerce Act. What this amendment requires of shipper and carrier becomes the question in the case.

The case involves, as we have said, a number of actions tried together and submitted to one jury. Plaintiff was plaintiff in all of them and obtained judgment which was affirmed by the Court of Errors and Appeals on the authority of another case of like kind.

There was a stipulation which concentrated the issues and removed from controversy the amounts involved. For instance, as to the latter it was stipulated that the value of the melons at the time and place of shipment was $13,465.00 and that they were sold at the place of delivery for $8,895.00, being the best price which could be obtained for them owing to their damaged condition. And it was further stipulated that the freight charges paid by plaintiff amounted to the sum of $5,484.59.

As to the other elements it was stipulated that the melons were received and accepted by defendant at Edgemoor, Delaware, for transportation to Jersey City, New Jersey, in accordance with the bills of lading; that the usual and customary time for transportation was about seven hours under the most favorable circumstances; that plaintiff was at the time of bringing the actions and is now the lawful holder of the bills of lading; that the melons were received at Edgemoor by defendant in apparently good order but were in a damaged condition when delivered to plaintiff at defendant's delivery yard at Jersey City, and that claims for damages were duly made in writing as required by the bills of lading.

The cases are designated as the "64-count case," the "13-count case," and the "11-count case." All of the bills of lading in the "64-count case," one in the "13-count case" and four in the "11-count case" contain a provision exempting the carrier from liability for loss or damage resulting "from riots or strikes." Twelve of the

bills of lading in the "13-count case" and seven in the "11-count case" provide that the carriers should "not be liable for any injury to, or decay of, fruits and vegetables, or other perishable freight, due to detention or delay occasioned by an accumulation of freight at any point . . . or to any other causes over which the carriers have no control." And there is difference in times of demands.

A motion is made to dismiss on the ground that no federal question appears in the record or, alternatively, if one appears, it is without merit. In support of the contentions it is said the questions in the case are: (1) Whether, it being stipulated that plaintiff was the holder of the bills of lading, it was the owner of the melons at the time the shipments were made; (2) whether there was any evidence of negligence of defendant which should have been submitted to the jury, and (3) whether plaintiff was entitled to recover the freight paid by it.

The first question involves the Carmack Amendment and, considering it, the Court of Errors and Appeals decided that "any lawful holder of a bill of lading issued by the initial carrier pursuant to the Carmack Amendment . . . upon receiving property for interstate transportation, may maintain an action for any loss, damage or injury to such property caused by any connecting carrier to whom the goods are delivered." Citing *Adams Express Co.* v. *Croninger*, 226 U. S. 491.

We are not prepared to say that a contest of this view is frivolous, and the motion to dismiss is denied. Besides, it is contended that the shipments having been in interstate commerce they are subject to and governed by the Interstate Commerce Act.

Coming to the merits of the question, however, we concur with the Court of Errors and Appeals in its construction of the Carmack Amendment. It provides: "That any common carrier . . . receiving property for transportation from a point in one State to a point in

another State shall issue a receipt or bill of lading therefor and shall be liable to the *lawful holder* [italics ours] thereof for any loss, damage, or injury to such property caused by it. . . ."

The crucial words are "lawful holder." Defendant contends that they mean "the owner or some one shown to be duly authorized to act for him in a way that would render any judgment recovered in such an action against the carrier *res adjudicata* in any other action." And § 8 of the Interstate Commerce Act is referred to as fortifying such view. It provides that "such common carrier shall be liable to the person or persons injured" in consequence of any violations of the act.[1]

To accept this view would make § 8 contradict the Carmack Amendment (§ 20), it having only a general purpose, whereas the purpose of the amendment is special and definitely expresses the lawful holder of the bill of lading to be the person to whom the carrier shall be liable "for any loss, damage, or injury" to property caused by it. *Adams Express Co.* v. *Croninger*, 226 U. S. 491.

The next contention of defendant is that there was error in applying the burden of proof upon the motion to direct a verdict for defendant.

The grounds of the contention urged at the trial and now repeated are that by certain of the bills of lading the carrier is relieved from liability in case of a strike, by certain others in case of delays occasioned by causes beyond

[1] "Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, 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." 24 Stat. 382.

its control, and by others in case of an accumulation of freight proved to be a matter beyond the control of the carrier. And these causes having been proved, it is contended the carriers were brought within the protection of the stipulation and it became incumbent upon plaintiff to show that defendant in one way or another failed "to handle the situation at that time in a way which was free from negligence." It was and is contended that the whole issue was shifted "from the general allegation of negligence to the allegation that the injury was caused because the defendant failed to perform the duty which it was obliged to perform under the law." Counsel concede that the whole question was whether when the proof was that "there was the excepting cause," defendant did what it "should have done to meet the situation," and the burden was upon the plaintiff to show that the carrier did not do what it "ought to have done."

The court rejected the contention. It replied that merely proving an accumulation of freight or a strike did not shift the burden of proof, but that to complete its defense the carrier must show that the strike or the accumulation of freight caused the delay in executing its contract to deliver the property.

If we should grant that the ruling was technically erroneous its effect in the case can hardly be estimated in view of the instructions of the court to the jury entirely considered. They are too long to quote, but we may say of them that they were very carefully expressed to give the jury the elements of decision.

The court told the jury that defendant had proved a cause beyond its control, that is, a strike, and at the request of defendant further instructed that if no negligence on the defendant's part was shown defendant was not liable and that the burden of proving such negligence was upon the plaintiff. A like instruction was given as to any cause beyond defendant's control, including an

accumulation of freight, if reasonable care was exercised by defendant to relieve the situation, that negligence was not to be presumed but must be affirmatively proved and that the burden of proving it was upon plaintiff. "The question is," the court said, "whether or not, in the light of what occurred over there, the defendant in this case has been shown by the greater weight of the evidence to have been negligent in the forwarding and the delivery of this freight. If it has been, why these plaintiffs are entitled to recover and to have you assess their damages, unless some of these other defenses have been made out by the greater weight of the evidence. If the defendant has not been shown to have been negligent in the particular indicated, why then manifestly the defendant is not responsible and the verdict in all the cases where these rules apply would have to be for the defendant."

Defendant, however, contended that there was not sufficient evidence of negligence to justify the submission of the case to the jury. Counsel, in attempted support of the contention, select certain elements in the case, ignoring others and their probative value. That is, counsel ignore the fact of which there was evidence that the melons were received for shipment after the strike was over, and the fact of which there was evidence that the delay in delivery was caused by the use by defendant of tracks where melons were usually delivered for the delivery of peaches usually delivered elsewhere, to the exclusion of melons, which were placed in storage tracks at the "meadows."

The fourth contention is that plaintiff should not recover as part of its damages the freight paid upon delivery at destination.

The contention is rested upon the prohibition of the Interstate Commerce Act against deviation from the filed tariffs and schedules and against rebates and undue preferences and discriminations. It is not asserted in the

present case that there was an evasion of the statute or an attempt to evade but that the possibility of such result makes the recovery of freight illegal. It is urged, besides, that the melons were carried to destination and were there sold by plaintiff or on its account and that freight thereby accrued and was properly paid. For which 2 Hutchinson on Carriers, 3d ed., § 802, is cited. But the cited authority shows that to be the rule when the loss or damage results from no fault or negligence of the carrier. And, besides, to the contentions the plaintiff opposes the terms of the bills of lading, they providing that the amount of loss or damage for which a carrier is liable "shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment. . . ."

Some of the bills of lading do not contain this provision, but it was agreed at the trial that the proper measure of damages was to be computed upon the basis of the value of the property at the place and time of shipment and that such measure should be read into all of the bills of lading. As plaintiff further says, to recover the damages sustained by it based upon this value, plaintiff must receive from defendant the difference between this value and the proceeds of the sale, and the freight paid. In this we concur, and therefore there was no error in including in the recovery such freight. *Shea* v. *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 63 Minnesota, 228; *Davis* v. *New York, Ontario & Western Ry. Co.*, 70 Minnesota, 37, 44; *Horner* v. *Missouri Pacific Ry. Co.*, 70 Mo. App. 285, 294; *Tibbits & Son* v. *Rock Island & Peoria Ry. Co.*, 49 Ill. App. Reps. 567, 572. The plaintiff was no more than made whole.

Affirmed.

PENNSYLVANIA RAILROAD COMPANY *v.* CARR ET AL., PARTNERS, DOING BUSINESS AS ISAAC W. CARR & COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

No. 578. Argued April 9, 10, 1917.—Decided April 30, 1917.

Decided on authority of *Pennsylvania R. R. Co.* v. *Olivit Brothers, ante,* 574.
88 N. J. L. 235, affirmed.

THE case is stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. Albert C. Wall, Mr. John A. Hartpence* and *Mr. John Spalding Flannery* were on the briefs, for plaintiff in error.

Mr. Edward P. Stout, with whom *Mr. George S. Hobart* was on the briefs, for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action in seven counts praying for damages caused by delay in the delivery of certain watermelons received for shipment and accepted by an initial carrier at certain places in the State of Georgia to be transported to Jersey City, New Jersey, and transferred in good condition to defendant's line at Edgemoor, Delaware, a point on the route.

A violation of the contract of carriage is charged in that the melons were not transported within a reasonable time, by reason of which a large part of them was lost and the rest delivered in a damaged condition.

The defenses were denials of the allegations of the complaint and an averment that the delay in delivery was caused by a strike on the road, for which cause, under the bills of lading issued by the initial carrier pursuant to the Interstate Commerce Act, defendant was exempt from liability for damages. This was one of the defenses in No. 577, with which this case was submitted.

Judgment was entered for plaintiff by consent and that plaintiff's damages be assessed at $1,841.13, "reserving to defendant the right to reduce said judgment in accordance with its exceptions and objections pertaining to the measure of damages and without prejudice to defendant to appeal from said judgment pursuant to law."

The judgment was affirmed by the Court of Errors and Appeals. 88 N. J. L. 235. Indeed, it was upon the opinion in the latter case that the Court of Errors and Appeals decided No. 577.

On the authority of No. 577 the motion to dismiss which is made is overruled and the judgment is

Affirmed.

LOTT *v.* PITTMAN, SHERIFF OF WARE COUNTY, GEORGIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 894. Submitted April 13, 1917.—Decided April 30, 1917.

A writ of error to review a sentence of murder was heard by the Supreme Court of Georgia *in banc* and, the six justices being evenly divided, the sentence was affirmed pursuant to Georgia Code of 1910, § 6116. Three of the justices participating did not hear the argument, and one of them, voting affirmance, was not then appointed, but after his appointment and before the affirmance notice

was given affording the convicted person opportunity for a reargument, of which he did not avail himself. *Held*, that the affirmance was not in violation of due process of law.

A right of appeal is not essential to due process under the Fourteenth Amendment, and where it is allowed the State may prescribe the conditions and procedure.

THE case is stated in the opinion.

Mr. John Randolph Cooper and *Mr. T. A. Wallace* for appellant.

Mr. Clifford Walker, Attorney General of the State of Georgia, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Petition in *habeas corpus*, in which appellant was petitioner, which presents the following facts, stated narratively:

Appellant is confined in the common jail of Ware County in execution of a life sentence upon conviction for murder, the sentence having been affirmed by the Supreme Court of the State. The court was evenly divided in opinion and therefore the judgment was affirmed by operation of law under the provision of that part of § 6116 of the Code of Georgia of 1910 which is as follows: "In all cases decided by a full bench of six Justices, the concurrence of a majority shall be essential to a judgment of reversal; and if the Justices are evenly divided, the judgment of the court below shall stand affirmed."

Three of the judges did not hear the argument but participated in the opinion of the court.

The case was argued before the Supreme Court on June 3, 1916, and when it was argued Justice Gilbert was not even a member of the court but was appointed in

September, 1916, to fill the place made vacant by the death of a member of the court.

Upon these facts it is averred that appellant was denied a right guaranteed by the Constitution and laws of the United States, the benefit of counsel and right to be heard, which abridged his privileges and immunities as a citizen of the United States, deprived him of liberty without due process of law and of his right to have a judicial determination of his guilt or innocence by a reviewing court.

Attached to the petition was a transcript of the record in the trial court and the Supreme Court.

His prayer to be discharged was denied. An appeal was allowed, the court certifying that there was probable cause.

It appears from the transcript of the record that the judgment affirming the sentence was rendered after Justice Gilbert had taken his seat as a member of the court and that if he had not taken part the judgment would have been reversed. It also appears that after the judgment a petition for rehearing was filed which attacked the statute permitting a judgment of affirmance by a divided court upon the same grounds as those alleged in the petition for *habeas corpus* and now urged here, and also attacked the judgment for the participation therein of Justice Gilbert.

It was stated in the petition for rehearing as follows:

"This case having been heard before three Justices by oral argument, or rather Wash Lott having appeared by attorneys, the case having been passed upon by the Court as a whole consisting of the entire six Judges, and the defendant not having been heard before the said six Judges either in person or by attorneys, movant begs leave to call the Court's attention to Section 6115 of the Code of 1910, which is as follows:

"'Whenever any Justice in either division differs from the other two as to any particular case pending be-

fore it, such case shall go to the Court as a whole, or any one or more Justices of the other division may be argued before one division only, it may, upon its own motion, but not otherwise, order a reargument therein.'"[1]

It was suggested that the court "hear reargument in this case on its own motion" because the court had overlooked the section of the code quoted above and the provision of the Constitution of the United States which gives assurance that no person shall be deprived of his liberty without due process of law.

The petition was filed November 24th and overruled December 19, 1916. Upon what consideration it does not appear; but it may be presumed that the court was of opinion that the statute of the State had been adequately complied with. The Attorney General asserts in his brief, and there is no denial by appellant, that after the appointment of Justice Gilbert notice was given to parties and counsel in all cases then pending in which argument had been heard prior to his appointment and which were to be passed on by him, setting a time for reargument of such cases. The appellant, therefore, was given an opportunity to be heard. Besides the right of appeal is not essential to due process. *Reetz* v. *Michigan*, 188 U. S. 505, 508. It was, therefore, competent for the State to prescribe the procedure and conditions, and the cases cited by appellant are not apposite.

Order affirmed.

---

[1] REPORTER'S NOTE: This section was erroneously codified in the Code of 1910. It should read as follows: "Whenever any Justice in either division differs from the other two as to any particular case pending before it, such case shall go to the court as a whole for decision; and whenever it decides a case which has been argued before one division only, it may, upon its own motion, but not otherwise, order a reargument therein." See Code of 1911, § 6115, and note.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* STARBIRD, ADMINISTRATOR OF MILLER.

STARBIRD, ADMINISTRATOR OF MILLER, *v.* ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

Nos. 275, 796. Argued December 5, 6, 1916.—Decided April 30, 1917.

Section 237 of the Judicial Code is in effect but a reënactment of § 25 of the Judiciary Act of September 24, 1789, and § 709 of the Revised Statutes.

In an action against an initial carrier for damage caused by its negligence and negligence of connecting carriers to goods of the plaintiff shipped in interstate commerce on a through bill of lading, the rights and liabilities of the parties are governed by the Carmack Amendment (§ 20 of the Act of June 29, 1906, c. 3591, 34 Stat. 584); and claims of the carrier that failure to give notice as required by the bill of lading relieved it from liability, and of the shipper that the requirement was illegal but was substantially complied with, are claims of rights arising under that statute as to which the decision of a state court may be here reviewed under § 237 of the Judicial Code.

When a carrier sued in a state court for damages to an interstate shipment alleges in its answer that notice was not given as required by the bill of lading, the attention of the court is sufficiently challenged to a claim of federal right based on a federal statute, viz., the Carmack Amendment.

And when in such case the state court decides that the requirement of the bill of lading is not controlling, it necessarily denies the claim of federal right, in the sense of Judicial Code, § 237.

A stipulation in a bill of lading that the carrier's liability for damage to goods shall be contingent upon notice being given by the consignee is valid if the terms are reasonable; and whether they are reasonable will depend on the circumstances in each case.

What constitutes a reasonable time in which notice may be required by the carrier depends on the nature of the goods; in the case of very

perishable fruit, thirty-six hours after the consignee has been notified of arrival at the place of delivery is not unreasonable.

Neither is it unreasonable to require that the notice shall be in writing in a case where by force of the Carmack Amendment the initial carrier is made liable for the defaults of connecting carriers, and the delivering carrier is the initial carrier's agent for the purpose of receiving the notice.

In a case of interstate shipment of fruit governed by the Carmack Amendment, before passage of the Act of March 4, 1915, c. 176, 38 Stat. 1196, the bill of lading stipulated that claims for damages must be reported by the consignee in writing to the delivering line within thirty-six hours after notice to the consignee of the arrival of the freight at the place of delivery, and that if such notice were not there given neither the initial carrier nor any of the connecting or intermediate carriers should be liable. The consignee after learning of the arrival of the fruit in badly damaged condition had time and opportunity to serve notice on the agent of the delivering carrier but did not do so. *Held:* (1) That the stipulation merely required the consignee to give notice within the time fixed of intention to claim damages, without ascertaining and specifying the amount.

(2) That the stipulation was reasonable and that non-compliance therewith excused the initial carrier from liability.

(3) That verbal notice to a dock master of the delivering carrier did not satisfy the stipulation.

118 Arkansas, 485, affirmed in part and reversed in part.

THE case is stated in the opinion.

Mr. Thomas B. Pryor, with whom *Mr. Edward J. White* was on the briefs, for the St. Louis, Iron Mountain & Southern Ry. Co.

Mr. Robert A. Rowe, with whom *Mr. Charles D. Folsom* was on the briefs, for Starbird.

MR. JUSTICE DAY delivered the opinion of the court.

A motion is made to dismiss the writ of error upon the ground that no federal question was properly raised in the state court. The disposition of this motion requires a consideration of § 237 of the Judicial Code, which section

is in effect but a re-enactment of § 25 of the Judiciary Act of September 24, 1789, and § 709 of the Revised Statutes of the United States.

This suit was brought by Miller, and revived by his administrator, to recover against the initial carrier, the St. Louis, Iron Mountain & Southern Railway Company, for its negligence and that of connecting carriers in failing to properly refrigerate certain carloads of peaches, shipped from a point in Arkansas to the City of New York over the lines of the initial and connecting carriers, and in the last-named city delivered upon the dock of the Pennsylvania Company, and found to be in a bad condition. Each shipment was interstate and upon a through bill of lading, the bill containing, among other things, a stipulation that the carrier should not be liable for damages unless claims for damages were reported to the delivering line within thirty-six hours after the consignee had been notified of the arrival of the freight at the place of delivery. In the answer filed in the case, making one of the issues upon which the case was tried and decided, the defendant set up this clause in the bill of lading and the failure of the plaintiff to comply with it.

Without now reciting other provisions of § 237, it is enough to say that a case is reviewable in this court where any title, right, privilege or immunity is claimed under a statute of the United States, and the decision is against the title, right, privilege or immunity especially set up or claimed by either party under such statute.

We have, therefore, to determine three propositions: (1) Was there a right involved which is the creation of a federal statute? (2) Was it sufficiently set up and called to the attention of the state court so as to be "especially set up or claimed," within the meaning of the act? (3) Was the decision against the right set up or claimed under the federal statute? If these requisites are complied with, the case is reviewable here.

1. On June 29, 1906, Congress passed the so-called Hepburn Act (34 Stat. 584), by § 20 of which it undertook to provide for the liability of carriers in interstate commerce, and to subject them, as to interstate shipments, to certain obligations which should supersede the varying requirements of the States through which interstate transportation might be conducted. The construction of this act came before this court in *Adams Express Company* v. *Croninger*, 226 U. S. 491, and upon full consideration it was held that the effect of the Carmack Amendment was to supersede all legislation in the particular States, and to embrace the liability of the carrier in interstate transportation. It was there said that almost every detail of the subject had been completely covered, and that there could be no rational doubt that Congress intended to take possession of the subject and lay down rules and regulations upon which the parties might rely and have their rights determined by a uniform rule of obligation. Among other things, the act required that the initial carrier should issue a receipt or bill of lading whenever it received property for transportation from a point in one State to a point in another State, and the initial carrier was made liable, not only for the results of its own negligence, but also for loss, damage or injury to the property occasioned by any common carrier, railroad or transportation company to which the property should be delivered and over whose line or lines the property might pass, and it was provided that no contract, receipt, rule or regulation should exempt such initial carrier from the liability imposed by the act.

As the shipment in this case was interstate, there can be no question that, since the decision in the *Croninger Case, supra*, the parties are held to the responsibilities imposed by the federal law, to the exclusion of all other rules of obligation. Since the Carmack Amendment, the carrier in this case is liable only under the terms of that

act of Congress, and the action against it to recover on a through bill of lading for the negligence of connecting carriers as well as of itself, was founded on that Amendment. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186, 196.

This principle has been so frequently recognized in the recent decisions of this court that it is only necessary to refer to some of them. In *Southern Railway Co.* v. *Prescott*, 240 U. S. 632, 636, 639, this court said:

"As the shipment was interstate, and the bill of lading was issued pursuant to the Federal Act, the question whether the contract thus set forth had been discharged was necessarily a Federal question. . . . Viewing the contract set forth in the bill of lading as still in force, the measure of liability under it must also be regarded as a Federal question. As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements of state legislation and decisions."

In *Southern Express Company* v. *Byers*, 240 U. S. 612, 614, this court said:

"Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading and common law principles accepted and enforced by the Federal courts."

To the same effect, *Northern Pacific Ry. Co.* v. *Wall*, 241 U. S. 87, 91, 92; *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190; *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin*, 241 U. S. 319.

2. As to the part of § 237 which deals with rights of this character, it requires that the right, privilege, etc., must be especially set up or claimed in order to make a decision

of the state court a proper subject of examination by writ of error from this court.

It would be superfluous to review the many decisions in which this court has had occasion to consider the effect of this provision, which has been in the law ever since the passage of the Judiciary Act of 1789 in practically the terms in which it is now embodied in § 237.

It is manifest that the object of the provision is to require that the alleged right of a federal character must in some way be drawn to the attention of the state court so that it may know, or from the nature of the pleadings be held to have known, that a federal right was before it for adjudication.

The Carmack Amendment is a federal statute regulating interstate commerce. It was passed under the power conferred by the Constitution upon Congress to regulate such commerce and is applicable throughout the United States and at once became the rule of law governing such shipments in all the courts of the country. *Claflin* v. *Houseman*, 93 U. S. 130, 136; *Second Employers' Liability Cases*, 223 U. S. 1.

Since the passage of the Carmack Amendment, the state court must be held to have known that interstate shipments were covered by a uniform federal rule which required the issuance of a bill of lading, and that that bill of lading contained the entire contract upon which the responsibilities of the parties rested. This is the result not only of our own holdings, but is universally held in the state courts.[1]

---

[1] *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Faulkner*, 111 Arkansas, 430; *Gamble-Robinson Com. Co.* v. *Union Pacific Ry. Co.*, 262 Illinois, 400; *Johnson Grain Co.* v. *C., B. & Q. R. R. Co.*, 177 Mo. App. 194; *Clingan* v. *C. C. C. & St. L. Ry. Co.*, 184 Ill. App. 202; *Kansas City & Memphis Ry. Co.* v. *Oakley*, 115 Arkansas, 20; *Mitchell* v. *Atlantic Coast Line R. R. Co.*, 15 Ga. App. 797; *Bailey* v. *Missouri Pacific Ry. Co.*, 184 Mo. App. 457; *Spada* v. *Penn-*

The federal right is not required to be pleaded in any special or particular form. It is enough that it be relied upon and in a proper manner called to the attention of the court. Section 237 of the Judicial Code does not require that the statute creating the federal right shall be especially set up. The courts take judicial notice of the statute. It is the right, privilege or immunity of federal origin which must be brought to the attention of the state court.

This question has been frequently dealt with in the decisions of this court; under the Judiciary Act of 1789 a case arose which required a consideration of § 25 and the requirements to be observed in order to bring a case within its provisions,—*Crowell* v. *Randell*, 10 Pet. 368. In that case the requirements of the Judiciary Act and the former decisions of this court were reviewed by Mr. Justice Story. Dealing with this feature of the law, he said:

"That it is not necessary, that the question should appear on the record to have been raised, and the decision made in direct and positive terms, *ipsissimis verbis;* but that it is sufficient, if it appears by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to have induced the judgment."

It is to be noticed, as to the manner of pleading a federal right, that Mr. Justice Story observed that all that is

---

sylvania R. R. Co., 86 N. J. L. 187; *St. L. & S. F. Ry. Co.* v. *Bilby*, 35 Oklahoma, 589; *M., K. & T. Ry. Co.* v. *Hailey*, 156 S. W. Rep. 1119 (Texas); *American Silver Mfg. Co.* v. *Wabash Ry. Co.*, 156 S. W. Rep. 830 (Missouri); *Wabash R. R. Co.* v. *Priddy*, 179 Indiana, 483; *Atlantic Coast Line R. R. Co.* v. *Thomasville Live Stock Co.*, 13 Ga. App. 102; *Ford* v. *Chicago, R. I. & P. Ry. Co.*, 123 Minnesota, 87; *Joseph* v. *C., B. & Q. Ry. Co.*, 157 S. W. Rep. 837 (Missouri); *Barstow* v. *N. Y., N. H. & H. R. R. Co.*, 143 N. Y. Supp. 983; *M., K. & T. Ry. Co.* v. *Walston*, 37 Oklahoma, 517; *St. Louis & San Francisco R. R. Co.* v. *Zickafoose*, 39 Oklahoma, 302; *Texas & Pacific Ry. Co.* v. *Langbehn*, 158 S. W. Rep. 244 (Texas); *Cincinnati, N. O. & Texas Pac. Ry. Co.* v. *Rankin*, 153 Kentucky, 730.

essential is that it must appear by clear and necessary intendment to have been raised. When the answer in this case set up the requirement of the bill of lading upon which the suit was brought, and the failure to comply with it, that was all that was necessary to fairly challenge the attention of the state court to rights existing by virtue of a federal statute as to carriers in interstate commerce.

In speaking of the necessity of especially setting up federal rights under § 709 of the Revised Statutes, now § 237 of the Judicial Code, this court said, in *Green Bay & Mississippi Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 67:

"But no particular form of words and phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court.

". . . In *Roby* v. *Colehour*, 146 U. S. 153, 159, it was said that 'our jurisdiction being invoked, upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment.' 'If it appear from the record, by clear and necessary intendment, that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient.' *Powell* v. *Brunswick County*, 150 U. S. 433, 440; *Sayward* v. *Denny*, 158 U. S. 180; *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226."

In *Ferris* v. *Frohman*, 223 U. S. 424, it appears that the complainant asserted a copyright in a certain play under

the common law and defendant set up the copyright for the play, the performance of which was sought to be enjoined, which copyright was issued under the laws of the United States. The state court enjoined the defendant from using that copyright, and it was held that was sufficient to show that a federal right had been set up and denied, as the copyright of the defendant was derived under the federal law. That the controversy raised a federal question was held by this court and the contrary contention disposed of in the following language:

"The defendants in error contest the jurisdiction of this court upon the ground that the bill was based entirely upon a common-law right of property, and insist that the upholding of this right by the state court raises no Federal question. But the complainants sued, not simply to maintain their common-law right in the original play, but by virtue of it to prevent the defendant from producing the adapted play which he had copyrighted under the laws of the United States. They challenged a right which the copyright, if sustainable, secured. R. S. 4952. It was necessary for them to make the challenge, for they could not succeed unless this right were denied. Ferris stood upon the copyright. That it had been obtained was alleged in the bill, was averred in the answer, and was found by the court. The fact that the court reached its conclusion in favor of the complainants, by a consideration, on common-law principles, of their property in the original play does not alter the effect of the decision. By the decree Ferris was permanently enjoined 'from in any manner using, . . . selling, producing, or performing . . . the said defendant's copyrighted play hereinbefore referred to for any purpose.' The decision thus denied to him a Federal right specially set up and claimed within the meaning of § 709 of the Revised Statutes of the United States. This court, therefore, has jurisdiction. *C., B. & Q. Ry. Co.* v. *Drainage Commissioners*, 200 U. S.

561, 580, 581; *McGuire* v. *Commonwealth*, 3 Wall. 382, 385; *Anderson* v. *Carkins*, 135 U. S. 483, 486; *Shively* v. *Bowlby*, 152 U. S. 1, 9; *Northern Pacific R. R. Co.* v. *Colburn*, 164 U. S. 383, 385, 386; *Green Bay &c. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 67, 68."

In *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 258, the defendants were enjoined from using their corporate name, and it was held that, as this right or privilege was derived under a statute of the United States, authorizing the incorporation, the case was reviewable here under § 237 of the Judicial Code.

In *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McWhirter*, 229 U. S. 265, where a suit was brought to recover for a death occurring while plaintiff's intestate was engaged in interstate commerce, it was held that the question of the amount of evidence necessary to establish a liability was inherently of a federal character, and that this court might review the decision of the state court for that reason.

3. The other requisite essential to bring the case within § 237 of the Judicial Code is that the alleged federal right must be denied. It has never been required that a federal right must be denied in terms, but it has been uniformly held that it is sufficient if the state court necessarily denied it in the judgment rendered. If the plaintiff, in bringing this suit to recover against the initial carrier, not only for its own negligence but for that of the intervening carriers in the failure to care for and deliver the several cars of peaches, had said in terms that the suit was thus brought upon a through bill of lading because of the federal statute giving the right to thus prosecute the action, no one would doubt that the federal question was brought to the attention of the state court; when the plaintiff set forth facts which necessarily showed that a suit could only be maintained because of rights given under the Carmack Amendment, upon a bill of lading required by that

act, it was unnecessary to further label the cause of action by specific reference to the federal statute. *Jones National Bank* v. *Yates*, 240 U. S. 541, 550, 551. So, when the defendant set up the breach of the through bill of lading, and insisted that it had not been complied with, he would have made his case no stronger for the purposes of review here had specific reference been made to the federal statute which made this bill of lading the sole rule of obligation between the parties.

This record presented a suit which showed that it was necessarily brought under rights conferred by a federal act; the defendant specifically pleaded the failure to keep the obligation of the contract whose force was binding by virtue of such act; and the state court, in stating in its decision that this bill of lading had been issued, and would be controlling in the absence of special facts which it found as to the effect of verbal notice given to certain agents of the Pennsylvania Company in New York, necessarily denied the contention of federal right made by the defendant that the provision of the bill of lading was conclusive of the rights of the parties in this case and required written notice within thirty-six hours after notice to the consignee of the delivery of the goods.

For these reasons the case is properly reviewable here.

The stipulation reads:

"Claims for damages must be reported by consignee, in writing, to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery. If such notice is not there given, neither this Company nor any of the connecting or intermediate carriers shall be liable."

Five of the cars arrived at Jersey City and were lightered over to Pier 29 in the evening, where they were opened and unloaded by the longshoremen of the Pennsylvania Company. The record shows that the course of business at the dock where these peaches were delivered is: At

midnight a bulletin is put up showing the car numbers and consignees. At one o'clock in the morning the dock is opened to the dealers, usually present in large numbers, who then go upon it and find their shipments. Miller testified that he had to get trucks to take the peaches to his store and then had to get extra men to sort and repack them so that they could be sold the following day, and that he could not tell within two or three days and until his bookkeeper had figured up what was going to be lost on each car, what the amount of the damage was, and in some cases it would be three or four or five days after the car arrived before he knew.

Miller further testified that by reason of a warning from the Health Department that it would destroy ensuing shipments of fruit if they arrived in as bad condition as those in preceding cars, he had the railroad company, upon the arrival of the other five cars in Jersey City, unload them and take the peaches to the Merchants Refrigerating Company's plant, where he had them sorted and repacked and then loaded on cars and taken over to Pier 29 for sale. He testified that he was notified of the cars' arrival and went over to the Refrigerating Company; that he put a lot of men at work sorting and repacking the peaches; that it would take from two to four days to do this and another day to put them on board the cars and get them over to Pier 29 and sold and it would be another day before the reports of sale could be made up.

The state court held that the stipulation, in view of the perishable character of these shipments, was a reasonable one, but as there was proof in the case to show the knowledge of the superintendent of the dock of the Pennsylvania Company, where delivery was made, as to five cars of peaches, that as to such cars the necessity of notice was dispensed with, notwithstanding the requirement of the bill of lading. As to the other cars involved in the cross-writ of error, Case No. 796, the court held that the only

knowledge of the condition of the peaches was that of longshoremen working on the dock and not under duty to inspect the fruit, and that as to such cars the action must fail.

Stipulations of this character have not infrequently been inserted in bills of lading, and where reasonable in their terms have been sustained by this court. *Express Company* v. *Caldwell*, 21 Wall. 264; *Queen of the Pacific*, 180 U. S. 49. Whether such stipulations are reasonable or not depends on the circumstances of each case. *Pennsylvania Co.* v. *Shearer*, 75 Ohio St. 249. We agree with the Supreme Court of Arkansas that, in view of the highly perishable nature of this shipment and the necessity of giving notice promptly in order that the carrier might have an opportunity to examine the same and determine the nature and extent of the injury thereto before the fruit was sold or destroyed, the stipulation requiring notice of such intention within the time named in the bill was not unreasonable. What constitutes reasonable time in which notice may be required must depend on the nature of the freight, and if such notice is to be of service in cases like the present it must be given promptly. In *Northern Pacific Ry. Co.* v. *Wall*, *supra*, this court dealt with the requirement of a bill of lading that the shipper must, as a condition precedent to his right of recovery for injury to cattle in transit, give notice in writing to some officer or agent of the initial carrier before the cattle were removed from the place of destination, and held that such requirement must be complied with by giving notice to the agent of the delivering carrier, as the Carmack Amendment makes such carrier for this purpose the agent of the initial carrier. And see *Chesapeake & Ohio Ry. Co.* v. *McLaughlin*, 242 U. S. 142. The Carmack Amendment requires the receiving carrier to issue a through bill of lading and makes that bill of lading the contract of shipment, and the initial carrier is made liable for injuries in

the course of transit over connecting lines. The requirement that notice in writing of a claim for damages shall be given in such cases to the delivering carrier, who is the agent of the initial carrier for the purpose of completing the shipment, is but reasonable. In *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co., supra,* it was held that a stipulation of this kind was complied with when the notice in writing was given by telegram within the time named in the bill of lading.

It is not difficult for the consignee to comply with a requirement of this kind, and give notice in writing to the agent of the delivering carrier. Such notice puts in permanent form the evidence of an intention to claim damages and will serve to call the attention of the carrier to the condition of the freight, and enable it to make such investigation as the facts of the case require while there is opportunity so to do.

In this case no attempt was made to give such notice in writing to the agent of the delivering carrier. The record shows the delivering carrier had a freight agent at the place of delivery in charge of the docks upon which the peaches were delivered, and he testifies without contradiction that no such notice was given to him; that he was acquainted with Adam Miller, the consignee, a commission merchant in New York City; and that he never heard of any claim for damages until after the beginning of the present suit. The fact that the peaches were greatly depreciated was known to the consignee very shortly after arrival and within sufficient time to have enabled him to give notice in writing within the time fixed of his intention to claim damages.

It is true that the record contains testimony tending to show that it would take more than thirty-six hours to separate the good peaches from the bad, and to re-crate and sell the good ones. But the bill of lading in this case only requires that "claims for damages must be *reported*

by the consignee, in writing, to the delivering line" within the time named. This bill of lading contained no stipulation requiring a specific claim to be filed within thirty-six hours fixing the amount of damages to be claimed. It was entirely consistent with this requirement, on discovery of the bad condition of the peaches, to have given notice within the time stipulated of the intention to make a claim for damages, although the exact amount of the claim might not have been ascertained. This would have given an opportunity for the delivering carrier to make the examination which it was the principal purpose of the stipulation to afford. *Northern Pacific Ry. Co.* v. *Wall, supra; St. Louis &c. R. R. Co.* v. *Keller,* 90 Arkansas, 308, 313. As was said in the *Keller Case:* "The contract of shipment in this case specifically provided that, before a recovery could be had, a notice in writing must be given of loss or damage within thirty hours after the arrival of the peaches at destination and their delivery; that is to say, a notice of the intention to claim damages must be so given. And in this case such notice was not given." Compliance with the requirement of the bill of lading in this respect would leave a right of recovery within the period named by the statute of limitations if the shipper has a good cause of action. *Pennsylvania Co.* v. *Shearer,* 75 Ohio St., *supra,* 254.

We find nothing unreasonable in the stipulation concerning notice, and there was no attempt made to comply with it. We therefore think the Supreme Court of Arkansas erred in holding that verbal notice to the dockmaster of the condition of the peaches was a compliance with the terms of the contract.

We may note that this case arose before the passage of the Act of March 4, 1915, 38 Stat. 1196, regulating, among other things, this feature of a bill of lading issued under the Carmack Amendment.

On cross-writ of error, No. 796, a reversal is sought of

the judgment of the Supreme Court of Arkansas as to the five cars where the damaged condition of the peaches was shown to be known to the longshoremen. This cross-writ involves the liability of the carrier under the bill of lading and it is assigned for error that the stipulation in question violates the act of Congress known as the Hepburn Act and the Carmack Amendment, and there are other reasons assigned for the alleged invalidity of the stipulation in the bill of lading. This court has jurisdiction upon the cross-writ. As to these cars, we think the conclusion reached by the Supreme Court of Arkansas was a correct one, and upon the cross-writ of error the judgment is affirmed. As to No. 275, the writ sued out by the railroad company, the judgment of the Supreme Court of Arkansas is reversed, and the cause remanded to that court for further proceedings not inconsistent with the opinion of this court.

Reversed, in part, and *Affirmed*, in part.

UNITED STATES *v.* MOREHEAD.

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

No. 685. Argued March 14, 1917.—Decided April 30, 1917.

A charge of perjury may be based upon a valid regulation of the Land Department requiring an affidavit, if the oath be taken "before a competent tribunal, officer or person." *United States* v. *Smull*, 236 U. S. 405.

The Land Department being expressly charged with the duty of enforcing the public land laws by appropriate regulations, its regulations in that regard, when duly promulgated, must be deemed valid if they are not unreasonable, inappropriate, or inconsistent with the acts of Congress.

A regulation of the Land Department requiring applicants for soldiers'

homesteads under Rev. Stats., §§ 2304 *et seq.*, to make oath in their declaratory statements that their claims are for their exclusive use and benefit, for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person, and that agents filing such statements have no right or interest, direct or indirect, in the filing thereof, is a valid regulation, not adding to the conditions of the statute but serving to effectuate its purpose.

The regulation of the Department providing that soldiers' declaratory statements, when filed by agent, may be executed before any officer having a seal and authorized to administer oaths generally, is appropriate and valid, and an oath to such a statement taken before a state notary or clerk of court pursuant to such regulation violates the federal perjury statute, if the statement is material and false.

THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful, with whom *Mr. S. W. Williams* was on the brief, for the United States.

Mr. W. B. Sands for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Morehead was indicted under § 37 of the Criminal Code for conspiring with others to commit an offense against the United States. The offense contemplated by the conspirators is subornation of perjury (Criminal Code, § 126) in connection with soldiers' declaratory statements, to be filed by defendant as agent, covering public lands under the Homestead Law. The perjury set forth in the indictment consists in false swearing before notaries public and clerks of state courts to declaratory statements. The parts of the statement alleged to be false are those which declare:

(1) That the claim is made for his [the applicant's] exclusive use and benefit, for the purpose of actual settle-

ment and cultivation, and not either directly or indirectly for the use or benefit of any other person.

(2) That the agent has no right or interest, direct or indirect, in the filing of such declaratory statement.

The District Court sustained a demurrer on the ground that the indictment did not charge a crime, holding that there was no law which required affidavits to soldiers' declaratory statements; that the Land Department was not authorized to exact them; that consequently no law "authorizes an oath to be administered" to such affidavits; and as perjury is possible only when an oath is authorized to be administered, the procuring of these false oaths could not be subornation of perjury, nor an agreement to secure them a conspiracy to suborn perjury. The case comes here on writ of error under the Criminal Appeals Act (March 2, 1907, c. 2564, 34 Stat. 1246).

The Homestead Law (Rev. Stats., §§ 2304–2309, embodying Act of June 8, 1872, c. 338, 17 Stat. 333), does not prescribe whether or not an affidavit shall accompany a soldier's declaratory statement. The affidavit is prescribed by a regulation of the Commissioner of the General Land Office, promulgated with the approval of the Secretary of the Interior.[1] It is clear that a charge of perjury

[1] The material part of the Regulation of October 11, 1910 (39 L. D. 291, 294–5) is as follows:

"The soldiers' declaratory statement, if filed in person, must be accompanied by the prescribed evidence of military service and the oath of the person filing the same, stating his residence and postoffice address, and setting forth that the claim is made for his exclusive use and benefit for the purpose of actual settlement and cultivation and not, either directly or indirectly, for the use or benefit of any other person; . . .

"In case of filing a soldier's declaratory statement by agent, the oath must further declare the name and authority of the agent and the date of the power of attorney, or other instrument creating the agency, adding that the name of the agent was inserted therein before its execution. It should also state in terms that the agent has no right or interest, direct or indirect, in the filing of such declaratory statement.

may be based upon a valid regulation of the General Land Office requiring an affidavit if the oath be taken "before a competent tribunal, officer or person." *United States* v. *Smull*, 236 U. S. 405. The question obviously arising here is whether the law authorized the oath to be administered. Another question—whether it was administered by a competent tribunal, officer or person—was treated by both parties as requiring decision. Assuming without specially determining the occasion for passing upon the second question, we proceed to consider both.

1. *Whether an affidavit may be required to a soldiers' homestead declaratory statement.*

The Homestead Law [1] gives to every soldier who served

"The agent must file (in addition to his power of attorney) his own oath to the effect that he has no interest, either present or prospective, direct or indirect, in the claim; that the same is filed for the sole benefit of the soldier, and that no arrangement has been made whereby said agent has been empowered at any future time to sell or relinquish such claim, either as agent or by filing an original relinquishment of the claimant.

"Where a soldier's declaratory statement is filed in person, the affidavit of the soldier or sailor must be sworn to before either the register or the receiver, or before a United States commissioner, or a United States court commissioner, or judge, or clerk of a court of record in the county or land district in which the land sought is situated. Where a declaratory statement is filed by an agent, the agent's affidavit must be executed before one of the officers above mentioned, but the soldier's affidavit may be executed before any officer having a seal and authorized to administer oaths generally, and not necessarily within the land district in which the land is situated."

[1] Rev. Stats., § 2304:

"Every private soldier . . . who has served in the Army of the United States during the recent rebellion . . . shall . . . be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres . . . subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead, and filing his declaratory statement, within which to make his entry and commence his settlement and improvement."

in the Army of the United States during the War of the Rebellion for ninety days, was honorably discharged and remained loyal to the Government, the right, upon certain conditions, to enter upon 160 acres of the public land as a homestead and receive a patent therefor. To comply with these conditions the applicant must make actual entry,[1] settlement and improvement; and he must, on applying to enter the land, make and file the affidavit, as provided in Rev. Stats., § 2290, that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person. Furthermore, in order to obtain a certificate or patent, he must, under Rev. Stats., § 2291, make proof of his residence for the full period and an affidavit "that no part of such land has been alienated." The filing of a declaratory statement is not a necessary step in acquiring title to land. It relates to a privilege, akin to pre-emption, by which he may secure, prior to the entry under § 2290, a preferential right to acquire, under the homestead law, the particular tract located on. The privilege is exercised by filing the declaratory statement with the register; and if exercised, lapses unless within six months thereafter, the soldier makes entry and actually commences settlement and improvement. See *Charles Hotaling*, 3 L. D. 17, 20; *Stephens* v. *Ray*, 5 L. D. 133, 134. To render this privilege readily available to soldiers living at a distance, authority is given (Rev. Stats., § 2309) [2] to "enter upon

[1] The term entry is used in the statutes, regulations and decisions in several senses; sometimes to designate the initiatory proceeding whereby an inchoate right or privilege is acquired; sometimes as referring to final entries or proof; sometimes as referring to the proceeding as a whole. *Dealy* v. *United States*, 152 U. S. 539, 545; *Stearns* v. *United States*, 152 Fed. Rep. 900, 907; *United States* v. *Northern Pacific Ry. Co.*, 204 Fed. Rep. 485.

[2] Rev. Stats., § 2309:

"Every soldier, sailor, marine, officer, or other person coming within the provisions of section twenty-three hundred and four, may, as well

the homestead by filing a declaratory statement," "as well by an agent as in person." Thus the soldier can be assured of the selection of an advantageous homestead before perfecting his plan for removing to his new home.

It is a matter of common knowledge that this special privilege, granted to facilitate the acquisition by soldiers of homesteads in grateful recognition of patriotic service, was soon perverted into an instrument of fraud. Soldiers' declaratory statements, acquired by so-called agents in large numbers, became the subject of extensive speculation. They were used as a means of pre-empting choice lands for a period of six months with a view merely to selling relinquishments of locations to persons desiring to acquire public lands under the pre-emption or general homestead laws. See 1 L. D. 79. To stay this abuse the General Land Office issued, on December 15, 1882, the circular concerning "Soldiers' Homestead Declaratory Statements," (1 L. D. 36) [1] prescribing requirements

---

by an agent as in person, enter upon such homestead by filing a *declaratory statement, as in pre-emption cases;* but such claimant in person shall within the time prescribed make his actual entry, commence settlements and improvements on the same, and thereafter fulfill all the requirements of law."

[1] "SOLDIERS' HOMESTEAD DECLARATORY STATEMENTS."

CIRCULAR.

"*Commissioner McFarland to registers and receivers, December 15, 1882.*

"In view of extensive frauds in the matter of declaratory statements of homestead applicants under Sections 2304 and 2309 of the Revised Statutes, the privilege conferred by the filing of such claims having been made the occasion of barter and sale, without attempt on the part of the soldier to comply with the statute by making formal entry at the district office, and commencement of settlement upon the land within the prescribed period of six months, the following regulations are prescribed for the admission of such filings:

"1. Proof of qualification as an honorably discharged soldier must be furnished in accordance with existing regulations in case of entry by soldiers who make direct homestead application without availing them-

which have since remained in force and are embodied in substance in the regulation of October 11, 1910.

Defendant contends that this regulation, which has been enforced continuously for nearly thirty-five years, is invalid. Since the Land Department is expressly charged with the duty of enforcing the public land laws by appropriate regulations [1] and the regulation in question was

---

selves of the preliminary filing. Oath of the soldier, setting forth his residence and post-office address, must accompany the filing, to the effect that the claim is made for his exclusive use and benefit, for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; and it must also be shown by such oath that he has not theretofore either made a homestead entry or filed a declaratory statement under the homestead law.

"2. Where the declaratory statement is offered for filing by an agent under Section 2309, the oath must further declare the name and authority of such agent, giving the date of the power of attorney or other instrument creating the agency, and also aver that the name was inserted therein before execution. It will be observed that with the filing of the declaratory statement the power of the agent, under the law, is at an end. He has thereafter no right or control with respect to the matter nor over the land selected, and has no authority to relinquish the claim or do any other act in the premises. The further declaration of the statute is express, that 'such claimant in person shall within the time prescribed make his actual entry, commence settlements and improvements on the same, and thereafter fulfill all the requirements of law.' Nevertheless, the oath of the soldier and the power of attorney should show that such is the understanding of the matter, and he should swear in terms that such agent has no right or interest direct or indirect in the filing of such declaratory statement. . . ."

[1] Rev. Stats., § 441:

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

Rev. Stats., § 453:

"The Commissioner of the General Land-Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, . . ."

duly promulgated, the assertion of its invalidity must be predicated either upon its being inconsistent with the statutes or upon its being in itself unreasonable or inappropriate. That the requirement of the soldier's affidavit to the facts essential to the existence of any right of the applicant under the law is both reasonable and appropriate, can scarcely be doubted. *United States* v. *Smull*, 236 U. S. 405, 411; *United States* v. *Bailey*, 9 Pet. 238, 255. But defendant urges that the regulation is inconsistent with the statute in that it adds to the requirements of the statute still another condition to be performed before the soldier can acquire his homestead; and hence is legislation, not regulation. But the regulation does not add a new requirement in exacting the affidavit, as in *Williamson* v. *United States*, 207 U. S. 425, 458–462. It merely demands appropriate evidence that the proceeding is initiated—as the statute requires it must be throughout conducted—in good faith for the single purpose of acquiring a homestead.

Great stress is laid upon the reference to "pre-emption cases" in Rev. Stats., § 2309, which provides that the soldier "may, as well by an agent as in person, enter upon such homestead by filing a declaratory statement, as in pre-emption cases." In proceedings under the pre-emption laws (Rev. Stats., §§ 2257–2288, repealed by Act

---

Rev. Stats., § 161:

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

Rev. Stats., § 2478:

"The Commissioner of the General Land-Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title [Title xxxii—The Public Lands] not otherwise specially provided for."

of March 3, 1891, c. 561, 26 Stat. 1095) an affidavit was not required either by the statute or by regulation (see 10 L. D. 687); and it is said that it cannot, therefore, be required under the provisions for soldiers in the Homestead Law. But the reference in the latter statute carries no such implication. It was inserted for a different purpose. The general homestead law does not give the privilege of securing, in advance of formal entry, a preferential right to a particular location. That is, it gives no right to prior selection; and none accrues from prior occupation save such as is given by § 3 of the Act of May 14, 1880, c. 89, 21 Stat. 140. Nor does the pre-emption law give a privilege to acquire, *merely* by selection, a preferential right to a particular parcel of land. But under it, the person who actually "settles and improves" land, may in advance of entry under Rev. Stats., § 2262, acquire a preferential right over others, to the particular parcel, by filing with the register within thirty days thereafter (Rev. Stats., § 2264) "a written statement describing the land settled upon." To that "written statement" the "declaratory statement" provided for by the provision for soldiers in the Homestead Law may be likened; but the conditions under which it is filed are very dissimilar. The pre-emptioner must personally before "filing" have actually entered upon the land, must have commenced settlement and improvement—acts which in themselves furnish evidence that the proceeding has been initiated in good faith. The soldier homesteader, on the other hand, need do nothing whatever to obtain a six months' preferential right save file the declaratory statement, and that may be done by an agent—a situation calling for extrinsic evidence by affidavit of the applicant's good faith. Good reasons thus exist for a difference in requirements in the two classes of cases: but the power of the Land Department to require an affidavit to the declaratory statement even in pre-emption cases, as it did to declaratory state-

ments under the Coal Land Law, seems not to have been questioned. (Rev. Stats., §§ 2348, 2349; 1 L. D. 687, paragraphs 28, 33.) The regulation calling for an affidavit to a soldier's declaratory statement under the Homestead Law, unlike that considered in *United States* v. *George*, 228 U. S. 14, is thus a regulation entirely consistent with the statutory provisions; and being also appropriate, is valid.

2. *Whether state officers are authorized to administer the oath.*

The purpose of Congress, in allowing filings to be made by an agent, was to facilitate the acquisitions of homesteads by soldiers living at a distance from the land to be settled on. To their declaratory statements the several statutes [1] which provide for the administering of oaths by registers and receivers, or by the clerks of courts or United States commissioners in the district wherein the land is situated are obviously not exclusively applicable, if applicable at all. And plainly the provision of Rev. Stats., § 2293, relating to affidavits before the commanding officers of soldiers actually engaged in service, is inapplicable. The requirement of an affidavit to the declaratory statement, to be made by soldiers living elsewhere than in the land district, can be complied with only if an oath before some officer other than those specifically named in those statutes is recognized as being within the authority of law. It follows that to carry out the duties imposed by law, the Land Department was called upon to make appropriate provision for the administering of oaths in such cases; and the provision that soldiers' declaratory statements, when filed by agent, "may be executed before any officer having a seal and authorized to administer oaths generally," is both appropriate and "not inconsist-

[1] Rev. Stats., §§ 2246, 2290, 2294; Act of June 9, 1880, c. 164, 21 Stat. 169; Act of May 26, 1890, c. 355, 26 Stat. 121; Act of March 11, 1902, c. 182, 32 Stat. 63; Act of March 4, 1904, c. 394, 33 Stat. 59.

ent with law." Ever since the decision in *United States* v. *Bailey*, 9 Pet. 238, 255, it has been held that an oath administered by a state magistrate, in pursuance of a valid regulation of one of the departments of the Federal Government, though without express authority from Congress, subjects the affiant to the penalties of the federal statute against false swearing. See *Caha* v. *United States*, 152 U. S. 211, 218.

The indictment charges a crime under the laws of the United States. Judgment of the District Court is reversed and the case is remanded for further proceedings in conformity with this opinion.

It is so ordered.

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL. *v.* LAYTON.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 840. Argued April 11, 1917.—Decided April 30, 1917.

The Georgia Employers' Liability Act, Georgia Code of 1911, § 2783, eliminates the defenses of assumed risk and contributory negligence when a violation of the Federal Safety Appliance Acts contributes to cause the injury.

Under the Federal Safety Appliance Acts carriers in Interstate Commerce are liable in damages to their employees, injured in the discharge of duty, whenever the failure to comply with those acts is the proximate cause of injury and without reference to the physical position occupied by the employee or the nature of the work upon which he is engaged at the time when the injury occurs.

So *held* in a case where failure of couplers to work automatically in a switching operation resulted in a collision of cars from one of which the plaintiff was thrown to his injury while preparing to release brakes.

145 Georgia, 886, affirmed.

THE case is stated in the opinion.

Mr. Sanders McDaniel, with whom *Mr. H. C. Peeples*, *Mr. P. H. Brewster* and *Mr. E. R. Black* were on the briefs, for plaintiffs in error.

Mr. Marion Smith for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

The plaintiff below was a switchman in the employ of the defendants when he suffered the injury for which he recovered the judgment which was affirmed by the Supreme Court of Georgia, and which is here for review on writ of error.

The facts essential to an understanding of the question presented for decision are as follows:

A train of many cars standing on a switch was separated by about two car lengths from five cars on the same track loaded with coal. An engine, pushing a stock car ahead of it, came into the switch, and failed in an attempt to couple to the five cars but struck them with such force that, although the engine with the car attached stopped within half a car length, the five loaded cars were driven over the two intervening car lengths and struck so violently against the standing train that the plaintiff, who was on one of the five cars for the purpose of releasing the brakes, was thrown to the track, with the result that his right arm was crushed by the wheels and was amputated below the elbow.

The recovery in the case was on the first count of the petition, which alleges that the defendants were carriers of interstate commerce and that they were negligent, among other things, in permitting the use of the car attached to the engine and of the car to which the attempt was made to couple it, without such cars being equipped

with automatic couplers, which would couple by impact, as required by law, the claim being that if the cars had coupled when they came together the five cars of coal would not have run down against the others, causing the shock which threw the plaintiff under the wheels.

The purpose of this allegation with respect to automatic couplers was to make applicable to the case the Georgia Employers' Liability Act, which provides that an injured employee shall not be held guilty of either contributory negligence or of having assumed the risk when the violation of any statute enacted for his safety contributed to his injury.

The defendants admit that they were interstate carriers of commerce and that the plaintiff was in the performance of his duty when he was thrown from the car, as he claims, or fell, as the defendants claim, but they deny all allegations of negligence.

On this state of pleading and of fact the court charged the jury that before the plaintiff could recover on his allegation that the cars were not properly equipped with automatic couplers "he must have shown to your satisfaction by a preponderance of the evidence" either that the cars had never been equipped with proper couplers or that, if they had been so equipped, they were in such condition that they would not couple automatically by impact and that such failure to so equip them contributed to cause the injury.

Upon this charge of the court the verdict was against the defendant and on it is based the only claim of error of sufficient substance to be noticed.

It is admitted by the defendants that the reference in the Georgia Employers' Liability Act to "any statute enacted for the safety of employees" is to the Federal Safety Appliance Act and that the charge is a proper one if that act, as amended, is applicable to a switchman engaged as the plaintiff was when he was injured, but the

claim is that it is not so applicable because it is intended only for the benefit of employees injured when between cars for the purpose of coupling or uncoupling them. This claim is based wholly upon the expression "without the necessity of men going between the ends of cars," following the automatic coupler requirement of § 2 of the Act of 1893, and it is urged in argument that this case is ruled by *St. Louis & San Francisco R. R. Co.* v. *Conarty*, 238 U. S. 243. In that case, however, it was not claimed that the collision resulting in the injury complained of was proximately attributable to a violation of the Safety Appliance Acts, and therefore the claim made for it cannot be allowed.

The declared purpose of the Safety Appliance Act of 1893 (c. 196, 27 Stat. 531), and of the amendatory Acts of 1903 and of 1910 is "to promote the safety of employees . . . upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers . . . and for other purposes," and at the time the plaintiff was injured these acts made it unlawful for any carrier engaged in interstate commerce to use on its railroad any car not so equipped. *Southern Railway Co.* v. *United States*, 222 U. S. 20; *Southern Railway Co.* v. *Railroad Commission of Indiana*, 236 U. S. 439. By this legislation the qualified duty of the common law is expanded into an absolute duty with respect to car couplers and if the defendant railroad companies used cars which did not comply with the standard thus prescribed they violated the plain prohibition of the law, and there arose from that violation a liability to make compensation to any employee who was injured because of it. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281, 295; *Chicago, Burlington & Quincy Ry. Co.* v. *United States*, 220 U. S. 559; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33; *Illinois Central R. R. Co.* v. *Williams*, 242 U. S. 462.

While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employees only when so engaged. The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty. The jury found that the plaintiff's case came within this interpretation of the statute and the judgment of the Supreme Court of Georgia must be

Affirmed.

STATE OF WYOMING *v.* STATE OF COLORADO ET AL.

IN EQUITY.

No. 7, Original. Argued December 6, 7, 8, 1916.—Order entered March 6, 1917.

It is ordered that this case be restored to the docket for re-argument.

1. Counsel are requested to specially direct their attention to the rule which they deem should properly be applied to a solution of the controversy for decision: That is, whether the rights asserted are to be tested and determined solely by the application of the general principles of prior appropriation without regard to state boundaries, or whether on the contrary the general principles of prior appropriation are subject to be restricted or their operation limited in this case by state lines, and if so, by what principles, under that assumption, the case is to be controlled.

2. They are moreover requested not merely by generalizations to state the facts relied upon, but specifically by careful reference to the pages of the record, and to group them under the various propositions relied upon including the extent of the use of water in both States when the work complained of was begun and when this suit was commenced, and the extent of appropriation made or authorized in either or both States since its commencement.

3. In view of the legislation of Congress concerning reclamation and the extensive public works which have been constructed under that legislation and the possible consequences which may result from the rule to be applied in the solution of this controversy, the clerk is instructed to notify the Attorney General of the United States of this order for re-argument.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

ORDER: IT IS ORDERED BY THE COURT that Section 4 of Rule 37 of the Rules of this Court be amended so as to read as follows, viz:

4. An application for a writ of certiorari will be deemed in time when the petition therefor, accompanied by the printed record and brief, is filed within the period prescribed by law: Provided this is followed by submitting the petition in open Court on some motion day not later than the first one which follows a period of four weeks after such filing. Notice of the date of submission and copies of the petition and brief must be served as required by Section 3 of this Rule.

Promulgated March 26, 1917.[1]

---

[1] See 241 U. S. 635.

DECISIONS PER CURIAM FROM FEBRUARY 6, 1917, TO APRIL 30, 1917, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. —. Original. *Ex parte:* IN THE MATTER OF SAMUEL WINTNER, PETITIONER. Submitted January 29, 1917. Decided March 6, 1917. Motion for leave to file petition for writ of mandamus denied. *Mr. Harold Remington* for petitioner.

No. 23. ELOIT A. DE PASS ET AL., APPELLANTS, *v.* UNITED STATES. Appeal from the Court of Claims. Submitted January 25, 1917. Decided March 6, 1917. *Per Curiam.* Judgment affirmed upon the authority of *Dooley* v. *United States*, 182 U. S. 222; *Armstrong* v. *United States*, 182 U. S. 243; *Fourteen Diamond Rings*, 183 U. S. 176; *De Lima* v. *Bidwell*, 182 U. S. 1. *Mr. Henry M. Ward* and *Mr. H. W. Van Dyke* for appellants. *Mr. Assistant Attorney General Warren* for appellee.

No. 236. SOUTHERN SURETY COMPANY, PLAINTIFF IN ERROR, *v.* BOARD OF COUNTY COMMISSIONERS OF OKLAHOMA COUNTY, ETC. In error to the Supreme Court of the State of Oklahoma. Motion to dismiss submitted February 5, 1917. Decided March 6, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112, 118; *Kansas City Southern Ry. Co.* v. *Henrie*, 214 U. S. 491; *Appleby* v. *Buffalo*, 221 U. S. 524; *Manhattan Life Insurance Co.* v. *Cohen*, 234 U. S. 123, 134. (2) *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600;

Deming v. *Carlisle Packing Co.*, 226 U. S. 102, 105; *Stewart* v. *Kansas City*, 239 U. S. 14. *Mr. Arthur G. Moseley* for plaintiff in error. *Mr. Charles J. Kappler* for defendant in error.

No. 454. Chesapeake & Ohio Ry. Co., Plaintiff in Error, *v.* John B. Shaw. In error to the Court of Appeals of the State of Kentucky. Submitted January 30, 1917. Decided March 6, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Chicago Junction Ry. Co.* v. *King*, 222 U. S. 222; *Seaboard Air Line Ry.* v. *Padgett*, 236 U. S. 668; *Louisville & Nashville R. R. Co.* v. *Parker*, 242 U. S. 14; *Baltimore & Ohio R. R. Co.* v. *Whitacre*, 242 U. S. 169. *Mr. E. L. Worthington*, *Mr. W. D. Cochran* and *Mr. LeWright Browning* for plaintiff in error. *Mr. Allan D. Cole* for defendant in error.

No. 466. Nashville, Chattanooga & St. Louis Railway, Plaintiff in Error, *v.* Toy Henry. In error to the Court of Appeals of the State of Kentucky. Motion to dismiss or affirm or place on the summary docket submitted March 6, 1917. Decided March 12, 1917. *Per Curiam.* Judgment affirmed with costs and 5 per cent. damages upon the authority of *Chicago Junction Ry. Co.* v. *King*, 222 U. S. 222; *Seaboard Air Line Ry.* v. *Padgett*, 236 U. S. 668; *Baltimore & Ohio R. R. Co.* v. *Whitacre*, 242 U. S. 169. *Mr. D. H. Hughes* and *Mr. Charles K. Wheeler* for plaintiff in error. *Mr. Samuel A. Anderson* for defendant in error.

No. 467. Nashville, Chattanooga & St. Louis Railway, Plaintiff in Error, *v.* George Banks. In error

to the Court of Appeals of the State of Kentucky. Motion to dismiss or affirm or place on the summary docket submitted March 6, 1917. Decided March 12, 1917. *Per Curiam.* Judgment affirmed with costs and 5 per cent. damages upon the authority of *Chicago Junction Ry. Co.* v. *King*, 222 U. S. 222; *Seaboard Air Line Ry.* v. *Padgett*, 236 U. S. 668; *Baltimore & Ohio R. R. Co.* v. *Whitacre*, 242 U. S. 169. *Mr. D. H. Hughes* and *Mr. Charles K. Wheeler* for plaintiff in error. *Mr. Samuel A. Anderson* for defendant in error.

No. 381. RAMON PASTOR DIAZ, PLAINTIFF IN ERROR, *v.* PEOPLE OF PORTO RICO; and

No. 382. LUIS ABELLA AND PEDRO G. GOICO, PLAINTIFFS IN ERROR, *v.* PEOPLE OF PORTO RICO. In error to the Supreme Court of Porto Rico. Motion to dismiss or affirm submitted March 6, 1917. Decided March 12, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Montana ex rel. Haire* v. *Rice*, 204 U. S. 291; *Thomas* v. *Iowa*, 209 U. S. 258; *Mallers* v. *Commercial Loan & Trust Co.*, 216 U. S. 613; *Appleby* v. *Buffalo*, 221 U. S. 524, 529. (2) *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 105; *Overton* v. *Oklahoma*, 235 U. S. 31; *Stewart* v. *Kansas City*, 239 U. S. 14. *Mr. R. H. Todd* for plaintiffs in error. *Mr. Samuel T. Ansell* for defendant in error.

No. ——. Original. *Ex parte:* IN THE MATTER OF PARRIS PRINCE, PETITIONER. Submitted March 6, 1917. Decided March 12, 1917. Motion for leave to file petition for writ of mandamus denied. *Mr. George E. Sullivan* for petitioner.

No. 226. Francesco Massari Zavaglia, Plaintiff in Error, *v.* Emanuela Notarbartolo. In error to the Supreme Court of the State of Louisiana. Motion to dismiss or affirm submitted March 6, 1917. Decided March 19, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Eustis* v. *Bolles*, 150 U. S. 361; *Leathe* v. *Thomas*, 207 U. S. 93; *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468; *Holden Land Co.* v. *Interstate Trading Co.*, 233 U. S. 536, 541; *Mellon Company* v. *McCafferty*, 239 U. S. 134. *Mr. Henry L. Lazarus, Mr. David Sessler, Mr. Hannis Taylor* and *Mr. Girault Farrar* for plaintiff in error. *Mr. W. B. Spencer* and *Mr. Charles Payne Fenner* for defendant in error.

No. 303. Esteban Huertas et al., Appellants, *v.* Jose Vazquez Montes, as Warden of the District Jail of Humacao. Appeal from the Supreme Court of Porto Rico. Motion to dismiss or affirm submitted March 12, 1917. Decided March 19, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Flemister* v. *United States*, 207 U. S. 372; *Gavieres* v. *United States*, 220 U. S. 338; *Morgan* v. *Devine*, 237 U. S. 632, 641. *Mr. Jackson H. Ralston* for appellants. *Mr. Samuel T. Ansell* for appellee.

No. 596. Eugenio Kilayco, Plaintiff in Error, *v.* United States. In error to the Supreme Court of the Philippine Islands. Submitted March 6, 1917. Decided March 19, 1917. *Per Curiam.* Judgment affirmed upon the authority of *Schick* v. *United States*, 195 U. S. 65, 71–72; *Mullan* v. *United States*, 212 U. S. 516, 520. *Mr. H. W. Van Dyke* and *Mr. Newton W. Gilbert* for plaintiff in error. *Mr. Assistant Attorney General Warren* for defendant in error.

No. 652. Frank W. Tillinghast, Leonard L. Barber, and Sam A. Fenner, Appellants, *v.* John J. Richards, Marshal of the United States for the District of Rhode Island. Appeal from the District Court of the United States for the District of Rhode Island. Motion to dismiss or affirm or place on summary docket submitted March 12, 1917. Decided March 19, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Franklin* v. *United States*, 216 U. S. 559, 570; *Brolan* v. *United States*, 236 U. S. 216; *Lamar* v. *United States*, 240 U. S. 60. *Mr. Percy W. Gardner* for appellants. *The Solicitor General* for appellee.

No. —. Original. *Ex parte:* In the Matter of Edgar F. Hathaway and Charles Lea, Petitioners. Submitted March 6, 1917. Decided March 19, 1917. Motion for leave to file petition for writ of mandamus denied. *Mr. Charles D. Lanning* and *Mr. William G. Johnson* for petitioners.

No. 25. Frank C. Stettler, Plaintiff in Error, *v.* Edwin V. O'Hara et al., Constituting the Industrial Welfare Commission of the State of Oregon; and

No. 26. Elmira Simpson, Plaintiff in Error, *v.* Edwin V. O'Hara et al., Constituting the Industrial Welfare Commission of the State of Oregon. In error to the Supreme Court of the State of Oregon. Argued December 16, 17, 1914. Restored to docket for reargument June 12, 1916. Reargued January 18 and 19, 1917. Decided April 9, 1917. *Per Curiam.* Judgments affirmed with costs by an equally divided court. (Mr. Justice Brandeis took no part in the consideration and decision of these cases.) *Mr. Charles W. Fulton* and *Mr.*

Rome G. Brown for plaintiffs in error. *Mr. Felix Frankfurter*, *Mr. A. M. Crawford*, *Mr. J. N. Teal* and *Mr. Geo. M. Brown* for defendants in error.

No. 85. HARRIET H. GOULD and FREDERICK A. WALDRON, APPELLANTS, *v.* HYDE PARK WATER COMPANY, FIRST NATIONAL BANK OF BOSTON, and CITY OF BOSTON. Appeal from the District Court of the United States for the District of Massachusetts. Submitted April 12, 1917. Decided April 16, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 105; *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Stewart* v. *Kansas City*, 239 U. S. 14. *Mr. Roscoe Walsworth* and *Mr. Frederick S. Deitrick* for appellants. *Mr. Robert M. Morse*, *Mr. Wm. M. Richardson* and *Mr. Edward E. Blodgett* for appellees.

No. 392. ST. LOUIS, SAN FRANCISCO & TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* MAUD SMITH, ADMINISTRATRIX OF THE ESTATE OF M. T. SEALE, DECEASED. In error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas. Motion to dismiss or affirm submitted April 9, 1917. Decided April 16, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570; *Seaboard Air Line Ry.* v. *Koennecke*, 239 U. S. 352, 354; *Seaboard Air Line Ry.* v. *Renn*, 241 U. S. 290, 293.

See *St. Louis, San Francisco & Texas Ry. Co.* v. *Seale*, 229 U. S. 156. *Mr. Frank Andrews* and *Mr. W. F. Evans* for plaintiff in error. *Mr. Judson H. Wood* and *Mr. James P. Haven* for defendant in error.

No. 422. HATHAWAY HARPER, PLAINTIFF IN ERROR, *v.* BOARD OF COUNTY COMMISSIONERS OF OKLAHOMA COUNTY, STATE OF OKLAHOMA, ET AL. In error to the Supreme Court of the State of Oklahoma. Motion to dismiss submitted April 9, 1917. Decided April 16, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 105; *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Stewart* v. *Kansas City*, 239 U. S. 14. *Mr. Arthur G. Moseley* for plaintiff in error. *Mr. Charles J. Kappler* for defendants in error.

No. 619. DON LACY, AS LIQUIDATING AGENT OF THE OKLAHOMA CITY NATIONAL BANK, PLAINTIFF IN ERROR, *v.* MOLLIE EZZARD. In error to the Supreme Court of the State of Oklahoma. Motion to dismiss or affirm submitted April 9, 1917. Decided April 16, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of: (1) *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U. S. 1; *Capital National Bank* v. *First National Bank of Cadiz*, 172 U. S. 425; *Union National Bank* v. *McBoyle*, 243 U. S. 26. (2) *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Norfolk & Western Ry. Co.* v. *West Virginia*, 236 U. S. 605, 609–610. (3) *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611–612. *Mr. W. F. Wilson* and *Mr. Enoch A. Chase* for plaintiff in error. *Mr. Harvey R. Winn*, *Mr. Henry E. Asp* and *Mr. Henry G. Snyder* for defendant in error.

No. 732. SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR, *v.* CYNTHIA WILLIAMS, ADMINISTRATRIX OF THE

ESTATE OF W. E. WILLIAMS, DECEASED. In error to the Supreme Court of the State of South Carolina. Argued April 9, 1917. Decided April 16, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Chicago Junction Ry. Co.* v. *King*, 222 U. S. 222; *Seaboard Air Line Ry.* v. *Padgett*, 236 U. S. 668; *Baltimore & Ohio R. R. Co.* v. *Whitacre*, 242 U. S. 169. *Mr. J. B. S. Lyles* for plaintiff in error. *Mr. W. Boyd Evans* for defendant in error.

No. 945. UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANT, *v.* TRAVELERS INSURANCE MACHINE COMPANY. Appeal from the District Court of the United States for the District of Arizona. Argued April 11, 1917. Decided April 16, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Bache* v. *Hunt*, 193 U. S. 523; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *Railroad Commission of Mississippi* v. *Louisville & Nashville R. R. Co.*, 225 U. S. 272, 279. *Mr. William Marshall Bullitt* for appellant. *Mr. David R. Castleman* and *Mr. Walter Bennett* for appellee.

No. 185. MCGOLDRICK LUMBER COMPANY, APPELLANT, *v.* CHARLES J. KINSOLVING ET AL. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. Submitted April 20, 1917. Decided April 23, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Johnson* v. *Towsley*, 13 Wall. 72; *Shepley* v. *Cowan*, 91 U. S. 330; *DeCambra* v. *Rogers*, 189 U. S. 119; *Greenameyer* v. *Coate*, 212 U. S. 434. *Mr. John P. Gray, Mr. William E. Cullen* and *Mr. F. M. Dudley* for appellant. *Mr. James H. Forney* and *Mr. Frank L. Moore* for appellees.

No. 140. Park Square Automobile Station, Plaintiff in Error, *v.* American Locomotive Company. In error to the District Court of the United States for the Northern District of New York. Argued April 24, 1917. Decided April 30, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *McLish* v. *Roff*, 141 U. S. 661; *Bender* v. *Pennsylvania Company*, 148 U. S. 502; *McDonnell* v. *Jordan*, 169 U. S. 734; *Heike* v. *United States*, 217 U. S. 423. *Mr. Edward C. Stone* for plaintiff in error. *Mr. Robert G. Dodge*, *Mr. Moorfield Storey* and *Mr. Reginald H. Johnson* for defendant in error, submitted.

No. 195. William W. Withnell, M. Cecile Withnell, his Wife; Maud E. Hager et al., Plaintiffs in Error, *v.* William R. Bush Construction Company. In error to the St. Louis Court of Appeals, State of Missouri. Argued April 23, 1917. Decided April 30, 1917. *Per Curiam.* Judgment reversed with costs upon the authority of *Gast Realty Company* v. *Schneider Granite Company*, 240 U. S. 55. *Mr. Clifford B. Allen* and *Mr. Edmund T. Allen* for plaintiffs in error. *Mr. Edward C. Kehr* for defendant in error, submitted.

No. 217. Pennsylvania Tunnel & Terminal Railroad Company, Plaintiff in Error, *v.* Charles E. Hendrickson et al., State Board of Assessors, and Edward I. Edwards, Comptroller. In error to the Supreme Court of the State of New Jersey. Submitted April 25, 1917. Decided April 30, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Florida Central & Peninsular R. R. Co.* v. *Reynolds*, 183 U. S. 471. *Mr. Albert C. Wall* for plaintiff in error. *Mr.*

John W. Wescott and *Mr. John R. Harden* for defendants in error.

No. 646. D. M. Hiller and Max Miller et al., Sureties, Plaintiffs in Error, *v.* Thomas B. Crenshaw, Clerk, W. E. Woolen, Revenue Agent, and John C. McLemore, Clerk. In error to the Supreme Court of the State of Tennessee. Motion to dismiss submitted April 23, 1917. Decided April 30, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Eustis* v. *Bolles*, 150 U. S. 361; *Leathe* v. *Thomas*, 207 U. S. 93; *Mellon Company* v. *McCafferty*, 239 U. S. 134. *Mr. H. D. Minor* for plaintiffs in error. *Mr. R. L. Bartels* for defendants in error.

DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI, FROM FEBRUARY 6, 1917, TO APRIL 30, 1917.

No. 852. A. S. Cohn, Petitioner, *v.* R. A. Malone, Trustee of A. S. Cohn, Bankrupt. March 6, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George S. Jones* for petitioner. *Mr. Alexander Akerman, Mr. John D. Pope* and *Mr. Charles Akerman* for respondent.

No. 855. Samuel C. Cohen, as Trustee in Bankruptcy of Elias W. Samuels, Bankrupt, Petitioner, *v.* Elias W. Samuels. March 6, 1917. Petition for a writ of certiorari to the United States Circuit Court of

Appeals for the Second Circuit denied. *Mr. Lawrence B. Cohen* for petitioner. *Mr. Irving L. Ernst* and *Mr. Samuel Sturtz* for respondent.

No. 856. Mrs. M. S. Jennings et al., Petitioners, *v.* L. P. Smith. March 6, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edgar T. Brackett* and *Mr. John J. Strickland* for petitioners. *Mr. S. H. Sibley, Mr. Alex C. King, Mr. H. M. Holden, Mr. Hamilton McWhorter* and *Mr. E. F. Noell* for respondent.

No. 865. Detroit Rock Salt Company, Petitioner, *v.* Swift & Company. March 6, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John B. Corliss* and *Mr. Samuel B. Moody* for petitioner. *Mr. William L. Hamilton* for respondent.

No. 877. Washington Loan & Trust Company, Trustee, Petitioner, *v.* Arthur E. Randle. March 6, 1917. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Charles H. Merillat, Mr. Daniel W. O'Donoghue, Mr. Arthur A. Alexander* and *Mr. William C. Woodward* for petitioner. No appearance for respondent.

No. 881. Samuel S. Chamberlin, etc., Petitioner, *v.* John B. Mullings. March 6, 1917. Petition for a writ

of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William J. Larkin, Jr.*, and *Mr. Paul A. Blair* for petitioner. *Mr. Lawrence L. Lewis* for respondent.

No. 896. HUGH G. MACWILLIAM, PETITIONER, *v.* PRESIDENT SUSPENDER COMPANY. March 6, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. W. P. Preble* for petitioner. *Mr. Odin Roberts* for respondent.

No. 899. JACOB S. HAYDEN, PETITIONER, *v.* ELLEN G. DAVIS ET AL. March 6, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. H. F. Stambaugh* and *Mr. John M. Freeman* for petitioner. *Mr. George M. Hoffheimer, Mr. Melvin G. Sperry, Mr. Charles McCamic* and *Mr. James Morgan Clarke* for respondents.

No. 914. GENERAL ELECTRIC COMPANY, PETITIONER, *v.* NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY. March 6, 1917. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Richmond Moot* for petitioner. *Mr. William L. Visscher* for respondent.

No. 916. R. S. HOWARD COMPANY, PETITIONER, *v.* BALDWIN COMPANY. March 6, 1917. Petition for a writ

of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel S. Watson* for petitioner. *Mr. Edmund Wetmore, Mr. Oscar W. Jeffery, Mr. Lawrence Maxwell* and *Mr. John E. Cross* for respondent.

No. 917. MEXICO-WYOMING PETROLEUM COMPANY ET AL., PETITIONERS, *v.* W. L. VALENTINE ET AL. March 6, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William E. Lutz* for petitioners. *Mr. William S. Metz* for respondents.

No. 868. THEODORE S. ROSEN ET AL., PETITIONERS, *v.* UNITED STATES. March 12, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Meier Steinbrink* for petitioners. *The Solicitor General* and *Mr. Assistant Attorney General Wallace* for respondent.

No. 919. WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING COMPANY, PETITIONER, *v.* INTERNATIONAL CURTIS MARINE TURBINE COMPANY ET AL. March 12, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. Clifton V. Edwards* and *Mr. Abraham M. Beitler* for petitioner. *Mr. Charles Neave* and *Mr. William G. McKnight* for respondents.

No. 922. NORTH GERMAN LLOYD, CLAIMANT OF THE STEAMSHIP KRONPRINZESSIN CECILIE, PETITIONER, *v.*

GUARANTY TRUST COMPANY OF NEW YORK ET AL. March 12, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted. *Mr. Walter C. Noyes* and *Mr. Joseph Larocque* for petitioner. *Mr. J. Parker Kirlin, Mr. Charles R. Hickox, Mr. Edward E. Blodgett, Mr. John A. Garver* and *Mr. James M. Beck* for respondents.

No. 866. CHARLES JEROME EDWARDS, PETITIONER, *v.* HENRY P. KEITH, AS COLLECTOR OF INTERNAL REVENUE, ETC. March 12, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Meier Steinbrink* for petitioner. *The Solicitor General* and *Mr. Assistant Attorney General Wallace* for respondent.

No. 873. THOMAS R. SHERIDAN, PETITIONER, *v.* UNITED STATES. March 12, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John L. McNab* and *Mr. James W. Ryan* for petitioner. *The Solicitor General* and *Mr. Wrisley Brown* for respondent.

No. 891. J. H. HERNDON ET AL., PETITIONERS, *v.* T. S. SLOAN ET AL. March 12, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Ben B. Cain* and *Mr. Cone Johnson* for petitioners. No appearance for respondents.

No. 892. R. B. SIMPSON, AS TRUSTEE, ETC., ET AL., PETITIONERS, *v.* THOMAS W. BRENT ET AL. March 12, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William H. Watson* for petitioners. *Mr. W. A. Blount, Mr. A. C. Blount* and *Mr. F. B. Carter* for respondents.

No. 920. P. W. WILLIAMS, PETITIONER, *v.* HOME INSURANCE COMPANY OF NEW YORK. March 12, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Alexander C. Birch* for petitioner. *Mr. B. P. Crum* for respondent.

No. 938. BALTIMORE & OHIO RAILROAD COMPANY ET AL., PETITIONERS, *v.* J. G. LEACH. March 19, 1917. Petition for a writ of certiorari to the Court of Appeals of the State of Kentucky granted. *Mr. Charles H. Gibson* and *Mr. William W. Crawford* for petitioners. No appearance for respondent.

No. 950. INTERBORO BREWING COMPANY, INC., PETITIONER, *v.* STANDARD BREWERY COMPANY OF BALTIMORE CITY. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Warren H. Small* and *Mr. George W. Ramsey* for petitioner. No appearance for respondent.

No. 964. E. J. LYNCH, COLLECTOR, ETC., PETITIONER, *v.* HENRY TURRISH. March 19, 1917. Petition for a writ

of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *The Solicitor General* for petitioner. *Mr. H. Oldenburg, Mr. Newel H. Clapp* and *Mr. A. W. Clapp* for respondent.

No. 965. E. J. LYNCH, COLLECTOR, ETC., PETITIONER, *v.* H. C. HORNBY. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *The Solicitor General* for petitioner. *Mr. H. Oldenburg, Mr. Newel H. Clapp* and *Mr. A. W. Clapp* for respondent.

No. 953. ARTHUR A. BONVILLAIN, PETITIONER, *v.* H. B. HOWELL, TRUSTEE, ETC. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. H. Generes Dufour* for petitioner. *Mr. E. A. O'Sullivan* for respondent.

No. 974. W. T. HENDRICKSON, JUDGE, ETC., PETITIONER, *v.* LEWIS APPERSON. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Helm Bruce* for petitioner. *Mr. A. E. Richards* and *Mr. W. Overton Harris* for respondent.

No. 975. W. T. HENDRICKSON, JUDGE, ETC., PETITIONER, *v.* ELIZABETH CREAGER. March 19, 1917. Petition for a writ of certiorari to the United States Circuit

Court of Appeals for the Sixth Circuit granted. *Mr. Helm Bruce* for petitioner. *Mr. W. Overton Harris* for respondent.

No. 976. W. T. HENDRICKSON, JUDGE, ETC., PETITIONER, *v.* HUGH S. GARDNER. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Helm Bruce* for petitioner. *Mr. W. Overton Harris* for respondent.

No. 977. W. T. HENDRICKSON, JUDGE, ETC., PETITIONER, *v.* MILDRED E. HOCKER. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Helm Bruce* for petitioner. *Mr. W. Overton Harris* for respondent.

No. 978. W. T. HENDRICKSON, JUDGE, ETC., PETITIONER, *v.* STERLING LAND & INVESTMENT COMPANY. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Helm Bruce* for petitioner. *Mr. A. E. Richards* and *Mr. W. Overton Harris* for respondent.

No. 923. HELA VAN THYN ET AL., PETITIONERS, *v.* RALPH WOLF, RECEIVER, ETC. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel P. Goldman* and *Mr. M. L. Heide* for petitioners. *Mr. John B. Stanchfield* for respondent.

No. 932. CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, PETITIONER, *v.* ERNEST H. OHME ET AL. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frank L. Littleton* and *Mr. George B. Gillespie* for petitioner. *Mr. Alexander Britton* and *Mr. Evans Browne* for respondents.

No. 933. MERGENTHALER LINOTYPE COMPANY, PETITIONER, *v.* INTERNATIONAL TYPESETTING MACHINE COMPANY ET AL. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederic D. McKenney* and *Mr. Robert Fletcher Rogers* for petitioner. *Mr. Edmund Wetmore* for respondents.

No. 934. MERGENTHALER LINOTYPE COMPANY, PETITIONER, *v.* INTERTYPE CORPORATION. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederic D. McKenney* and *Mr. Robert Fletcher Rogers* for petitioner. *Mr. Edmund Wetmore* for respondent.

No. 939. MARY E. SIMS ET AL., PETITIONERS, *v.* W. H. STARK ET AL. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. E. Townes* for petitioners. No appearance for respondents.

No. 940. PAUL A. EWERT, PETITIONER, *v.* G. W. BECK. March 19, 1917. Petition for a writ of certiorari to the

United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Paul A. Ewert* and *Mr. Henry C. Lewis* for petitioner. *Mr. W. H. Kornegay* for respondent.

No. 958. Chicago Great Western Railroad Company, Petitioner, *v.* John Manning. March 19, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. John Everall* and *Mr. Asa G. Briggs* for petitioner. *Mr. Harlan E. Leach* for respondent.

No. 963. Lee Line Steamers, Petitioner, *v.* Atlas Transportation Company. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John F. Green* for petitioner. *Mr. George A. Mahan* and *Mr. Dulaney Mahan* for respondent.

No. 936. Glasgow Navigation Company, Ltd., Petitioner, *v.* Munson Steamship Company. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Parker Kirlin* and *Mr. Charles R. Hickox* for petitioner. *Mr. John W. Griffin* for respondent.

No. 951. Winfield S. Pendleton, Petitioner, *v.* American Warehouse & Trading Company et al. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second

Circuit denied. *Mr. Avery F. Cushman* for petitioner. *Mr. John W. Griffin* and *Mr. Frank Harvey Fields* for the respondents.

No. 967. GEORGIA COAST & PIEDMONT RAILROAD COMPANY, PETITIONER, *v.* DAVID LOEWENTHAL. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert M. Hitch, Mr. Samuel B. Adams* and *Mr. Henry V. Poor* for petitioner. *Mr. Alex C. King, Mr. Max Isaacs, Mr. Jack J. Spalding* and *Mr. C. Henry Cohen* for respondent.

No. 971. RED JACKET, JR., COAL COMPANY ET AL., PETITIONERS, *v.* UNITED THACKER COAL COMPANY. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. E. Spencer Miller* and *Mr. John H. Holt* for petitioners. *Mr. Malcolm Jackson* and *Mr. C. W. Campbell* for respondent.

No. 972. AMERICAN BANK NOTE COMPANY, PETITIONER, *v.* BLUE RIDGE ELECTRIC COMPANY. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Henry A. Alexander* for petitioner. *Mr. Robert C. Alston* for respondent.

No. 885. JOHN A. GARDNER, PETITIONER, *v.* WESTERN UNION TELEGRAPH COMPANY. March 19, 1917. Petition

for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles A. Loomis* for petitioner. *Mr. Rush Taggart* and *Mr. Francis Raymond Stark* for respondent.

No. 956. ROBERT H. ONEAL, PETITIONER, *v.* JULIA G. STEWART ET AL. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Reeve Lewis* and *Mr. Malcolm McAvoy* for petitioner. *Mr. Oscar W. Kuhn*, *Mr. Alfred M. Cohen* and *Mr. Charles W. Baker* for respondents.

No. 980. ROBERT A. WOODS, ETC., PETITIONER, *v.* ATLANTIC COAST LINE RAILROAD COMPANY. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. W. Boyd Evans* for petitioner. No appearance for respondent.

No. 987. J. SCHUELER ET AL., PETITIONERS, *v.* MANITOU SPRINGS MINERAL WATER COMPANY. March 19, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles W. Waterman* for petitioners. *Mr. Ralph Hartzell* for respondent.

No. 985. GRATIOT COUNTY STATE BANK, PETITIONER, *v.* D. LLOYD JOHNSON, AS TRUSTEE, ETC. March 26, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Michigan granted. *Mr. William L.*

Carpenter for petitioner. *Mr. Edward J. Moinett* and *Mr. William A. Bahlke* for respondent.

No. 954. Mrs. W. H. Lee, etc., et al., Petitioners, *v.* Fort Worth Savings Bank & Trust Company. March 26, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. D. T. Bomar* for petitioners. *Mr. R. W. Flournoy* for respondent.

No. 984. Southern Railway Company, Petitioner, *v.* Mrs. Vinnie Butler. March 26, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Millard Reese* for petitioner. No appearance for respondent.

No. 991. Clara Kelly, Executrix, etc., Petitioner, *v.* Pennsylvania Railroad Company. March 26, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. John B. Brooks* for petitioner. *Mr. Frederic D. McKenney* for respondent.

No. 993. Elliott Frederick, Trustee, etc., Petitioner, *v.* Metropolitan Life Insurance Company of New York. March 26, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Lowrie C. Barton* for petitioner. *Mr. W. K. Jennings* for respondent.

No. 994. STANDARD FASHION COMPANY, PETITIONER, *v.* JOHN J. KUHN, AS TRUSTEE, ETC. March 26, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Herbert Noble* for petitioner. *Mr. Jacob J. Lesser* for respondent.

No. 1005. NATIONAL CITY BANK OF CHICAGO, PETITIONER, *v.* KALAMAZOO CITY SAVINGS BANK. March 26, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frederic D. McKenney* and *Mr. J. S. Flannery* for petitioner. *Mr. Dallas Boudeman* for respondent.

No. 989. VICTOR PAKAS, PETITIONER, *v.* UNITED STATES. April 9, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Terence J. McManus* for petitioner. No brief filed for respondent.

No. 1014. UNITED STATES, PETITIONER, *v.* BROOKLYN EASTERN DISTRICT TERMINAL. April 9, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *The Solicitor General* for petitioner. *Mr. Henry B. Closson* for respondent.

No. 959. CENTRAL TRUST COMPANY OF NEW YORK, PETITIONER, *v.* TEXAS COMPANY. April 9, 1917. Petition for a writ of certiorari to the United States Circuit

Court of Appeals for the Fifth Circuit denied. *Mr. Arthur H. Van Brunt* for petitioner. *Mr. Amos L. Beaty* for respondent.

No. 999. CENTRAL TRUST COMPANY OF NEW YORK ET AL., PETITIONERS, *v.* TEXAS COMPANY. April 9, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Arthur H. Van Brunt* and *Mr. George Wellwood Murray* for petitioners. *Mr. Amos L. Beaty* for respondent.

No. 986. MICHIGAN CENTRAL RAILROAD COMPANY, PETITIONER, *v.* EVERETT A. TRIPP. April 9, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frank E. Robson* and *Mr. J. Walter Dohany* for petitioner. *Mr. Sidney T. Miller* for respondent.

No. 1003. BYRON F. BABBITT, TRUSTEE, ETC., PETITIONER, *v.* CAROLINE S. REED ET AL. April 9, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles A. Boston* for petitioner. *Mr. Charles E. Rushmore* for respondents.

No. 1020. CAROLINE S. REED ET AL., EXECUTORS, ETC., PETITIONERS, *v.* BYRON F. BABBITT, TRUSTEE, ETC. April 9, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles E. Rushmore* for petitioners. *Mr. P. Taylor Bryan* and *Mr. George H. Williams* for respondent.

No. 1013. RIVERS & HARBORS IMPROVEMENT COMPANY, OWNER, ETC., PETITIONER, *v.* JOHN S. LATTA ET AL. April 9, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Russell T. Mount* for petitioner. No appearance for respondents.

No. 1018. MATTHEW HOWARD REED, PETITIONER, *v.* CROPP CONCRETE MACHINE COMPANY ET AL. April 9, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Otto Raymond Barnett* for petitioner. *Mr. William Nevarre Cromwell* and *Mr. Louis T. Greist* for respondents.

No. 1024. WASHINGTON RAILWAY & ELECTRIC COMPANY, PETITIONER, *v.* MINA L. CLARK, ADMINISTRATRIX, ETC. April 9, 1917. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. John S. Barber* and *Mr. George P. Hoover* for petitioner. *Mr. Wilton J. Lambert* and *Mr. Rudolph H. Yeatman* for respondent.

No. 1026. ALEXANDER DOYLE, PETITIONER, *v.* HAMILTON FISH CORPORATION. April 9, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Max J. Kohler* for petitioner. *Mr. Henry W. Taft* for respondent.

No. 852. A. S. COHN, PETITIONER, *v.* R. A. MALONE, TRUSTEE of A. S. COHN, BANKRUPT. April 16, 1917.

Order entered herein on March 6, 1917, vacated and set aside, and petition for writ of certiorari granted. *Mr. George S. Jones* and *Mr. James H. McIntosh* for petitioner. *Mr. Alexander Akerman, Mr. John D. Pope* and *Mr. Charles Akerman* for respondent. (See No. 852, *ante*, 634.)

No. 855. SAMUEL C. COHEN, AS TRUSTEE IN BANKRUPTCY OF ELIAS W. SAMUELS, BANKRUPT, PETITIONER, *v.* ELIAS W. SAMUELS. April 16, 1917. Order entered herein on March 6, 1917, vacated and set aside, and petition for writ of certiorari granted. *Mr. Lawrence B. Cohen* for petitioner. *Mr. Irving L. Ernst* and *Mr. Samuel Sturtz* for respondent. (See No. 855, *ante*, 634.)

No. 995. SOUTHERN PACIFIC COMPANY, PETITIONER, *v.* CALIFORNIA ADJUSTMENT COMPANY. April 16, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. C. W. Durbrow* and *Mr. William F. Herrin* for petitioner. *Mr. Leon E. Morris* for respondent.

No. 998. CHARLES D. SMITH ET AL., PETITIONERS, *v.* COPIAH COUNTY ET AL. April 16, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Caruthers Ewing* for petitioners. *Mr. J. S. Sexton* for respondents.

No. 1006. CHARLES A. NONES, PETITIONER, *v.* STATE OF NEW JERSEY. April 16, 1917. Petition for a writ of

certiorari to the Court of Errors and Appeals of the State of New Jersey denied. *Mr. Barry Mohun* and *Mr. Henry E. Davis* for petitioner. *Mr. J. Henry Harrison* for respondent.

No. 1016. DAVID W. SIDEY, PETITIONER, *v.* CITY OF MARCELINE, IN THE COUNTY OF LINN, STATE OF MISSOURI. April 16, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John T. Wayland* for petitioner. No appearance for respondent.

No. 1019. CHARLES HATHAWAY ET AL., ETC., PETITIONERS, *v.* JOSEPH B. MARTINDALE ET AL., RECEIVERS, ETC. April 16, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Alfred B. Cruikshank* for petitioners. *Mr. Charles E. Rushmore* for respondents.

No. 1022. SAALFIELD PUBLISHING COMPANY ET AL., PETITIONERS, *v.* G. & C. MERRIAM COMPANY. April 16, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Challen B. Ellis* and *Mr. Wade H. Ellis* for petitioners. *Mr. William B. Hale* for respondent.

No. 1025. ILLINOIS SURETY COMPANY, PETITIONER, *v.* STANDARD UNDERGROUND CABLE COMPANY. April 16, 1917. Petition for a writ of certiorari to the United States

Circuit Court of Appeals for the Third Circuit denied. *Mr. Albert J. Hopkins* for petitioner. *Mr. George B. Gordon* for respondent.

No. 1039. UNION SAND & MATERIAL COMPANY, PETITIONER, *v.* STATE OF ARKANSAS. April 16, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied. *Mr. Caruthers Ewing* for petitioner. No appearance for respondent.

No. 1047. FRANCIS SEMIDEY ET AL., PETITIONERS, *v.* CENTRAL AGUIRRE COMPANY, ETC., ET AL. April 16, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Perry Allen* and *Mr. Elijah N. Zoline* for petitioners. *Mr. Charles Hartzell* and *Mr. Malcolm Donald* for respondents.

No. 1049. FENTRESS COAL & COKE COMPANY, PETITIONER, *v.* BEECHER ELMORE. April 16, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. White B. Miller* for petitioner. No appearance for respondent.

No. 1057. CHARLES W. RANTOUL, JR., PETITIONER, *v.* NORTH GERMAN LLOYD. April 16, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. J. Parker Kirlin*, *Mr. Charles R. Hickox* and *Mr. Edward E. Blodgett* for

petitioner. *Mr. Joseph Larocque* and *Mr. Walter C. Noyes* for respondent.

No. 1058. MAURICE HANSSENS, PETITIONER, *v.* NORTH GERMAN LLOYD. April 16, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. J. Parker Kirlin, Mr. Charles R. Hickox* and *Mr. Edward E. Blodgett* for petitioner. *Mr. Joseph Larocque* and *Mr. Walter C. Noyes* for respondent.

No. 1015. UNITED STATES, PETITIONER, *v.* WILLIAM B. POLAND ET AL. April 23, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *The Solicitor General* for petitioner. No appearance for respondents.

No. 1056. THOMAS GILCREASE, PETITIONER, *v.* G. R. MCCULLOUGH ET AL. April 23, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma granted. *Mr. A. J. Biddison* for petitioner. *Mr. Frederic de C. Faust* and *Mr. Charles F. Wilson* for respondents.

No. 1065. NORTHERN PACIFIC RAILWAY COMPANY ET AL., PETITIONERS, *v.* E. W. MCCOMAS. April 23, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Oregon granted. *Mr. Charles H. Carey, Mr. James B. Kerr* and *Mr. Charles A. Hart* for petitioners. No appearance for respondent.

No. 1002. UNION PACIFIC RAILROAD COMPANY, PETITIONER, *v.* EVA E. COOK, ADMINISTRATRIX, ETC. April 23, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Iowa denied. *Mr. N. H. Loomis* and *Mr. Alfred G. Ellick* for petitioner. *Mr. William R. Green* for respondent.

No. 1031. UNITED STATES EX REL. NG. SAM ET AL., PETITIONERS, *v.* JOSEPH H. WALLIS, ASSISTANT COMMISSIONER OF IMMIGRATION, ETC. April 23, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert M. Moore* for petitioners. *The Solicitor General* for respondent.

No. 1040. HUGH CHAMBERS, TRUSTEE, ETC., PETITIONER, *v.* CONTINENTAL TRUST COMPANY. April 23, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Rudolph S. Wimberly* for petitioner. *Mr. George S. Jones* and *Mr. Orville A. Park* for respondent.

No. 1043. UNION PACIFIC RAILROAD COMPANY, PETITIONER, *v.* MAUDE M. HENDERSON, ADMINISTRATRIX, ETC. April 23, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Nebraska denied. *Mr. N. H. Loomis* and *Mr. Alfred G. Ellick* for petitioner. *Mr. T. J. Mahoney* and *Mr. J. A. C. Kennedy* for respondent.

No. 1044. JOSEPH HERTZBERG ET AL., PETITIONERS, *v.* UNITED STATES. April 23, 1917. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Walter Jeffreys Carlin* for petitioners. No brief filed for respondent.

No. 1050. SIDNEY J. BROOKS, RECEIVER, ETC., PETITIONER, *v.* EMPIRE TRUST COMPANY ET AL. April 23, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walter P. Napier, Mr. E. C. Brandenburg, Mr. Chester H. Terry* and *Mr. Weldon Bailey* for petitioner. *Mr. Stephen H. Olin, Mr. Henry C. Coke* and *Mr. Thomas H. Franklin* for respondents.

No. 1072. MOUNT VERNON & MARSHALL HALL STEAMBOAT COMPANY, LTD., PETITIONER, *v.* JOHN L. MCKENNEY. April 23, 1917. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Daniel Thew Wright, Mr. Henry F. Woodward* and *Mr. T. Morris Wampler* for petitioner. No appearance for respondent.

No. 1073. PRESBYTERIAN HOME HOSPITAL ET AL., PETITIONERS, *v.* MARY DOCKERY GOOCH, BY HER NEXT FRIEND, WILLIAM D. GOOCH. April 23, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John L. Stout* and *Mr. John W. Farley* for petitioners. No appearance for respondent.

No. 1074. KEYSTONE WOOD COMPANY, PETITIONER, *v.* SUSQUEHANNA BOOM COMPANY. April 23, 1917. Petition

for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Mortimer C. Rhone* for petitioner. *Mr. N. M. Edwards* and *Mr. Max L. Mitchell* for respondent.

Nos. 1000 and 1001. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA, PETITIONER, *v.* SOUTHERN PACIFIC COMPANY. April 30, 1917. Petitions for writs of certiorari to the Supreme Court of the State of California denied. *Mr. Christopher M. Bradley* for petitioner. *Mr. Henley C. Booth* and *Mr. William F. Herrin* for respondent.

No. 1051. JOHN B. GLEASON, PETITIONER, *v.* MARY C. THAW. April 30, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. John B. Gleason* and *Mr. Gist Blair* for petitioner. *Mr. Abram J. Rose* and *Mr. Alfred C. Pette* for respondent.

No. 1075. CITY OF CENTRALIA, PETITIONER, *v.* A. R. TITLOW, AS RECEIVER, ETC., ET AL. April 30, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Samuel H. Piles, Mr. James B. Howe, Mr. Dallas V. Halverstadt* and *Mr. Blackburn Esterline* for petitioner. No appearance for respondents.

No. 1085. NICK A. MAYERS, PETITIONER, *v.* UNION RAILROAD COMPANY. April 30, 1917. Petition for a writ

of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. Frank C. McGirr* and *Mr. John M. Freeman* for petitioner. *Mr. Samuel McClay* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM FEBRUARY 6 1917, TO APRIL 30, 1917.

No. 272. TIMOTHY HEALY, PETITIONER, *v.* SAMUEL W. BACKUS, AS COMMISSIONER OF IMMIGRATION AT THE PORT OF SAN FRANCISCO. On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. March 6, 1917. Decree reversed with costs upon confession of error, and cause remanded for further proceedings, on motion of *Mr. Solicitor General Davis* for the respondent. *Mr. Marshall B. Woodworth* for petitioner.

No. 603. HENRY F. MARSHALL, PETITIONER, *v.* SAMUEL W. BACKUS, COMMISSIONER OF IMMIGRATION AT THE PORT OF SAN FRANCISCO. On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. March 6, 1917. Decree reversed with costs upon confession of error, and cause remanded for further proceedings, on motion of *Mr. Solicitor General Davis* for the respondent. *Mr. Henry Ach* for petitioner.

No. 233. MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* J. F. DUGGAN. In error to the Supreme Court of the State of Kansas. March 6, 1917. Dismissed

with costs, on motion of counsel for the plaintiff in error. *Mr. B. P. Waggener, Mr. W. P. Waggener* and *Mr. A. E. Crane* for plaintiff in error. *Mr. E. C. Brandenburg* for defendant in error.

No. 257. DUNCAN L. THOMPSON, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF MISSISSIPPI, ET AL., APPELLANTS, *v.* MOBILE & OHIO RAILROAD COMPANY. Appeal from the District Court of the United States for the Southern District of Mississippi. March 6, 1917. Dismissed with costs, on motion of counsel for the appellants. *Mr. William H. Watkins* and *Mr. James N. Flowers* for appellants. *Mr. S. R. Prince* and *Mr. Carl Fox* for appellee.

No. 258. DUNCAN L. THOMPSON, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF MISSISSIPPI, ET AL., APPELLANTS, *v.* SOUTHERN RAILWAY COMPANY IN MISSISSIPPI. Appeal from the District Court of the United States for the Southern District of Mississippi. March 6, 1917. Dismissed with costs on motion of counsel for the appellants. *Mr. William H. Watkins* and *Mr. James N. Flowers* for appellants. *Mr. S. R. Prince* and *Mr. Carl Fox* for appellee.

No. 349. NATIONAL LOAN & EXCHANGE BANK OF GREENWOOD ET AL., PLAINTIFFS IN ERROR, *v.* ADOLPHUS W. JONES ET AL., CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, ET AL. In error to the Supreme Court of the State of South Carolina. March 6, 1917. Dismissed with costs on motion of counsel for the plaintiffs in error. *Mr. F. B. Grier* for plaintiffs in error. No appearance for defendants in error.

No. 350. PEOPLE'S NATIONAL BANK OF GREENVILLE, S. C., PLAINTIFF IN ERROR, *v.* A. W. JONES ET AL., COMMISSIONERS, ETC. In error to the Supreme Court of the State of South Carolina. March 6, 1917. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. F. B. Grier* for plaintiff in error. No appearance for defendants in error.

No. 602. LOUISVILLE & NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* GREENBRIER DISTILLING COMPANY. In error to the Court of Appeals of the State of Kentucky. March 6, 1917. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. Charles H. Moorman* for plaintiff in error. No appearance for defendant in error.

No. 167. CENTRAL FORTUNA, PLAINTIFF IN ERROR, *v.* PEOPLE OF PORTO RICO. In error to the Supreme Court of Porto Rico. March 20, 1917. Dismissed with costs on motion of *Mr. H. P. Blair,* for the plaintiff in error. *Mr. Francis E. Neagle* for plaintiff in error. *Mr. Samuel T. Ansell* for defendant in error.

No. 1012. UNITED STATES, APPELLANT, *v.* ILLINOIS CENTRAL RAILROAD COMPANY ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. April 9, 1917. Dismissed, on motion of *Mr. Solicitor General Davis* for the appellant. *Mr. Edward J. Brundage* and *Mr. James H. Wilkerson* for appellees.

No. 791. ALEXANDER M. EMERSON, PETITIONER, *v.* WARREN E. SWEETSER. On writ of certiorari to the United States Circuit Court of Appeals for the First Circuit. April 9, 1917. Dismissed with costs on motion of *Mr. Henry Wheeler* for the petitioner. *The Attorney General* for respondent.

No. 792. ALFRED P. LOWELL, PETITIONER, *v.* WARREN E. SWEETSER. On writ of certiorari to the United States Circuit Court of Appeals for the First Circuit. April 9, 1917. Dismissed with costs on motion of *Mr. Henry Wheeler* for the petitioner. *The Attorney General* for respondent.

No. 297. A. LEO WEIL, PLAINTIFF IN ERROR, *v.* HENRY K. BLACK, JUDGE, ETC. In error to the Supreme Court of Appeals of the State of West Virginia. April 9, 1917. Dismissed with costs on motion of *Mr. Charles F. Wilson* for the plaintiff in error. *Mr. Frederick de C. Faust, Mr. Charles F. Wilson, Mr. Philander C. Knox, Mr. Louis Marshall, Mr. George E. Price* and *Mr. B. M. Ambler* for plaintiff in error. *Mr. T. C. Townsend* and *Mr. S. B. Avis* for defendant in error.

No. 620. NORFOLK & WESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* CORNELIUS H. MELVIN. In error to the Court of Appeals for the Fourth Judicial District, State of Ohio. April 9, 1917. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. Theodore W. Reath* for plaintiff in error. No appearance for defendant in error.

No. 348. ROSA C. GOODE ET AL., PLAINTIFFS IN ERROR, *v.* UNITED STATES. In error to the Court of Appeals of the District of Columbia. April 10, 1917. Dismissed with costs on motion of counsel for the plaintiffs in error. *Mr. Charles T. Cates, Jr.*, *Mr. William G. Johnson* and *Mr. Henry P. Blair* for plaintiffs in error. *The Attorney General* for defendant in error.

No. 293. UNITED STATES, PLAINTIFF IN ERROR, *v.* GROVER C. ARRINGTON. In error to the District Court of the United States for the Western District of Virginia. April 16, 1917. Dismissed, on motion of *Mr. Solicitor General Davis*, for the plaintiff in error. No appearance for defendant in error.

No. 468. WALTER BRANDT, APPELLANT, *v.* THOMAS W. MORGAN, WARDEN, ETC. Appeal from the District Court of the United States for the District of Kansas. April 16, 1917. Dismissed with costs, on motion of counsel for the appellant. *Mr. Franz E. Lindquist* for appellant. No appearance for defendant in error.

No. 519. INTERNATIONAL LUMBER COMPANY, PLAINTIFF IN ERROR, *v.* UNITED STATES. In error to the United States Circuit Court of Appeals for the Eighth Circuit. April 17, 1917. Dismissed, pursuant to the 16th rule, on motion of *Mr. Solicitor General Davis* for the defendant in error. *Mr. Harris Richardson* for plaintiff in error.

No. 198. ADOLFO GARCIA GRANADA, PLAINTIFF IN ERROR AND APPELLANT, *v.* JOSE STA. MARIA ET AL. In

error to the Supreme Court of the Philippine Islands. April 20, 1917. Dismissed with costs, pursuant to the 10th rule. *Mr. Clement L. Bouvé* for plaintiff in error and appellant. No appearance for defendants in error and appellees.

No. 1089. FRANCISCO ARIAS AND ROSARIO ARIAS, THE LATTER BEING REPRESENTED BY HER GUARDIAN AD LITEM, FRANCISCO ARIAS, APPELLANTS, *v.* MARIANO VELOSO, DAMIANO VELOSO, AND MELCHOR VELOSO. Appeal from the Supreme Court of the Philippine Islands. April 23, 1917. Docketed and dismissed with costs, on motion of *Mr. Evans Browne* for the appellees. No one opposing.

No. 227. LAZARUS, MICHEL AND LAZARUS, PETITIONERS, *v.* W. P. G. HARDING ET AL., TRUSTEES, ETC. April 25, 1917. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. Dismissed for the want of prosecution. *Mr. Girault Farrar* for petitioners. No appearance for respondents.

No. 244. DAVID E. SOWERS ET AL., PLAINTIFFS IN ERROR, *v.* FRANK T. JOHNSON ET AL. In error to the Supreme Court of the State of Colorado. April 26, 1917. Dismissed with costs, pursuant to the 10th rule. *Mr. Ernest Knaebel* and *Mr. William W. Grant, Jr.*, for plaintiffs in error. No appearance for defendants in error.

No. 806. WILLIAM TERRY, PLAINTIFF IN ERROR, *v.* STATE OF KANSAS. In error to the Supreme Court of the

State of Kansas. April 30, 1917. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Franz E. Lindquist, Mr. Malcolm B. Nicholson* and *Mr. William J. Pirtle* for plaintiff in error. *Mr. J. P. Coleman* for defendant in error.

INDEX.

ABATEMENT AND REVIVOR: PAGE

1. In the absence of a statute otherwise providing, a suit to restrain a state official and his successors from levying and assessing a tax under a state law, claimed to be unconstitutional, abates upon expiration of his term of office. *Pullman Co.* v. *Knott*. 447

2. Under Texas Rev. Stats., Art. 1206, a suit against a corporation is not abated by its dissolution pending appeal. *Pease* v. *Rathbun-Jones Co.*. 273

3. Error in suing out writ of error in the name of a plaintiff after he had died while case was pending in Circuit Court of Appeals *held* waived by stipulation of counsel in that court that administrator might be substituted. *McCluskey* v. *Marysville & Northern Ry.*. 36

ACTION. See **Cause of Action.**

ACTS OF CONGRESS. See Table at front of volume; **Statutes.**

ADEQUATE REMEDY AT LAW. See **Equity,** 4.

ADMINISTRATION OF ESTATES. See **Executors and Administrators.**

ADMINISTRATIVE CONSTRUCTION AND REGULATIONS. See **Procedure; Public Lands.**

ADMIRALTY:

1. A violation of neutrality by a belligerent in wrongfully making use of an American port for storing indefinitely a merchant vessel and cargo captured on the high seas affords jurisdiction in admiralty to the District Court to seize the vessel and cargo and restore them to their private owners. *The Appam*. 124

ADMIRALTY—*Continued.* PAGE

2. Proceedings in a prize court of the belligerent country could not oust the jurisdiction of the District Court having the vessel in custody or defeat its judgment. *Id.*

3. The British steamer *Appam*, captured on the high seas and navigated to an American port in control of German officers and crew, *held* to have been brought here as a prize. *Id.*

4. Under established principles of international law, it is a breach of our neutral rights for one of two belligerents, with both of which we are at peace, to make use of our ports for the indefinite storing of prizes captured from its adversary. *Id.*

5. Failure of our government to issue a proclamation on the subject will not warrant such use of our ports; certainly not where the possibility of removal depends upon recruiting crews in violation of our established rules of neutrality. *Id.*

6. The Treaty with Prussia, 1799, makes no provision for indefinite stay of vessels, and includes prizes only when in charge of vessels of war. *Id.*

7. Under Art. 16 of International Regulations for preventing collisions at sea, it is the duty of a steam vessel proceeding in a fog upon hearing the fog signal of another vessel whose position is not ascertained to stop the engines, if the circumstances admit. *Lie* v. *San Francisco & Portland S. S. Co.*... 291

8. The fact that the vessel was navigated in accordance with good seamanship does not excuse a breach of the duty contributing directly to cause the collision. *Id.*

9. When both masters are negligent and the negligence of each continues to operate as an efficient cause until the moment when the accident occurs, the doctrine of major and minor fault does not apply. *Id.*

ADVERSE POSSESSION:

1. This court will not review a state decision against a claim of title by adverse possession where the question is essentially local and dependent upon an appreciation of evidence as to conduct of parties. *Donohue* v. *Vosper*..... 59

2. The seven year statute of limitations of Washington does not apply when claim of title accompanying possession is not made in good faith. *Baker* v. *Schofield*..... 114

ALIENATION, RESTRAINT ON. See **Indians**, 2–6; **Patents for Inventions.** PAGE

ALIENS. See **Naturalization Act.**

ALIMONY:

A State may seize absent, divorced husband's bank account to satisfy decree of alimony. *Pennington* v. *Fourth Natl. Bank*..... 269

ALLOTMENTS. See **Indians.**

AMENDMENT:

Trial court, in its sound discretion, may allow a new cause of action to be set up by amendment of complaint. *Thomsen* v. *Cayser*..... 66

ANTI-TRUST ACT:

1. A combination of foreign steamship owners to end competition between themselves and suppress it from without, which exacted from shippers deposits in addition to freight charges to be repaid subsequently as rebates if the shippers used vessels of the combination to the exclusion of competitors; and which in particular cases cut rates with competitors by means of "fighting ships," *held* unlawful under the Sherman Act. *Thomsen* v. *Cayser*..... 66

2. Common carriers are under a duty to compete, and are subject in a peculiar degree to the policy of the Sherman Act. *Id.*

3. A combination is not excusable on the ground that it was induced by good motives and produced good results. *Id.*

4. The fact that the parties might have stayed out of the business cannot justify an unlawful combination. *Id.*

5. A combination affecting the foreign commerce of this country and put in operation here, though formed abroad, is within the act; and those actively participating in its management here are liable under § 7 though they are not the principals. *Id.*

6. When more than a reasonable rate is exacted, the excess over what was reasonable affords a basis for the damages recoverable under § 7. *Id.*

See **Damages**, 3–5.

APPEAL AND ERROR. See **Jurisdiction; Procedure.** PAGE

APPEAL BONDS:
Judgment on. See **Sureties.**

ARBITRATION:
The Act of Sept. 3, 5, 1916, to establish an 8-hour day for employees of interstate carriers, in substance and effect is an exertion of the power of Congress, existing under the circumstances, to arbitrate compulsorily the dispute between the carriers and employees affected. *Wilson* v. *New* 332

ASSUMPTION OF RISK. See **Employers' Liability Act,** 7, 8; **Negligence,** 1–6.

ATTACHMENT:
1. Consistently with the Constitution, States may seize tangible and intangible property to satisfy obligations of absent owners. *Pennington* v. *Fourth Natl. Bank* 269

2. Essentials to power are presence of *res*, its seizure at commencement of proceedings, and opportunity of the owner to be heard. *Id.*

3. Where these essentials exist, a decree for alimony will be valid as a charge upon divorced husband's bank account. *Id.*

4. An injunction entered at commencement of proceedings for divorce and alimony operates as seizure, in nature of a garnishment, of defendant's bank account. *Id.*

ATTORNEYS. See **Disbarment.**

BANKRUPTCY ACT:
1. A suit by a trustee in bankruptcy, under § 60b, to set aside an unlawful preference, is a controversy arising in a bankruptcy proceeding. *Staats Co.* v. *Security Trust & Savgs. Bank* 121

2. In such controversies, judgments and decrees of the Circuit Courts of Appeals are final (Act Jan. 28, 1915), and are reviewable in this court only by certiorari. *Id.*

BANKS. See **National Banks.**

BILL OF LADING. See **Interstate Commerce Acts,** 9–16; **Carriers,** 9–16. PAGE

BONDS. See **Stocks.**
Appeal bonds. See **Sureties.**

BUCKET SHOPS. See **Contracts,** 1–2.

BURDEN OF PROOF:

1. A State may provide that failure to safeguard dangerous machinery shall be negligence, and in actions by employees for injury abolish the defenses of contributory negligence and assumption of risk and place the burden on the defendant of showing compliance with the act. *Bowersock* v. *Smith* 29

2. A State may provide that where an employer has rejected a workmen's compensation act the presumption shall be that injury was due to his negligence, and that burden of proof shall be upon employer. *Hawkins* v. *Bleakly* 210

3. *Quære:* When carrier proves a cause of delay of the goods for which it was not responsible under terms of bill of lading, does burden shift to shipper to prove negligence in dealing with the situation thereafter? *Pennsylvania R. R.* v. *Olivit Bros.* 574

4. A criminal statute which shifts the burden of proof in prosecutions under it for making contracts for future delivery of goods when delivery is not intended affords no ground, in a civil action to enforce a contract, for holding that the averments of the petition regarding the intent to deliver must be taken to be untrue. *Bond* v. *Hume* 15

CANCELLATION:

1. The United States cannot maintain for the benefit of an Indian a suit to annul a deed which, by force of the Clapp Amendment, he had full power to make, on the ground that it was procured by fraud. *United States* v. *Waller* 452

2. A certificate of citizenship granted on a state of facts showing petitioner not qualified is subject to be annulled in an independent suit by the United States under § 15 of the Naturalization Act. *United States* v. *Ginsberg* 472

CARMACK AMENDMENT. See **Interstate Commerce Acts,** 9 *et seq.*

CARRIERS. See **Employers' Liability Act; Interstate Commerce Acts; Safety Appliance Act.** PAGE

1. Common carriers are under a duty to compete, and are subject in a peculiar degree to the policy of the Sherman Act. *Thomsen* v. *Cayser* 66

2. The business of common carriers by rail is in one aspect a public business because of the interest of society in its continued operation and rightful conduct; and this public interest gives rise to a public right of regulation to the full extent necessary to secure and protect it. *Wilson* v. *New* ... 332

3. A railroad company, not owning property in a State, is not doing business there when it merely ships goods into the State over lines of a connecting carrier, each receiving a proportionate share of the freight charged for the interstate haul, and the connecting carrier there sells coupon tickets and advertises the other company's name to promote travel and public convenience. *Phila. & Reading Ry.* v. *McKibbin* 264

4. Under Kentucky laws a railroad company is required to take notice of the places where numerous people are accustomed to cross or be upon its tracks and to moderate the speed of its trains, maintain lookouts and give proper signals to prevent injuries. *McAllister* v. *Ches. & Ohio Ry.* 302

5. Under Kentucky laws lessor and lessee railroads are jointly liable for injuries or death inflicted on persons on tracks, not trespassers, by negligence of lessee in operating trains. *Id.*

6. Who are shippers of goods so far as concerns their relations with carrier over whose lines the consignments go? *Lehigh Valley R. R.* v. *United States* 444

7. A switch track, owned by a railroad company and connecting with its main line, used by a packing company under a license, *held* not a private track. *Swift & Co.* v. *Hocking Valley Ry.* 281

8. When are private cars, let to carrier, in service of carrier? *Id.*

9. In an action for damage to goods caused by delay in forwarding, where carrier defends on ground that delay was due to proven conditions of traffic beyond its control—due to a

CARRIERS—*Continued.* PAGE

strike,—affording an excuse under the bill of lading, evidence that the goods were received after the strike and that delay was caused by preferring other goods in delivery *held* sufficient evidence of negligence to go to jury. *Pennsylvania R. R.* v. *Olivit Bros.* 574

10. *Quære:* When carrier proves a cause of delay of the goods for which it was not responsible under terms of bill of lading, does burden shift to shipper to prove negligence in dealing with the situation thereafter? *Id.*

11. When carrier and shipper agree that measure of damages shall be value of goods at place and time of shipment, freight paid upon delivery may be added to the depreciation of such value caused by carrier's default. *Id.*

12. Where goods are brought to destination in a damaged condition, and sold at less than their value at shipment, the carrier is liable to refund freight paid if the damage resulted from its negligence. *Id.*

13. A stipulation conditioning carrier's liability for damage to goods upon written notice being given by consignee is valid if the terms are reasonable. *St. Louis, I. Mt. & So. Ry.* v. *Starbird* 592

14. Reasonableness depends on nature of goods and circumstances of each case; 36 hours in case of perishable fruit is not unreasonable. *Id.*

15. Such a stipulation *held* merely to require notice of intention to claim damages without ascertaining or specifying amount. *Id.*

16. Verbal notice to a dock-master of delivering carrier does not satisfy stipulation. *Id.*

CAUSE OF ACTION:

1. Trial court, in sound discretion, may allow new cause of action to be set up by amendment of complaint. *Thomsen* v. *Cayser* 66

2. Suit against Secretary of Interior and Commissioner of General Land Office to restrain issuance of patent to an individual who has entered coal land claimed by plaintiff is a suit against the United States. *New Mexico* v. *Lane* 52

CAUSE OF ACTION—*Continued.* PAGE

3. Under Carmack Amendment, the lawful holder of bill of lading may sue without proving ownership of goods. *Pennsylvania R. R.* v. *Olivit Bros.* 574

4. A petition averring that decedent was negligently and wantonly run down and killed at a public crossing, without fault on his part, and specifying the acts of negligence, *held* to state a joint cause of action against lessor and lessee railroads under the law of Kentucky. *McAllister* v. *Ches. & Ohio Ry.*. 302

CERTIFICATE OF CITIZENSHIP. See **Naturalization Act.**

CERTIFYING OF QUESTIONS. See **Procedure, VII.**

CERTIORARI:

1. This court will dismiss a certiorari upon discovering that the question which induced the issuance of the writ does not arise on the record. *Tyrrell* v. *District of Columbia* 1

2. In controversies arising in bankruptcy proceedings (e. g., suit by trustee to set aside preference), a final judgment of the Circuit Court of Appeals is reviewable only by certiorari. *Staats Co.* v. *Security Trust & Savgs. Bank* 121

3. Amendment to § 4 of Rule 37 623

CIRCUIT COURTS:

The provisions of § 764, Rev. Stats., as amended, for review in this court of appellate judgments of Circuit Courts in *habeas corpus* cases, were repealed by the Judiciary Act of 1891 and § 289, Jud. Code, abolishing Circuit Courts. *Horn* v. *Mitchell*..... 247

CIRCUIT COURTS OF APPEALS. See **Jurisdiction.**

CITY ORDINANCES. See **Franchise and License.**

Granting franchise to construct and operate water works, construed with respect to duration of franchise. *Owensboro* v. *Owensboro Water Works Co.*..... 166

COLLISIONS. See **Admiralty, 7–9.**

COMITY. See **Constitutional Law, II.** PAGE

1. The courts of an independent sovereignty will not enforce a foreign contract where such action would be contrary to good morals or violate its public policy. *Bond* v. *Hume*... 15

2. They will refuse to enforce foreign contracts, valid where made, only when constrained by clear conviction of the existence of the conditions justifying that course. *Id.*

3. The public policy indicated by enactments of the law-making power controls comity in the enforcement of foreign contracts. *Id.*

COMMERCE. See **Anti-Trust Act; Constitutional Law,** III; **Interstate Commerce; Interstate Commerce Acts; Waters and Water Rights.**

COMMON CARRIERS. See **Carriers.**

COMPUTATION OF TIME. See **Time.**

CONDEMNATION. See **Eminent Domain.**

CONFLICT OF LAWS. See **Comity.**

CONGRESS. See **Constitutional Law; Statutes.**
Power to punish for contempt. *Marshall* v. *Gordon*..... 521

CONSIGNOR AND CONSIGNEE. See **Carriers.**
Who are shippers of goods as regards relations with interstate carrier over whose lines consignments go? *Lehigh Valley R. R.* v. *United States*..... 444

CONSPIRACY. See **Criminal Law,** 6–7; **Anti-Trust Act.**

CONSTITUTIONAL LAW:
Jurisdiction of this court in disbarment proceedings. See **Jurisdiction,** II, (1).

I. General References, p. 674.

II. State Equality and Comity, p. 675

III. Commerce Clause, p. 675.

IV. Contempt, Power of House of Representatives to Punish for, p. 676.

CONSTITUTIONAL LAW—*Continued.* PAGE

V. Contract Clause, p. 676.

VI. Elections, p. 677.

VII. Full Faith and Credit, p. 677.

VIII. Impeachment, p. 677.

IX. Indians, p. 678.

X. Public Lands, p. 678.

XI. Republican Form of Government, p. 678.

XII. Fifth Amendment:
- (1) Taking Private Property for Public Use, p. 678.
- (2) Due Process of Law, p. 679.

XIII. Seventh Amendment: Right to Jury, p. 680.

XIV. Fourteenth Amendment:
- (1) General, p. 680.
- (2) Notice and Opportunity for Hearing.
  - (a) Service of Process, Foreign Corporations, Attachment, p. 680.
  - (b) Statutory Presumptions and Shifting Burden of Proof, p. 682.
  - (c) Retroactive Judicial Construction, p. 682.
  - (d) Administrative Proceedings and Curtailment of Judicial Remedies, p. 682.
  - (e) Appeal in Criminal Cases, p. 682.
- (3) Jury, p. 683.
- (4) Police Regulations Affecting Property and Liberty —Subjects and Methods.
  - (a) Regulating Rights and Liabilities of Employer and Employee, p. 683.
  - (b) Affecting Railroad's Franchise and Liability for Torts, p. 685.
  - (c) Taking Property for Public Use, p. 685.
- (5) State Taxation, p. 685
- (6) Equal Protection of the Laws, p. 685.

XV. Who may Question Constitutionality of Statutes. Presumptions in their Favor, p. 686.

XVI. Adopting State Construction and Findings, p. 688.

I. **General References.**

1. Although emergency may not create federal power, it may afford ground for exerting a power conferred. *Wilson* v. *New* 332

CONSTITUTIONAL LAW—*Continued.* PAGE

2. Executive regulations under an act of Congress which exceed the power of Congress may be disregarded as void, but not such as are illiberal, inequitable or unwise. *Utah Power Co.* v. *United States*..... 389

3. The United States is not estopped by agreements of its officers not sanctioned by law, or subject to the doctrine of laches, especially in a suit to enforce its policy respecting public lands. *Id.*

4. The power of the States to seize tangible and intangible property to satisfy obligations of absent owners is not obstructed by the Federal Constitution. *Pennington* v. *Fourth Natl. Bank*..... 269

II. **State Equality and Comity.**

1. Iowa was admitted to the Union upon equal footing with all other States with equal right to abolish or limit trial by jury irrespective of the provisions contained in the Ordinance of 1787 for the government of the Northwest Territory. *Hawkins* v. *Bleakly*..... 210

2. The principles which lead the courts to accept legislative definitions of public policy in respect to contracts, and to enforce foreign contracts, valid where made, if not clearly contrary to local policy, apply with added force as between the States of the Union. *Bond* v. *Hume*..... 15

3. *Quære:* Whether the existence of a state statute punishing the making of contracts for goods or securities to be delivered in future where actual delivery was not intended in good faith could constitutionally justify the courts of that State or the United States courts sitting there in refusing to execute such a contract validly made in another State? *Id.*

III. **Commerce Clause.** See *infra* XII, (2) 1–4.

1. Where a particular subject lies within the commerce clause, the extent to which it may be regulated depends upon the nature and appropriateness of the means adopted. *Wilson* v. *New*..... 332

2. Congress may regulate the hours of labor of railway employees engaged in interstate commerce. *Id.*

3. For the purpose of preventing a complete stoppage of interstate traffic through a strike, Congress has power to fix

CONSTITUTIONAL LAW—*Continued.* PAGE

the wages of railway employees during a reasonable period, to afford an opportunity for employers and employees to agree upon wage standards of their own. *Id.*

4. Such a provision is in the nature of compulsory arbitration of the dispute. *Id.*

5. When navigable streams affording ways of commerce between States are improved by the federal government by raising the water by locks and dams, they remain as thus improved navigable waters of the United States for all purposes of federal jurisdiction and regulation. *United States* v. *Cress*. 316

6. In improving navigable streams under the commerce power the government must afford due compensation for private property taken as required by the Fifth Amendment. *Id.*

IV. **Contempt, Power of House of Representatives to Punish for.**

1. The House has no express power to punish for contempt except as committed by its own members. Art. 1, § 5. *Marshall* v. *Gordon* 521

2. It has implied power to deal directly with contempt only so far as necessary to preserve and exercise the legislative authority expressly granted. *Id.*

3. This is not a power to inflict punishment in the strict sense but a power to prevent acts obstructing the discharge of legislative duty and to compel acts essential to its performance. *Id.*

4. The power is limited to imprisonment during the session of the body of Congress affected by the contempt. *Id.*

5. In the absence of manifest abuse of discretion, this implied power is not subject in its exercise to judicial interference. *Id.*

6. In quality and quantity it is the same when exerted in behalf of the impeachment powers as in other cases. *Id.*

V. **Contract Clause.**

1. A provision in a special railroad charter permitting the grantee to lease its road to any other railroad company

CONSTITUTIONAL LAW—*Continued.* PAGE

" upon such terms as may be mutually agreed upon," is not to be construed as authority for the lessor and lessee to determine what shall be their respective liabilities toward third persons tortiously injured in the operation of the road when leased; therefore it creates no contract right which would be impaired by subsequent legislation rendering lessor and lessee jointly liable for torts of the latter. *Chicago & Alton R. R.* v. *McWhirt* 422

VI. **Elections.** See general title " **Elections.**"

1. *Quære:* Whether the power of Congress to regulate elections of senators and representatives, Art. 1, § 4, is applicable to a general nominating primary as distinguished from a final election? *United States* v. *Gradwell* 476

2. The rights of candidates for nomination for the office of United States Senator at a primary in West Virginia *held* to spring from the West Virginia primary election law and not from the Constitution or laws of the United States. *Id.*

VII. **Full Faith and Credit.**

1. Failure to give effect to an Indian lease approved by the United States Court for the Indian Territory cannot be said to deny full faith and credit when the approval was expressly conditioned upon approval by the Secretary of the Interior, which was not given. *Wellsville Oil Co.* v. *Miller* 6

2. A mere error of construction committed by a state court in a candid effort to construe the laws of another State is not a denial of full faith and credit. *Penna. Fire Ins. Co.* v. *Gold Issue Mining Co.* 93

VIII. **Impeachment.**

1. Proceedings by sub-committee of the House of Representatives in making an inquiry concerning the liability of an official to impeachment *held* not to amount to impeachment proceedings. *Marshall* v. *Gordon.* 521

2. The power of the House to punish for contempt is the same when exerted in protection of the impeachment power as in other cases. *Id.*

See **Contempt,** *supra,* IV.

CONSTITUTIONAL LAW—*Continued.* PAGE

IX. **Indians.**

1. In the exercise of its guardianship over tribal Indians, Congress may adjust its action to meet new and changing conditions, provided no fundamental right be violated. *United States* v. *Rowell* 464

2. Having directed that a patent be issued to an individual for land assigned him as an Indian allotment, Congress had power to recall the direction upon finding that the tract had been lawfully devoted to a special use—school purposes,—from which it could not be withdrawn without due regard to the tribe, or that in situation and value it exceeded a fair distributive share—this without prejudice to the allottee's obtaining another allotment. *Id.*

X. **Public Lands.**

1. The power to regulate the use of lands of the United States and to prescribe the conditions upon which rights in them may be acquired by others is exclusively in Congress. *Utah Power Co.* v. *United States* 389

2. The inclusion of public lands within a State does not diminish this power or subject the lands or interests in them to disposition by the state power. *Id.*

3. Congress is allowed wide discretion in controlling the use of public lands through administrative regulations. *Id.*

XI. **Republican Form of Government.**

1. Whether the constitutional guaranty of a republican form of government, Art. IV, § 4, has been violated is not a judicial question but a political one addressed to Congress. *Mountain Timber Co.* v. *Washington* 219

XII. **Fifth Amendment.**

(1) *Taking Private Property for Public Use.*

1. The taking of private property in the exercise of the commerce power must be in accordance with the Fifth Amendment. *United States* v. *Cress* 316

2. The flooding of private lands along non-navigable tributary as a result of raising a navigable stream may amount to a partial taking of the land so flooded, where the flooding

CONSTITUTIONAL LAW—*Continued.* PAGE

is periodical, and render the government liable to compensate the owner in exchange for the easement to overflow the lands. *Id.*

3. Loss of a ford over a non-navigable tributary, used in connection with a private right of way, and loss of water power used in operating a mill due to the flooding of the tributary through the raising of a navigable stream *held* taking of private property for which the United States must pay. *Id.*

(2) *Due Process of Law.* See *supra*, IX, **"Indians."**

1. An act of Congress fixing the wages of employees of interstate railroads temporarily to avert the calamity of a general strike *held* not to be an invasion of the private rights of either carriers or employees. *Wilson* v. *New*. 332

2. All the business and property of an interstate carrier is subject to such regulation as is required to protect public interest in interstate commerce. *Id.*

3. Similarly, the liberty of the employees of such carriers is subject to limitation by Congress under the commerce power as may be necessary for the protection of interstate commerce. *Id.*

4. An act "to establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce, and for other purposes," is constitutional and is not open to the objection that its provisions are unworkable. *Id.*

5. Where Congress, in exercising its power to distribute tribal lands by allotment, directs the Secretary of the Interior to issue a patent to certain land to a member of an Indian tribe, it has power to recall the direction before the patent is issued and the full title passed. *United States* v. *Rowell*. 464

6. Lands having been granted to the Oregon & California Railroad Company by laws reserving the right of alteration or repeal, designed to distribute the lands to actual settlers while conferring on the grantee an interest to obtain not more than $2.50 per acre, and the plan having turned out unworkable largely through the grantee's misconduct, Congress had power, as against the railroad and its mortgage

CONSTITUTIONAL LAW—*Continued.* PAGE

trustee, to resume the title in the United States, making suitable provision by law for the protection of such interest of the railroad company. *Oregon & Cal. R. R.* v. *United States*. 549

7. *Quære:* Whether the power of the federal courts in equity to render summary judgment against sureties on appeal bonds is dependent upon notice to the sureties? *Pease* v. *Rathbun-Jones Co*. 273

XIII. **Seventh Amendment. Right to Jury.**

1. A workmen's compensation act which does away with trial by jury in the federal courts indirectly by abolishing all right to recovery as between employer and employee for the future, but which does not attempt to interfere with existing rights of action, is not violative of the Seventh Amendment. *Mountain Timber Co.* v. *Washington*. 219

2. Granting summary judgment on appeal bonds in the federal courts is not an evasion of the surety's right to a trial by jury. *Pease* v. *Rathbun-Jones Co*.. 273

XIV. **Fourteenth Amendment.**

(1) *General.*

1. The question whether a state law deprives of a right secured by the Constitution depends not on how the law is characterized but on its operation and effect. *Mountain Timber Co.* v. *Washington* 219

2. Questions of construction and meaning of state laws do not involve the Fourteenth Amendment. *Enterprise Irrig. Dist.* v. *Canal Co*. 157

(2) *Notice and Opportunity for Hearing.*

(a) Service of Process. Foreign Corporations. Attachment.

1. A personal money judgment, based on service by publication after defendant has left the State to establish domicile elsewhere, is absolutely void, although the action was commenced before actual change of domicile and while his family continued to reside in such State. *McDonald* v. *Mabee* 90

2. *Quære:* Whether such judgment would be good if a sum-

CONSTITUTIONAL LAW—*Continued.* PAGE

mons had been left at the abode of defendant while his family was in the State and before the new domicile was acquired? *Id.*

3. An ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the State of its rendition as elsewhere. *Id.*

4. A foreign fire insurance company to gain the right to do business in a State, filed a power of attorney consenting that service on a state officer should be personal service on the company so long as it had liabilities outstanding in the State; the state court, construing the statute, held that the consent covered service in an action on a policy issued in and insuring property in another State. *Held*, that the construction had a rational basis in the statute and therefore could not be deemed to deprive the company of due process, even if it took it by surprise. *Penna. Fire Ins. Co.* v. *Gold Issue Mining Co.* 93

5. When a power actually is conferred by a document, the maker takes the risk of the interpretation that may be put upon it by the courts. *Id.*

6. In the absence of consent, a corporation of one State may not be summoned in another in an action *in personam* unless doing business in the State where served in such manner and to such extent as to warrant the inference that it is present there and unless process be served on some authorized agent. *Phila. & Reading Ry.* v. *McKibbin* 264

7. The power of States to seize tangible and intangible property and apply it to satisfy obligations of absent owners is not obstructed by the Federal Constitution. *Pennington* v. *Fourth Natl. Bank.* 269

8. The only essentials to its exercise are the presence of the *res*, its seizure at commencement of proceeding, and opportunity to be heard. *Id.*

9. These existing, a decree of alimony will be valid under the same circumstances and to the same extent as a judgment on a debt, i. e., valid as a charge on the property seized. So *held* where the property was a divorced husband's bank account. *Id.*

CONSTITUTIONAL LAW—*Continued.* PAGE

(b) **Statutory Presumptions and Shifting Burden of Proof.**

10. A State may provide that failure to safeguard dangerous machinery shall be negligence and place the burden of proof upon the defendant to show compliance with the act. *Bowersock* v. *Smith*..... 29

11. A State may provide that in an action by an employee against an employer who has rejected an elective workmen's compensation act the injuries to the employee shall be presumed to have resulted from the employer's negligence and that the burden of rebutting the presumption shall rest on him. *Hawkins* v. *Bleakly*..... 210

12. Also that a rejection of the compensation act by an employee, if made at the request of the employer or his agent, shall be conclusively presumed to have been unduly influenced, and shall be void. *Id.*

(c) **Retroactive Judicial Construction.** See XIV, (2), (a) 4, *supra.*

(d) **Administrative Proceedings and Curtailment of Judicial Remedies.**

13. A workmen's compensation act, prescribing the measure of compensation and the circumstances under which it is to be made, establishing a method of applying the measure to the facts of each case by due hearings before an administrative tribunal, whose action upon all fundamental and jurisdictional questions is subject to judicial review, is consistent with due process of law. *Hawkins* v. *Bleakly*..... 210

14. It is competent for a State to abolish entirely the judicial remedies for personal injuries occurring in the course of employment and substitute administrative remedies through state boards with compensation through state funds. *Raymond* v. *Chicago, Mil. & St. P. Ry.*..... 43
See *New York Cent. R. R.* v. *White*..... 188
Mountain Timber Co. v. *Washington*..... 219

(e) **Appeal in Criminal Cases.**

15. A sentence for murder was affirmed by an equal division of the justices of the appellate court, three of whom did not hear the argument and one of whom, who voted for affirm-

CONSTITUTIONAL LAW—*Continued.* PAGE

ance, was not appointed until after it was made, but opportunity was given for reargument. *Held* not violative of due process. *Lott* v. *Pittman*. 588

16. The right of appeal is not essential to due process, and, where allowed, the State may prescribe conditions. *Id.*

(3) *Jury.*

1. Denial of trial by jury in civil cases is not inconsistent with due process of law. *New York Cent. R. R.* v. *White*.. 188
Hawkins v. *Bleakly*..... 210

(4) *Police Regulations Affecting Property and Liberty. Subjects and Methods.*

(a) Regulating Rights and Liabilities of Employer and Employee.

1. For the protection of employees in hazardous occupations, States may make failure to safeguard dangerous machinery actionable negligence in case of injury or death, doing away with contributory negligence, assumption of risk and fellow servant doctrine, and casting burden on defendant to show compliance with the act. *Bowersock* v. *Smith*.. 29

2. Such an act does not violate the Amendment even if held applicable in behalf of an employee who contracted with the owner to provide safeguards required by the statute, the absence of which later resulted in his injury and death. *Id.*

3. A workmen's compensation system abolishing all common-law rules of liability and damages, requiring employers to compensate for disability or death of employees in accordance with a prescribed scale based on loss of earning power, to insure payment by contributions to state insurance fund or by deposit of securities, etc., and providing that liability and amount shall be determined through administrative proceedings, *Held* valid as to both employers and employees, the amounts of compensation prescribed being fair, though less than might be obtained in negligence cases at common law. *New York Cent. R. R.* v. *White*..... 188
Hawkins v. *Bleakly*..... 210
See also *Mountain Timber Co.* v. *Washington*..... 219
Raymond v. *Chicago, Mil. & St. P. Ry*..... 43

CONSTITUTIONAL LAW—*Continued.* PAGE

4. As an incident to the establishment of an elective workmen's compensation system, common-law defenses may be withdrawn from employers who do not accept it and the burden of rebutting a presumption of negligence may be cast on the employer. *Hawkins* v. *Bleakly* 210

5. A compensation act requiring employers to contribute to a state fund for the compensation of injured employees and the dependents of employees killed, without regard to fault, does not deprive employers of their property or liberty to acquire property in violation of the Amendment if the compensation fixed be not excessive and if the burden of contribution was fairly distributed among the employers in the industries affected. *Mountain Timber Co.* v. *Washington* 219

6. *Semble*, That such an act might be void if it provided compensation unreasonably onerous on an employer or too insignificant to afford a reasonable substitute for the opportunity of employees to obtain damages for negligence under the common law which the act abolishes. *Id.*

7. A state compensation law classifying most employments as hazardous and grouping them according to supposed hazard and requiring all in a group to contribute to a state fund in payments gauged by their respective pay-rolls for the compensation of injuries occurring in any of the factories in that group, and doing away completely with common-law rules respecting liability, and providing for compensation in all cases of injury without regard to fault, to be administered through a state commission, *Held* valid. *Id.*

8. *Quære:* Whether a provision in a workmen's compensation act forbidding employer and employee, in agreeing on wages, from taking into consideration fact of employer's enforced contribution to compensation fund would not be unwarranted deprivation of liberty? *Id.*

9. The Constitution does not require a separate exercise of the state powers of regulation and taxation. *Id.*

10. For the protection of health, a State may provide that no person shall work in any mill, etc., more than 10 hours per day except watchmen and employees engaged in making necessary repairs or in case of emergency where life or property is in danger, and adding a proviso that employees may

CONSTITUTIONAL LAW—*Continued.* PAGE

work overtime not exceeding three hours per day if paid for such overtime at the rate of one and one-half times the regular wage. *Bunting* v. *Oregon* 426

11. In sustaining a state law passed in the exercise of an admitted power of government, the court need not be sure of the precise reasons for the means adopted nor may it pass upon their adequacy or wisdom. *Id.*

12. Upon the question whether a 10-hour law is useful or necessary for the preservation of health, the court may accept the judgment of a state legislature and supreme court when the record shows no facts to support the contrary contention. *Id.*

(b) Affecting Railroad's Franchise and Liability for Torts.

13. A street railway company claiming a franchise right to operate over county bridges cannot complain of state action requiring it to pay one-third of the cost of reconstructing the bridges as a condition upon its right to use them, if it has in effect surrendered its claim of franchise in exchange for a revocable grant or license. *Rome Ry. & Lt. Co.* v. *Floyd County* 257

14. A state law rendering a local railroad company leasing its road to a company of another State jointly liable with the lessee for actionable torts of the latter committed in operating the road does not deprive of due process. *Chicago & Alton R. R.* v. *McWhirt* 422

(c) Taking Property for Public Use.

15. A State may authorize an electric railway corporation to condemn privately owned water power for the generation of electricity to run the road and for sale of the surplus electricity, if any. *Hendersonville &c. Co.* v. *Blue Ridge Ry.* 563

(5) *State Taxation.*

1. The Constitution does not require a separate exercise of the state powers of regulation and taxation. *Mountain Timber Co.* v. *Washington* 219

(6) *Equal Protection of the Laws.*

1. A Kansas statute requiring owners of dangerous machinery to provide safeguards for the protection of their em-

CONSTITUTIONAL LAW—*Continued.* PAGE

ployees, etc., construed as applicable to corporate as well as individual owners, and therefore affording no basis for the claim of inequality. *Bowersock* v. *Smith* 29

2. The New York Workmen's Compensation Law does not discriminate against those affected by it in excluding therefrom farm laborers and domestic servants. *New York Cent. R. R.* v. *White* 188

3. The Iowa Workmen's Compensation Law does not deprive the employer of equal protection in allowing him the common-law defenses of assumption of risk, contributory negligence and negligence of fellow servants only when he has accepted the act and the employee has not, while withdrawing them if employer and employee both, or employer alone, have rejected it. *Hawkins* v. *Bleakly* 210

4. In the absence of any particular showing of erroneous classification, the evident purpose of a workmen's compensation act to classify the various occupations according to the respective hazard of each *held* sufficient answer to any contention that it improperly distributes the burdens among the several industries. *Mountain Timber Co.* v. *Washington* 219

5. The Oregon law limiting the hours of employees in mills, factories, etc., to 10 hours, with provisions for allowing extra time at increased pay, *Held* not to discriminate against employers. *Bunting* v. *Oregon*..... 426

6. A state law, rendering any railroad company of the State leasing its road to a company of another State liable jointly with the lessee for actionable torts of the latter committed in operation of the road, does not deprive of equal protection of the law. *Chicago & Alton R. R.* v. *McWhirt* 422

XV. **Who May Question Constitutionality of Statutes. Presumptions in their Favor.**

1. Where an act would not be valid against employers if not valid against employees, an employer may question its constitutionality in both aspects. *New York Cent. R. R.* v. *White* 188
Mountain Timber Co. v. *Washington*. 219

2. One who is engaged in the business of logging timber, operating a logging railroad, and operating a sawmill with

CONSTITUTIONAL LAW—*Continued.* PAGE

power-driven machinery, is not in a position to question the classification of other businesses as hazardous. *Mountain Timber Co.* v. *Washington*..... 219

3. Whether a provision for penalties in a federal act is unconstitutional will not be determined in a suit not concerning penalties. *Wilson* v. *New*..... 332

4. The making of a deposit of cash and securities in obedience to the New York Workmen's Compensation Act, accompanied by an express reservation of all contentions respecting the invalidity of the act, does not estop depositor from questioning its constitutionality. *New York Cent. R. R.* v. *White*..... 188

5. In passing on the New York Workmen's Compensation Act, the court assumes that the provision made for self-insurance by employers, when the state commission assents, will be open to all employers on reasonable terms within the power of the State to impose. *Id.*

6. In allowing employers to provide insurance for future liabilities by insuring themselves, depositing securities, etc., under the control of the state commission, the New York Workmen's Compensation Law is not to be deemed violative of the rights of employees to adequate security, in the absence of any ground to presume that the methods of security provided would be insufficient to safeguard their interests. *Id.*

7. Declarations in the Washington Workmen's Compensation Law *held* acceptable evidence of an intelligent effort to limit the burden of contributions required of the employers in the several classes of industries to the requirements of their class. *Mountain Timber Co.* v. *Washington*..... 219

8. The compensation provided under the Washington Workmen's Compensation Law may be regarded as reasonable in the absence of any showing to the contrary. *Id.*

9. While mere legislative declaration cannot give character to a law or turn illegal into legal operation, there is a presumption that the purpose of an act is the purpose expressly declared by the legislature and confirmed by the state court. *Bunting* v. *Oregon*..... 426

CONSTITUTIONAL LAW—*Continued.* PAGE

10. If the terms of an act may be accommodated to its declared purpose, the court will not hold that a legislature, while intending one thing, through improvidence of language, effected another. *Id.*

11. Upon the question whether a 10-hour law is necessary or useful for the preservation of the health of employees, the court may accept the judgment of the state legislature and state supreme court when the record contains no facts tending to overthrow it. *Id.*

XVI. **Adopting State Construction and Findings.** See *supra*, XV, 9, 11.

1. Where no conflict with the Federal Constitution or laws is involved, a construction of a state statute by the highest state court is taken as conclusive. *Memphis Street Ry.* v. *Moore*..... 299

2. The state court having found that the taking of an entire water power was necessary to generate electricity for the running of a railroad, this court, in the absence of definite proof that surplus current would result, cannot say that the sale of surplus current allowed in the condemnor's charter is the real object of the enterprise or anything more than a possible incident of the railway use necessary to prevent waste. *Hendersonville &c. Co.* v. *Blue Ridge Ry.*..... 563

CONSTRUCTION. See **Contracts; Statutes.**

Construction of city ordinances. See **Franchise and License.**

Construction of judgment. See **Judgments.**

When a power actually is conferred by a document, the party executing it takes the risk of interpretation that may be put upon it by the courts. *Penna. Fire Ins. Co.* v. *Gold Issue Mining Co.*..... 93

CONTEMPT:

Power of House of Representatives to punish for. *Marshall* v. *Gordon*..... 521

CONTRACTS. See **Constitutional Law; Carriers; Franchise and License; Indians; Statutes,** I, 3, 4.

Stipulations in bills of lading restricting carrier's liability. See **Carriers,** 9–16.

CONTRACTS—*Continued.* PAGE

Enforcement of foreign contracts. See **Comity.**

Liability of United States *ex contractu.* arising from flooding riparian land and raising level of tributary streams. See **Eminent Domain.**

1. A contract between citizens of New York and Texas, executed in New York, for purchase and sale of cotton for future delivery on New York Cotton Exchange, pursuant to its rules, *held* valid under the New York law and the common law. *Bond* v. *Hume* 15

2. Where it is alleged and admitted that actual delivery was *bona fide* intended, the contract is not repugnant to the Texas "Bucket Shop" Law or the public policy of Texas as manifested by other statutes or decisions of its courts. *Id.*

3. A city granted a 25-year water works franchise to one company, contracting also to rent hydrants from it from time to time "for the unexpired term of said franchise." A second company, succeeding the first, received a re-grant of the franchise to run, however, during its corporate life, which it had a charter right to prolong by periodical extensions; and the city also recognized the second company as succeeding to the hydrant contract "as fully as if such contract had originally been made" with the second company without intervention of the first. *Held*, that while the second company's franchise endured during its corporate life as it might be extended, the hydrant contract was a separate obligation which expired with the original 25-year period. *Owensboro* v. *Owensboro Water Works Co* 166

4. *Held*, also, that the conduct of the parties in ceasing to collect and pay rent under the hydrant contract when the 25-year period expired was a practical construction of it. *Id.*

5. The liberty of employer and employee to agree upon compensation for injury or death incurred in hazardous employments is subject to restriction by the police power. *New York Cent. R. R.* v. *White* 188

6. Washington Workmen's Compensation Law not construed, in absence of constraining state construction, as prohibiting employer and employee, in agreeing upon terms of employment, from taking into consideration fact that em-

CONTRACTS—*Continued.* PAGE

ployer is contributor to state insurance fund. *Mountain Timber Co.* v. *Washington*..... 219

7. *Quære:* Whether if so construed it would be an unconstitutional interference with liberty of contract? *Id.*

8. Where a street railway company claimed a perpetual, unconditional franchise right to operate over county bridges, which was disputed by the county, and they entered into agreements granting right to operate under certain conditions, the county being controlled by a statute limiting its power to the granting of temporary, revocable privileges, the agreements *held* to effect a substitution of temporary for claimed perpetual grant. *Rome Ry. & Lt. Co.* v. *Floyd County* 257

9. A provision in a special charter to a railroad company permitting it to lease its road to another company " upon such terms as may be mutually agreed upon " not construed as vesting parties with authority to contract as to their respective liabilities to third persons who may be injured in the operation of the road. *Chicago & Alton R. R.* v. *McWhirt* 422

10. A direction by Congress that a patent be issued an individual for land assigned him as an Indian allotment is to be regarded not as a proposal by the government which upon acceptance makes a contract, but as a law amendable and repealable at the will of Congress, provided vested rights are not impaired. *United States* v. *Rowell*..... 464

11. A stipulation in a bill of lading that claims for damage to goods shall be reported to the carrier within a certain time after notice to consignee of arrival, merely requires notice of intention to claim damages, without specifying the amount. *St. Louis, I. Mt. & So. Ry.* v. *Starbird*..... 592

CONTRIBUTORY NEGLIGENCE. See **Employers' Liability Act; Negligence.**

CONVEYANCES. See **Indians.**

CORPORATIONS. See **Franchise and License; National Banks; Stocks.**

Construction of city ordinances to determine duration of corporate franchise. *Owensboro* v. *Owensboro Water Works Co.*..... 166

CORPORATIONS—*Continued.* PAGE

Liability of lessor and lessee railroads for torts of lessee. See
McAllister v. *Ches. & Ohio Ry.* 302
Chicago & Alton R. R. v. *McWhirt* 422

1. In absence of consent, a corporation of one State may not be summoned in another, in an action *in personam*, unless it is doing business in the State where served. *Phila. & Reading Ry.* v. *McKibbin.* 264

2. The process must be served on its duly authorized agent. *Id.*

3. A railroad corporation is not doing business in a State because it ships cars into the State over the lines of connecting carriers, or because the connecting carrier, within the State, sells coupon tickets and advertises the other carrier's name. *Id.*

4. The fact that corporations subsidiary to another are doing business in a State does not warrant finding that the other is present there, doing business. *Id.*

5. *Quære:* Whether corporation doing business in a State may be served there on a cause of action arising in another State and unrelated to the business in the first? *Id.*

6. An arrangement by counsel to facilitate attempted service on officer while in State on private business, does not estop the corporation from contesting jurisdiction on ground that it was not doing business in the State. *Id.*

7. Under Rev. Stats., of Texas, Art. 1206, a suit against a corporation is not abated by its dissolution pending appeal. *Pease* v. *Rathbun-Jones Co.* 273

8. A Kansas statute requiring owners of dangerous machinery to provide safeguards for the protection of their employees, etc., construed as applicable to corporate as well as individual owners, and therefore affording no basis for the claim of inequality. *Bowersock* v. *Smith* 29

COSTS. See **Procedure, XIV.**

COTTON FUTURES. See **Contracts, 1, 2.**

CRIMINAL APPEALS ACT: PAGE

When trial court besides holding indictment defective for not following language of the statute bases its decision also upon the ground that the statute does not apply to the facts alleged, the decision as to the latter ground is reviewable under the Criminal Appeals Act. *United States* v. *Davis* .. 570

CRIMINAL CODE. See **Criminal Law.**

CRIMINAL LAW:

1. Section 4 of Washington Workmen's Compensation Law, making it a misdemeanor for employer to deduct from wages premium paid into state insurance fund, not construed, in absence of constraining state construction, as prohibiting employer and employee, in agreeing upon terms of employment, from considering fact that employer is a contributor to such fund. *Mountain Timber Co.* v. *Washington* 219

2. One who causes the mailing, through an innocent agent, in furtherance of a scheme to defraud, is punishable under § 215, Crim. Code. *United States* v. *Kenofskey* 440

3. So, where the agent of a life insurance company delivered to its local superintendent false proofs of death, knowing they would be mailed in due course to the home office. *Id.*

4. The scheme was not executed on delivery of the documents to the superintendent. *Id.*

5. A deputy clerk of the District Court who converts to his own use fees deposited by litigants to secure payment of costs in bankruptcy and other cases is punishable under § 97, Crim. Code. *United States* v. *Davis* 570

6. A conspiracy to influence a congressional election by bribery of voters is not a conspiracy to defraud the United States within the meaning of § 37, Crim. Code, formerly § 5440, Rev. Stats. *United States* v. *Gradwell* 476

7. A conspiracy to deprive candidates for nomination to the United States Senate of their rights to a fair primary election under the West Virginia Primary Election Law, 1915, is not a conspiracy to deprive them of rights or privileges secured by the Constitution or laws of the United States, and prosecution under Crim. Code, § 19, will not lie. *Id.*

CRIMINAL LAW—*Continued.* PAGE

8. A charge of perjury may be based upon a valid regulation of the Land Department requiring an affidavit, if the oath be taken "before a competent tribunal, officer or person." *United States* v. *Morehead*..... 607

9. A regulation of the Land Department providing that soldiers' declaratory statements, when filed by an agent, may be executed before any officer having a seal and authorized to administer oaths generally, is appropriate and valid, and an oath to such a statement taken before a state notary or clerk of court pursuant to such regulation violates the federal perjury statute, if the statement is material and false. *Id.*

DAMAGES. See **Admiralty, 7–9; Sureties, 3.**

1. When carrier and shipper agree that measure of damages shall be the value of goods at place and time of shipment, the freight paid upon delivery may be added to the depreciation of such value caused by carrier's default. *Pennsylvania R. R.* v. *Olivit Bros*..... 574

2. When goods are brought to destination in a damaged condition and sold at less than their value at shipment, the carrier is liable to refund freight paid if the damage resulted from its negligence. *Id.*

3. When more than a reasonable rate for transportation is exacted as result of an unlawful combination, the excess over what was reasonable affords basis for damages recoverable under § 7 of the Sherman Act. *Thomsen* v. *Cayser*..... 66

4. When claims for damages for loss of custom are definitely stated, a charge that burden of proof is on plaintiff, and that jury must not allow speculative damages or guess at amounts but should calculate them from the evidence, sufficiently guards against danger of supposititious profits being considered as an element of the verdict. *Id.*

5. *Semble*, that a general verdict for an amount which equals a particular claim of damages and interest may be assumed to have been responsive to that claim alone, although there were others which were submitted to the jury. *Id.*

6. In a suit by the United States to enjoin unlawful occupancy and use of its reserved lands, compensation measured by the reasonable value of the occupancy and use, consider-

DAMAGES—*Continued.* PAGE

ing its extent and duration, should be included in the decree. *Utah Power Co.* v. *United States* 389

7. The compensation should not be measured by the charges prescribed for like uses by governmental regulations when the regulations have not been accepted or assented to by the defendants. *Id.*

8. Action against United States under Tucker Act for damages due to partial taking of private property in improvement of navigable streams. *United States* v. *Cress* 316

DECREES. See **Judgments.**

DEED. See **Indians.**

DEMURRAGE. See **Interstate Commerce Acts,** 3.

DESCENT AND DISTRIBUTION. See **Indians,** 3.

DISBARMENT:

1. This court alone has power to disbar attorneys from practicing before it. *Selling* v. *Radford* 46

2. Character and scope of investigation depend upon acts of misconduct charged, place of their commission, and nature of proof relied upon. *Id.*

3. Loss of membership of the bar of a state court of last resort, after admission here, cannot, without more, affect the standing of the member. *Id.*

4. Loss of fair private and professional character by wrongful personal and professional conduct is adequate reason for disbarment. *Id.*

5. This court is not concluded by a state decision upon the question of professional character. *Id.*

6. Upon a motion to disbar from this court one who has been disbarred from the highest court of a State on ground of ill professional character, this court will follow the state court unless upon intrinsic consideration of the record of that court lack of due process or obvious injustice is revealed. *Id.*

DISTRICT COURTS. See **Jurisdiction.**

DIVORCE. See **Alimony.**

DOCUMENTS. See **Construction; Computation of Time.** PAGE

DUE PROCESS OF LAW. See **Constitutional Law,** XII, (2); XIV.

EASEMENTS. See **Waters and Water Rights.**
For rights of way over Public Lands and Reservations. See **Public Lands.**

1. An easement to overflow private lands is acquired by the United States after payment of compensation for damage thereto resulting from raising level of navigable stream. *United States* v. *Cress* 316

2. The right to have water of a non-navigable stream flow away from riparian land without artificial obstruction is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land itself. *Id.*

ELECTIONS. See **Criminal Law,** 6, 7.
1. *Quære:* Whether the power of Congress to regulate elections of Senators and Representatives is applicable to a general nominating primary as distinguished from a final election? *United States* v. *Gradwell* 476

2. The rights which candidates for nomination for the office of United States Senator have in a primary election under West Virginia Acts, 1915, cannot be said to be derived from the Constitution and laws of the United States. *Id.*

3. The Federal Corrupt Practices Act, and amendments, recognizing primary elections and limiting the expenditures of candidates for Senator in connection with them, are not in effect an adoption of all state primary laws as acts of Congress. *Id.*

4. The temporary measure enacted by Congress for the conduct of the nomination and election of Senators until other provision should be made by state legislation (c. 103, 38 Stat. 384) was superseded as to West Virginia by the primary law of that State of Feb. 20, 1914, effective 90 days after its passage. *Id.*

EMBEZZLEMENT:
By deputy clerk. See **Criminal Law,** 5.

EMINENT DOMAIN. See **Constitutional Law,** XII, (1); XIV, (4), (c). **Waters and Water Rights.**
1. In a proceeding to condemn land for private railway, a

EMINENT DOMAIN—*Continued.* PAGE

judgment of the state supreme court going only to the right to condemn and remanding to the trial court for hearing as to damages is interlocutory and not reviewable in this court under § 237, Jud. Code. *Grays Harbor Logging Co.* v. *Coats-Fordney Co.* 251

2. Where state law and charter authorized electric railroad to condemn water power for generating electricity to operate its road, and to sell any surplus current, and state court found that taking was in good faith, was necessary, and that the purpose was public, in the absence of proof that a surplus would result this court will not say that sale of the surplus power was the real object. *Hendersonville &c. Co.* v. *Blue Ridge Ry.* 563

3. Even if sale of the surplus current were likely to occur, the taking would be justified. *Id.*

EMPLOYERS' LIABILITY ACT:

(1) *Interstate Commerce vel non.*

1. A company transporting logs within a State over its own railroad to tidewater, where part are sold and part towed to its mills in same State and finished products sold partly within State and partly without, is not engaged in interstate commerce; and employee injured while unloading logs at tidewater is not engaged in interstate commerce within the act. *McCluskey* v. *Marysville & Northern Ry.*.. 36

2. An employee of a company similarly engaged, injured while loading logs upon one of company's cars, is not engaged in interstate commerce within the act. *Bay* v. *Merrill & Ring Logging Co.*. 40

3. An employee injured in a tunnel under construction by carrier to shorten its main line between interstate points (the tunnel never having been used in interstate commerce), is not engaged in interstate commerce within the act. *Raymond* v. *Chicago, Mil. & St. P. Ry.*..... 43

4. An employee guarding tools, etc., intended for use in construction of station and track which, when finished, will be used in interstate commerce, is not engaged in such commerce within the act. *New York Cent. R. R.* v. *White*.... 188

(2) *Diverse Citizenship and Remand.*

5. An action governed by federal act is not removable from

EMPLOYERS' LIABILITY ACT—*Continued.* PAGE
state to federal court on ground of diversity of citizenship. *St. Joseph & G. I. Ry.* v. *Moore* 311

(3) *Negligence.*

6. Where there is substantial evidence of negligence to support verdict, this court will not disturb finding of state court. *Id.*

7. Where evidence showed injury due to raising coupler without aid of a jack—the proper appliance—and that on former occasions employee had requested a jack and had been promised one prior to accident, *held* there was no clear error justifying this court in disregarding concurrent decisions of state courts and setting aside plaintiff's verdict. *Seaboard Air Line Ry.* v. *Lorick* 572

8. Under Georgia Employers' Liability Act defenses of assumed risk and contributory negligence are eliminated when violation of Federal Safety Appliance Act contributes to cause the injury. *Louis. & Nash. R. R.* v. *Layton* 617

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** XIV, (6).

EQUITY. See **Cancellation.**

1. Property not subject to attachment at law may be reached in equity. *Pennington* v. *Fourth Natl. Bank* 269

2. Injunction entered at commencement of suit for divorce and alimony operates as seizure, in nature of a garnishment, of husband's account in bank. *Id.*

3. Federal courts, sitting in equity, may render summary judgment against sureties on appeal bonds—possibly without notice. *Pease* v. *Rathbun-Jones Co.* 273

4. Such practice is not objectionable on ground that legal remedy, by action on the bond, is adequate. *Id.*

ESTOPPEL. See **Vendor and Vendee.**

1. Where defendant as receiver of national bank contracted on its behalf for purchase of realty, using part of bank's money in payment, and under apparent authority from court assigned contract for cash paid the bank, the assignee acting

ESTOPPEL—*Continued.* PAGE

secretly for defendant as an individual, *held*, in an action to recover property for the bank, that he was estopped to claim the purchase was beyond the powers of the bank. *Baker* v. *Schofield*.... 114

2. The fact that a company in former litigation, not involving the duration of its special franchise, described it as for 25 years, works no estoppel, by conduct or judgment, against subsequently claiming that the term was extensible beyond that period. *Owensboro* v. *Owensboro Water Works Co.*.... 166

3. One who complies with a statute claimed to be unconstitutional, reserving all contentions respecting its validity, is not estopped from questioning its constitutionality. *New York Cent. R. R.* v. *White*.... 188

4. A corporation is not estopped from contesting jurisdiction on ground that it is not doing business in a State by an arrangement of counsel, designed to facilitate attempted service on officer while passing through State on private affairs. *Phila. & Reading Ry.* v. *McKibbin*.... 264

5. The United States is not estopped by acts of its officers or agents in agreeing to do or cause to be done what the law does not permit. *Utah Power Co.* v. *United States*.... 389

6. So *held* in regard to an alleged agreement for the use of federal lands by a power company. *Id.*

7. For a case in which the right to question a state water right adjudication was lost by laches and estoppel. See *Enterprise Irrig. Dist.* v. *Canal Co.*.... 157

EVIDENCE. See **Burden of Proof.**

Evidence of interstate commerce and negligence. See **Employers' Liability Act.**

Evidence of " doing business " within State. See **Corporations,** 3.

Evidence of negligence in delivery of goods. See **Carriers,** 9.

EXCEPTION:

Ruling of trial court not excepted to does not furnish proper basis for certiorari. *Tyrrell* v. *District of Columbia*.... 1

EXECUTION: PAGE

Where decree directs foreclosure sale and execution for deficiency, the amount of deficiency becoming fixed by the sale its insertion in the execution is but a clerical act. *Pease* v. *Rathbun-Jones Co.*..... 273

EXECUTORS AND ADMINISTRATORS:

1. Substitution of administrator as party where writ of error from this court erroneously sued out in intestate's name. *McCluskey* v. *Marysville & Northern Ry.*..... 36

2. Under Tennessee act, nonresident personal representatives of decedents leaving assets in State are regarded as citizens of the State for purposes of suit. *Memphis Street Ry.* v. *Moore*..... 299

3. The act does not however, prevent resort to federal courts. *Id.*

4. As construed by state supreme court, purpose is to permit them to sue *in forma pauperis*. *Id.*

FEDERAL EMPLOYERS' LIABILITY ACT. See **Employers' Liability Act.**

FELLOW SERVANT DOCTRINE. See **Negligence**, 1–2, 4.

FIFTH AMENDMENT. See **Constitutional Law**, XII.

FINDINGS OF FACT. See **Constitutional Law**, XVI; **Procedure**, XII.

FORECLOSURE:

1. A decree for recovery of a sum certain, with provisions establishing a lien and for foreclosure, was affirmed with directions for execution and further proceedings according to law. *Held* that a decree directing foreclosure sale and execution for any deficiency was consistent with affirmance. *Pease* v. *Rathbun-Jones Co.*..... 273

2. The amount of deficiency becoming fixed by the sale, its insertion in the execution was but a clerical act. *Id.*

3. *Quære:* Whether Rule 29 of this court binds sureties on a supersedeas bond to pay deficiency decrees in foreclosure cases, or only damages due to delay caused by appeal? *Id.*

FORWARDERS. See **Interstate Commerce Acts**, 5–7. PAGE

FOURTEENTH AMENDMENT. See **Constitutional Law**, XIV.

FRANCHISE AND LICENSE:

1. Where a city ordinance granted a franchise for 25 years to construct and operate water works, and subsequently granted a similar, substitute franchise to the successor of the first company " for and during the existence " of the second company whose life was 25 years primarily, with the reserved right to prolong the term by 25 year extensions, the life of the second company was not limited to 25 years but endured while its life endured by extensions beyond that period. *Owensboro* v. *Owensboro Water Works Co.*..... 166

2. The fact that the first franchise was expressly limited to 25 years while the second was " for the existence " of the corporation confirms this construction. *Id.*

3. The first ordinance containing a contract whereby the city agreed to rent hydrants for the unexpired term of the franchise if the company should extend its pipes, and the second ordinance recognizing the second company as successor of the first with respect to this contract, *held* that second company became successor of first with respect to that contract only for the unexpired term thereof. *Id.*

4. Later ordinances requesting extensions of pipes, and renting hydrants, and compliance with them by the second company, *held* not to import recognition by parties that franchise of latter company was for a definite term, not to be extended under its charter, but were referable to the hydrant contract only. *Id.*

5. The fact that grantee, in former litigation in which question of duration of its franchise was not material, the primary period having then some years to run, described franchise as for 25 years, works no estoppel by conduct or judgment. *Id.*

6. In computing time " from and after " a day named, that day will not be excluded where purpose of those whose words are being construed will be defeated. *Id.*

7. Where a claim by a street railway company to a perpet-

FRANCHISE AND LICENSE—*Continued.* PAGE

ual, unconditional franchise to operate over county bridges was disputed by the county, and it subsequently entered into and acted upon agreements with the county purporting to grant right to operate subject to conditions, the county being controlled by a statute limiting its authority to the granting of temporary, revocable privileges, *Held* that such agreements effected a substitution of a temporary grant subject to revocation. *Rome Ry. & Lt. Co.* v. *Floyd County* 257

8. Having thus surrendered its franchise for a temporary, revocable grant, the company cannot enjoin county from proceeding under act of legislature (Ga. Laws, 1914, p. 271) to rebuild the bridges and charging one-third of the cost as a condition precedent to company's use of the new structures. *Id.*

FRAUD:

Use of mails to defraud. See **Criminal Law,** 2–4.

1. Where defendant as receiver of national bank contracted on its behalf for purchase of realty, using part of bank's money in payment, and under apparent authority from court assigned contract for cash paid the bank, the assignee acting secretly for defendant as individual, *held,* in an action by his successor to recover the property for the bank, that the transaction was a gross breach of defendant's duty as receiver. *Baker* v. *Schofield* 114

See **Laches,** 1.

2. Where fraud in the joinder of resident and nonresident defendants to prevent removal is alleged, specific facts supporting the charge must be shown. *McAllister* v. *Ches. & Ohio Ry.* 302

Chicago & Alton R. R. v. *McWhirt* 422

3. A deed procured by fraud from an Indian of lands allotted and patented to him with the right of alienation cannot be annulled in a suit by the United States for his benefit. *United States* v. *Waller* 452

FULL FAITH AND CREDIT. See **Constitutional Law,** VII.

GARNISHMENT. See **Attachment.**

GEORGIA: PAGE

The Georgia Employers' Liability Act, Ga. Code, 1911, § 2783, eliminates defenses of assumed risk and contributory negligence when a violation of the Federal Safety Appliance Acts contributes to cause the injury. *Louis. & Nash. R. R.* v. *Layton* 617

HABEAS CORPUS. See **Jurisdiction,** II, 11, 12, 14.

Discharge of person unlawfully arrested by House of Representatives on charge of contempt. *Marshall* v. *Gordon* ... 521

HAGUE CONFERENCE. See **International Law,** 1.

HAWAII:

District Court for. See **Jursidiction,** II, (7).

HOURS OF LABOR:

Regulation of. See **Constitutional Law,** III; XII, (2); XIV, (4), (a). Oregon Law of 1913 an hours of service, not a wage, law. *Bunting* v. *Oregon* 426

IMPEACHMENT:

Power of House of Representatives to punish for contempt. *Marshall* v. *Gordon*. 521

INDIANS:

1. An order of the United States Court for Indian Territory, authorizing an Indian lease if the Secretary of the Interior approves, is conditional upon such approval being given, and, if it is not given or if the power to give it does not exist, no authority to lease can be derived from the order. *Wellsville Oil Co.* v. *Miller*..... 6

2. Under Choctaw-Chickasaw supplemental agreement of 1902, surplus lands, selected by member of Chickasaw Tribe, become alienable only with expiration of respective periods after patent fixed in § 16. *Gannon* v. *Johnston* 108

3. Such restrictions accompany land when it passes by inheritance to tribal member, and conveyance by him while periods are running is void. *Id.*

4. The Act of April 26, 1906, in providing that conveyances of allotments made after selection should not be declared invalid solely because made prior to patent, does not validate

INDIANS—*Continued.* PAGE

deeds made before removal of restrictions on alienation; it expressly declares them null and void. *Id.*

5. Under the Clapp Amendment, lands in the White Earth Reservation allotted and patented in trust to an adult mixed-blood Indian belong to him with all the rights and incidents of full ownership, including the right of alienation. *United States* v. *Waller*..... 452

6. The United States cannot maintain for his benefit a suit to annul his deed of the lands upon the ground that it was procured by fraud. *Id.*

7. In the exercise of its guardianship over tribal Indians, Congress may adjust its action to meet new and changing conditions, provided no fundamental right be violated. *United States* v. *Rowell*..... 464

8. Having directed that a patent be issued to an individual for land assigned him as an Indian allotment, Congress had power to recall the direction upon finding that the tract had been lawfully devoted to a special use—school purposes,—from which it could not be withdrawn without due regard to the tribe, or that in situation and value it exceeded a fair distributive share—this without prejudice to the allottee's obtaining another allotment. *Id.*

9. Such direction is not a proposal by the government which, upon acceptance, makes a contract, but a law repealable at the will of Congress, provided that rights created by the execution of such provision be not impaired. *Id.*

10. No intention being manifested to pass title by the act itself, the grant was not a grant *in præsenti*. *Id.*

11. Such a provision calls for no acceptance other than such as would be implied from taking the patent when issued. *Id.*

INJUNCTION:

1. Injunction at commencement of suit for divorce and alimony operates as seizure, in the nature of a garnishment, of the defendant's account in bank. *Pennington* v. *Fourth Natl. Bank*..... 269

2. A suit to restrain a state officer from levying a tax under a law claimed to be unconstitutional is a suit against him as an individual and, in absence of statute, abates upon expiration of term of office. *Pullman Co.* v. *Knott*..... 447

INSTRUCTIONS TO JURY: PAGE

1. When claims for loss of custom are definitely stated, a charge that burden of proof is on plaintiff, and that jury must not allow speculative damages but should calculate them from the evidence, sufficiently guards against suppositious profits being considered as an element of the verdict. *Thomsen* v. *Cayser*..... 66

2. Failure to instruct upon burden of proving rates unreasonable *held* harmless error, in view of painstaking trial and careful instructions upon estimation of damages. *Id.*

3. Where carrier proves a strike as cause of delay for which it was not responsible under the bill of lading if due care was exercised thereafter to meet the situation, a refusal to charge that burden is on plaintiff to prove such care was not exercised is harmless error when followed by instructions that carrier is not responsible for delay resulting from the strike nor liable if not negligent in forwarding and delivering the goods, and that negligence must be proved by plaintiff. *Pennsylvania R. R.* v. *Olivit Bros.*..... 574

INSURANCE:

1. Insurance by employers, under Workmen's Compensation Laws, to secure compensation for injury or death of employees. *New York Cent. R. R.* v. *White*..... 188
Hawkins v. *Bleakly*..... 210
Mountain Timber Co. v. *Washington*..... 219

2. Returning false claims of death in using mails in furtherance of scheme to defraud. *United States* v. *Kenofskey*... 440

INTERNATIONAL LAW. See **Admiralty.**

1. Under the principles of international law as long recognized by this country, and as emphasized in its attitude in the Hague Conference of 1907, it is a violation of our neutrality for one of two belligerents, with both of which we are at peace, to make use of our ports for the indefinite storing of prizes captured from its adversary. *The Appam*..... 124

2. Failure of our government to issue a proclamation on the subject will not warrant such use; certainly not where possibility of removal depends upon recruiting crews in violation of our established rules of neutrality. *Id.*

INTERNATIONAL LAW—*Continued.* PAGE

3. The Treaty with Prussia, 1799, makes no provision for indefinite stay of vessels, and includes prizes only when in charge of vessels of war. *Id.*

INTERSTATE COMMERCE. See **Constitutional Law, III; Employers' Liability Act; Interstate Commerce Acts; Safety Appliance Act; Waters and Water Rights.**

INTERSTATE COMMERCE ACTS. See **Carriers.**

I. **Powers of Commission.**

1. District Court has no jurisdiction over order of Commission declining to exercise its authority to extend period fixed in Panama Canal Act for divorcement of railroad and water carriers. *Lehigh Valley R. R.* v. *United States*..... 412

II. **Duties, Rights and Liabilities of Carriers and Shippers.**

1. *Public vs. Private Track.* Where a packing company was licensed to use for warehouse purposes lands adjacent to railroad siding, including a switch track connecting with main line, the railroad reserving the right to repair and maintain the tracks and to switch cars thereover, the switch track, when used by cars moving interstate goods of the licensee between the warehouse and main line, is not a private track. *Swift & Co.* v. *Hocking Valley Ry*..... 281

2. *Private Cars.* Private cars let to carrier by shipper in consideration of mileage charged on outgoing and return journeys, the carrier to freight them on return if shipper does not—freight charges being the same as for goods hauled in cars of carrier—are in the service of carrier while standing loaded with goods consigned to shipper on switch track of carrier at shipper's warehouse. *Id.*

3. *Demurrage.* In such case, the "transportation" has not ended, and demurrage, for detention of cars by their owner, may be exacted by the carrier. *Id.*

4. *Eight-Hour Law.* The Act of Sept. 3, 5, 1916, establishing an 8-hour day for employees of interstate carriers, as between the carriers and employees affected, fixes permanently an 8-hour standard for work and wages and, for the period defined by the act, a scale of minimum wages. *Wilson* v. *New*..... 332

INTERSTATE COMMERCE ACTS—*Continued.* PAGE

5. *Forwarders as Shippers.* Forwarders who attend to transporting goods from abroad to destination in this country, charging importers amounts agreed upon in advance for the transportation and services and consigning the goods to themselves, are the shippers so far as concerns their relations with the interstate carrier over whose lines the consignments go. *Lehigh Valley R. R.* v. *United States*..... 444

6. *Rebate to Forwarder.* Any allowance by carrier to such forwarder in reduction of tariff rate, whether by deducting percentage of freight or by cross-payment of salary by carrier to forwarder, is prohibited by § 6 as amended. *Id.*

7. *Id. Services Connected with Transportation.* Maintaining offices, advertising railroad and soliciting traffic by forwarder are not services connected with the transportation for which allowance may be made by carrier under § 15 as amended. *Id.*

8. *Freight Recovery not Rebate.* Allowing the shipper to recover freight paid when goods are damaged or lost is not objectionable as a rebate, preference or discrimination, where there is no attempt to evade the act. *Pennsylvania R. R.* v. *Olivit Bros.* 574

9. *Carmack Amendment and Bill of Lading.* Under the Carmack Amendment, the lawful holder of a bill of lading may sue the carrier for loss or damage to goods without proving ownership of goods. *Id.*

10. *Id.* Section 8 of the act, in giving a remedy to the person injured, is not in conflict with this interpretation.... *Id.*

11. *Id.* In an action against initial carrier for damage caused by its negligence and the negligence of connecting carriers to goods shipped in interstate commerce on through bill of lading, the rights and liabilities of the parties are governed by the Carmack Amendment. *St. Louis, I. Mt. & So. Ry.* v. *Starbird*..... 592

12. *Id. Stipulation for Notice.* A stipulation conditioning carrier's liability for damage to goods upon written notice being given by consignee is valid if the terms are reasonable. *Id.*

13. *Id.* Reasonableness depends on nature of goods and circumstances of each case; 36 hours in case of perishable fruit is not unreasonable. *Id.*

INTERSTATE COMMERCE ACTS—*Continued.* PAGE

14. *Id.* A requirement that notice be in writing is not unreasonable where by force of the Carmack Amendment the initial carrier is liable for defaults of connecting carriers and the delivering carrier is the initial carrier's agent for receiving notice. *Id.*

15. *Id.* A stipulation in a bill of lading covering shipment of fruit governed by the Carmack Amendment, before the Act of Mar. 4, 1915, exempting initial and connecting carriers from liability where claims for damages are not made in writing to delivering line within 36 hours, *held* merely to require notice of intention to claim damages, without ascertaining and specifying the amount; noncompliance excuses initial carrier from liability. *Id.*

16. *Id.* Verbal notice to a dock master of the delivering carrier does not satisfy the stipulation. *Id.*

IOWA:

1. Iowa was not a part of the Northwest Territory, nor subject to the Ordinance of 1787. *Hawkins* v. *Bleakly* 210

2. Act of 1838, establishing Iowa Territory, construed. *Id.*

JOINDER:

Fraudulent joinder of defendants to prevent removal. See **Procedure**, II.

Joint liability of lessor and lessee railroad companies for torts of lessee. *McAllister* v. *Ches. & Ohio Ry.* 302
Chicago & Alton R. R. v. *McWhirt* 422

JUDGMENTS. See **Sureties.**

1. In a suit to determine title to land, a decree by consent that title at the commencement of suit was, and has remained in one party, and that the title be quieted in him, and providing that the decree shall operate as a release to him from the opposing parties, is not to be construed as a conveyance divesting their title but as an adjudication that they had none. *Donohue* v. *Vosper* 59

2. Such a decree therefore does not disturb the relation of warrantor and warrantee existing between two parties who consented to it and against whom it operated, and when one of them afterwards acquires title from the successful party,

JUDGMENTS—*Continued.* PAGE

the covenant attaches by estoppel in favor of the warrantee. *Id.*

3. The question being whether a decree operated to terminate the relation of warrantor and warrantee between two parties, their conduct in dealing with the property afterwards is *held* to be a practical construction that it did not. *Id.*

4. A personal money judgment based on service by publication, after defendant had left the State to acquire a new domicile, is void, although the action began before actual change of domicile and while his family continued to reside in State. *McDonald* v. *Mabee* 90

5. *Quære:* Whether such judgment would have been valid had summons been left at abode of defendant while his family remained in the State and before new domicile was acquired? *Id.*

6. Such a judgment is invalid for want of service as well in the State of rendition as elsewhere. *Id.*

7. A judgment void if sued on by plaintiff is void also when interposed by defendant as bar to the original cause of action. *Id.*

8. A judgment of the state supreme court in a condemnation case, going only to the right to condemn and remanding for hearing as to damages, is interlocutory. *Grays Harbor Logging Co.* v. *Coats-Fordney Co.* 251

9. Although a federal question be settled by state supreme court as the law of the case by interlocutory judgment, this court may consider question when final judgment comes before it. *Id.*

10. Objections to form of decree, if not taken on first appeal, are waived on second. *Pease* v. *Rathbun-Jones Co.* 273

11. Where a decree for a sum certain, with provisions establishing a lien and for foreclosure, was affirmed with directions that execution and further proceedings be had according to law, a decree directing foreclosure sale and execution for any deficiency is consistent with affirmance. *Id.*

12. Federal courts sitting in equity may render summary

JUDGMENTS—*Continued.* PAGE

judgment against sureties on appeal bonds, and possibly without notice. *Id.*

13. Where this court ordered injunction to hold intact public lands and timber theretofore granted for railroad purposes until Congress should make new provisions for disposing of them consistently with the interests of the railroad company, and an act was passed after decree of the District Court, this court, upon a review of the decree based on an alleged departure from its mandate, will determine the validity of the act as a matter involved in the decree's execution. *Oregon & Cal. R. R.* v. *United States*..... 549

14. An order of the United States Court for Indian Territory authorizing an Indian lease if the Secretary of the Interior approves is conditional upon such approval being given, and, if it is not given or if the power to give it does not exist, no authority to lease can be derived from the order. *Wellsville Oil Co.* v. *Miller*..... 6

15. The fact that a company in former litigation, not involving the duration of its special franchise, described it as for 25 years, works no estoppel, by conduct or judgment, against subsequently claiming that the term was extensible beyond that period. *Owensboro* v. *Owensboro Water Works Co.*..... 166

JURISDICTION:

I. Jurisdiction over Person or *Res.*
   (1) Service by Publication and Judgment *In Personam*, p. 710.
   (2) Foreign Corporations, p. 710.
   (3) Attaching Bank Account by Injunction, p. 711.

II. Jurisdiction of this Court.
   (1) Disbarment, p. 711.
   (2) Fictitious Cases and Stipulations, p. 711.
   (3) Abatement and Revivor. (See that title.) p. 712.
   (4) In Original Cases, p. 712.
   (5) Over Circuit Courts of Appeals, p. 712.
   (6) Over District Courts, p. 713.
   (7) Under Criminal Appeals Act. (District Court for Hawaii.) p. 713.

JURISDICTION—*Continued.* PAGE

(8) Over State Courts.

(a) Judicial Code, § 237, p. 714.

(b) Final or Interlocutory Judgment, p. 714.

(c) Fictitious Case, p. 714.

(d) Federal Question, p. 714.

(e) Local Question. Construction of State Laws, p. 715.

(f) Claim and Decision of Federal Right, p. 716.

III. Jurisdiction of District Court.

(1) Admiralty, p. 716.

(2) Appeal Bonds, p. 717.

(3) Costs, p. 717.

(4) Diverse Citizenship, p. 717.

(5) Foreign Corporations, p. 717.

(6) Interstate Commerce Commission, p. 717.

(7) Naturalization Act, p. 717.

(8) Removal and Remand, p. 717.

Limitations upon judicial power to interfere with proceedings by a house of Congress to punish for contempt. *Marshall* v. *Gordon*. 521

Upon the possible duty of courts, particularly of the United States, to enforce contracts valid where made in spite of contrary policy evinced by the laws of place of suit. *Bond* v. *Hume*..... 15

I. Jurisdiction over Person or Res.

(1) *Service by Publication and Judgment in Personam.*

1. A state court has no jurisdiction to render personal judgment based on published service against a former citizen who has definitely departed to make his domicile elsewhere; and a judgment so rendered is absolutely void in the State of rendition as well as in other places. *McDonald* v. *Mabee*..... 90

(2) *Foreign Corporations.*

2. A fire insurance company of another State, to do business in Missouri, filed a power of attorney consenting that service of process on a Missouri official should be personal service on the company so long as it should have any liabilities outstanding in the State. The Missouri court, construing the local law, held that the consent covered service in an action on a policy issued in, and insuring buildings in, Colorado.

JURISDICTION—*Continued.* PAGE

This is *held* consistent with due process of law. *Penna Fire Ins. Co.* v. *Gold Issue Mining Co.* 93

3. In the absence of consent, a corporation of one State is not suable in another *in personam* unless it is doing business in the latter State and unless process is served on some authorized agent. *Phila. & Reading Ry.* v. *McKibbin* 264

4. A railroad company is not doing business in a manner and extent sufficient to found jurisdiction merely because it exchanges traffic with a connecting interstate carrier or because the latter sells coupon tickets good over its road and advertises its name at the latter's station and in a telephone directory, or because its subsidiary corporations do business in the State of suit. *Id.*

5. *Quære:* Whether a corporation doing business in the State may be served there on a cause of action arising in another State and unrelated to such business? *Id.*

(3) *Attaching Bank Account by Injunction.*

6. State courts have jurisdiction to seize tangible and intangible property of absent owners to satisfy their obligations. So *held* where the property seized was a divorced husband's bank account and the obligation was a decree for alimony. *Pennington* v. *Fourth Natl. Bank* 269

7. The only essentials to the exercise of this jurisdiction are the presence of the *res*, its seizure at commencement of proceedings and the opportunity of the owner to be heard—in this case by injunction. *Id.*

II. **Jurisdiction of this Court.**

(1) *Disbarment.*

1. This court alone has power to disbar attorneys from practicing before it. *Selling* v. *Radford* 46

2. In a proceeding to disbar an attorney, this court has no power to reëxamine or reverse an order of a state court disbarring him from the state bar for professional misconduct; but this court is not concluded by a decision of the state court upon the question of professional character. *Id.*

(2) *Fictitious Cases and Stipulations.*

3. This court cannot decide fictitious cases or be controlled

JURISDICTION—*Continued.* PAGE

by an agreement of counsel on a subsidiary question of law. *Swift & Co.* v. *Hocking Valley Ry.*..... 281

4. A stipulation of counsel, made only for the purpose of reviewing a judgment rendered on demurrer to the petition, and declaring a proposition which, tested by the petition, is erroneous in fact and in law, will be treated by this court as a nullity. *Id.*

(3) *Abatement and Revivor.* See that Title.

(4) *In Original Cases.*

5. A suit brought by a State against the Secretary of the Interior and Commissioner of the General Land Office which amounts in substance to a suit against the United States must be dismissed. *New Mexico* v. *Lane*..... 52

6. The court has no original jurisdiction of a suit by a State against citizens of other States and a necessary party who is a citizen of the State complaining. *Id.*

(5) *Over Circuit Courts of Appeals.*

7. The right of this court to review a final judgment of the Circuit Court of Appeals dismissing an action is not impaired by the circumstances that judgment of dismissal has been entered on that court's mandate in the trial court or by the fact that the latter has thereupon adjourned. *Thomsen* v. *Cayser*..... 66

8. When parties in the Circuit Court of Appeals, desiring to shorten litigation by bringing the merits directly to this court, consent that final judgment may be entered against them in lieu of one remanding the cause for a re-trial, the consent is not a waiver of errors relied on, and a final judgment entered as requested is reviewable here. *Id.*

9. A judgment of the Circuit Court of Appeals in a controversy arising in a bankruptcy proceeding, viz., in a suit by a trustee to set aside unlawful preferences, is made final by the Act of Jan. 28, 1915, and reviewable in this court only by certiorari. *Staats* v. *Security Trust & Savgs. Bank*..... 121

10. When several questions are certified under Jud. Code, § 239, and answers to part will dispose of the case, answers to the rest may be omitted. *United States* v. *Ginsberg*..... 472

JURISDICTION—*Continued.* PAGE

11. A judgment of the Circuit Court of Appeals affirming a judgment of the District Court refusing *habeas corpus* is not appealable under § 241, Jud. Code, on the ground that constitutional and treaty questions are involved, since no pecuniary value is in controversy. *Horn* v. *Mitchell* 247

12. The provision made by Rev. Stats., § 764, as amended by the Act of Mar. 3, 1885, for review of appellate judgments of the Circuit Courts in *habeas corpus* cases, was necessarily repealed by the Judiciary Act of 1891 and § 289, Jud. Code, abolishing the Circuit Courts, and has no reference to appeals from Circuit Courts of Appeals. *Id.*

13. Error in suing out writ of error in name of plaintiff after he had died while case was in Court of Appeals *held* waived by stipulation of counsel in that court that administrator might be substituted. *McCluskey* v. *Marysville & Northern Ry.* 36

(6) *Over District Courts.*

14. Judgment of District Court refusing *habeas corpus* is appealable directly to this court under § 238, Jud. Code, if the petition raises constitutional or treaty questions. *Horn* v. *Mitchell* 247

15. The questions whether a corporation sued in the District Court was doing business in the State, and whether process was served on its authorized agent, being vital to the jurisdiction of the District Court, either, if duly raised, is subject to be reviewed directly by this court, in fact and in law, upon a certificate under Jud. Code, § 238. *Phila. & Reading Ry.* v. *McKibbin.* 264

16. An order of the District Judge allowing a writ of error from this court and containing a recital that the judgment was based solely upon lack of jurisdiction supplies the place of the certificate required by § 238, Jud. Code. *McAllister* v. *Ches. & Ohio Ry.* 302

(7) *Under Criminal Appeals Act.* (District Court for Hawaii.)

17. When trial court, besides holding the indictment defective for not following the statute, bases its decision upon ground that statute does not apply to facts alleged, the de-

JURISDICTION—*Continued.* PAGE

cision as to the latter ground is reviewable under the Criminal Appeals Act. *United States* v. *Davis* 570

(8) *Over State Courts.*

(a) Judicial Code, § 237.

18. Section 237, Jud. Code, is in effect but a reënactment of § 25 of the Judiciary Act of 1789 and § 709, Rev. Stats. *St. Louis, I. Mt. & So. Ry.* v. *Starbird* 592

(b) Final or Interlocutory Judgment.

19. A judgment of a state supreme court in a condemnation case, going only to the right to condemn and remanding the case to the trial court for hearing as to damages, is not a final judgment reviewable under § 237, Jud. Code. *Grays Harbor Logging Co.* v. *Coats-Fordney Co.* 251

20. Although a federal question involved in state court proceedings be settled by interlocutory judgment so that the decision becomes binding on the state tribunals as the law of the case before a final judgment occurs, this court is free to consider the question when final judgment comes before it. *Id.*

(c) Fictitious Case.

21. A stipulation of counsel, made only for the purpose of reviewing a judgment rendered on demurrer to the petition, and declaring a proposition which, tested by the petition, is erroneous in fact and in law, will not be accepted by this court even though effect was given it by the state courts. *Swift & Co.* v. *Hocking Valley Ry.* 281

(d) Federal Question.

22. This court may review a judgment of a state court involving the power of the United States Court for the Indian Territory to authorize and approve lease of Indian allotment subject to approval by the Secretary of the Interior and involving the validity and effect of such lease so judicially authorized and approved, but disapproved by the Secretary, and involving the power of the Secretary to disapprove—such matters being inherently federal in character. *Wellsville Oil Co.* v. *Miller* 6

JURISDICTION—*Continued.*

23. When a state court in applying state laws to real property is controlled by a construction of federal land statutes affecting the title, this court has jurisdiction to review. *California* v. *Deseret Water Co.* 415

24. In an action against a carrier for damage to goods shipped under a bill of lading governed by the Carmack Amendment, claims of the carrier that failure to give notice as required by the bill of lading relieved it from liability, and of the shipper that such requirement was illegal but was substantially complied with, are claims of right arising under the amendment reviewable under Jud. Code, § 237. *St. Louis, I. Mt. & So. Ry.* v. *Starbird* 592

25. In an action against an interstate carrier for damages to goods shipped on a through bill of lading, the questions whether under the Carmack Amendment the lawful holder of the bill of lading may sue without proving ownership of the goods, and whether there was evidence of negligence which under the bill of lading would render the carrier liable, and whether a recovery of freight paid by the shipper was allowable—are questions reviewable by this court. *Pennsylvania R. R.* v. *Olivit Bros.* 574

(e) Local Question. Construction of State Laws.

26. A question of the construction of the rules adopted by the board of directors of a national bank and not concerning the meaning of the National Bank Act is not a federal question upon which the court may assume jurisdiction. *Union Natl. Bank* v. *McBoyle* 26

27. A decision by a state court against a claim of title by adverse possession, where the question is essentially local and dependent on an appreciation of evidence as to the conduct of parties, is not reviewable. *Donohue* v. *Vosper* 59

28. When the judgment of a state court is placed upon a non-federal as well as a federal ground and the former is independent of the latter and sufficiently broad to sustain the judgment and not so certainly unfounded as to be arbitrary or a mere device to prevent a review of the federal question, the judgment is not reviewable in this court. *Enterprise Irrig. Dist.* v. *Canal Co.* 157

29. Where no conflict with the Federal Constitution or laws

JURISDICTION—*Continued.* PAGE

is involved, a construction of a state statute by the highest court of a State is accepted by this court as conclusive. *Memphis Street Ry.* v. *Moore*..... 299

30. This court does not pass on the adequacy or wisdom of state legislation. *Bunting* v. *Oregon*..... 426

(f) **Claim and Decision of Federal Right.**

31. The court took jurisdiction where the answer in a state condemnation case attacked the taking as contrary to the Fourteenth Amendment and a dissenting opinion of the state supreme court bore evidence that the Federal Constitution was invoked against a construction of the state laws by which the taking was justified. *Hendersonville &c. Co.* v. *Blue Ridge Ry*..... 563

32. When a state court's opinion shows that both parties relied on the construction and effect to be given a decree of a federal court and that the state court applied it against one of them, rejecting the construction relied on by the other, a federal question is presented for review. *Donohue* v. *Vosper* 59

33. A claim of federal right is sufficiently set up in the state court by an allegation in the answer that notice was not given as required by a bill of lading governed by the Carmack Amendment; and decision that the requirement of the bill of lading is not controlling necessarily denies the claim of federal right in the sense of Jud. Code, § 237. *St. Louis, I. Mt. & So. Ry.* v. *Starbird*..... 592

III. **Jurisdiction of District Court.**

(1) *Admiralty.*

1. A violation of neutrality committed by a belligerent in wrongfully making use of an American port for storing indefinitely a merchant vessel and cargo captured on the high seas affords jurisdiction in admiralty to the District Court of the locality to seize the vessel and cargo and restore them to their private owners. *The Appam*..... 124

2. In such case proceedings in prize court of belligerent country could not oust jurisdiction of District Court or defeat its judgment. *Id.*

JURISDICTION—*Continued.* PAGE

(2) *Appeal Bonds.*

3. District Courts, sitting in equity, may render summary judgment against sureties on appeal bonds without trial by jury. *Pease* v. *Rathbun-Jones Co.* 273

(3) *Costs.* See **Procedure,** XIV.

4. The power to award costs against the United States in claims cases, Jud. Code, § 152, applies when the District Court is exercising concurrent jurisdiction under § 24. *United States* v. *Cress* 316

(4) *Diverse Citizenship.* See (8) *infra.*

5. The District Court has no jurisdiction upon the ground of diverse citizenship where the cause of action, between employee and employer, is governed by a state workmen's compensation law abolishing judicial remedies in such cases and substituting administrative remedies by a state board. *Raymond* v. *Chicago, Mil. & St. P. Ry.* 43
See also *Mountain Timber Co.* v. *Washington* 219

(5) *Foreign Corporations.*

6. In the absence of consent a corporation of one State cannot be sued *in personam* in another unless doing business there and unless process be served on authorized agent. *Phila. & Reading Ry.* v. *McKibbin* 264

(6) *Interstate Commerce Commission.*

7. The District Court is without jurisdiction over an order of the Interstate Commerce Commission, negative in substance and form, in which the Commission declined to extend the period fixed in the Panama Canal Act for the divorcement of railroad and water carriers. *Lehigh Valley R. R.* v. *United States* 412

(7) *Naturalization Act.*

8. Under § 9, Naturalization Act, final hearings upon petitions must be held entirely in open court; cannot be held in judge's chambers adjoining court-room. *United States* v. *Ginsberg* 472

(8) *Removal and Remand.*

9. An action governed by the Federal Employers' Liability

JURISDICTION—*Continued.* PAGE

Act is not removable on ground of diverse citizenship. *St. Joseph & G. I. Ry.* v. *Moore* 311

10. When plaintiff's petition states a case of joint liability under the state law against resident and nonresident defendants and removal petition fails to aver facts showing joinder fraudulent, District Court must remand. *McAllister* v. *Ches. & Ohio Ry.* 302
Chicago & Alton R. R. v. *McWhirt* 422

JURY. See **Constitutional Law,** XIII, XIV, (3); **Instructions to Jury.**

1. In an action against a carrier for damages resulting from delay in forwarding goods, defended on ground that delay was due to a strike, evidence that goods were received after the strike was over and delay was caused by preferring other goods is sufficient evidence of negligence to go to the jury. *Pennsylvania R. R.* v. *Olivit Bros.* 574

2. When more than a reasonable rate is exacted from a shipper as a result of an unlawful combination, the question whether, and to what extent, such rate was unreasonable are questions for the jury. *Thomsen* v. *Cayser* 66

3. *Semble*, that a general verdict for an amount which equals a particular claim of damages and interest is responsive to that claim alone, although there were others which were submitted to the jury. *Id.*

4. Where there is substantial evidence of negligence to support the verdict in an action for personal injuries, this court will not disturb the finding of a state court. *St. Joseph & G. I. Ry.* v. *Moore* 311

LACHES:

1. In an action by a receiver of a national bank against his predecessor to recover for the bank property fraudulently acquired by the latter, delay of suit for 16 years after the transaction and 14 years after defendant's resignation as receiver is not laches, in view of the finding that defendant's successors had no knowledge or notice of the fraud. *Baker* v. *Schofield.* 114

2. Laches or neglect of duty of government officers is no defense to suit to enforce a public right or protect a public interest. *Utah Power Co.* v. *United States* 389

LACHES—*Continued.* PAGE

3. Any exceptions to this rule are limited by the principle which places on different planes a private suit over title and a suit by the United States to enforce its policy respecting public lands. *Id.*

4. For a case in which the right to question a state water right adjudication was lost by laches and estoppel, see *Enterprise Irrig. Dist.* v. *Canal Co.* 157

LAND DEPARTMENT. See **Public Lands.**

LANDS. See **Indians; Public Lands.**

LEASE:

Validity of lease of Indian allotment approved by court subject to further approval by Secretary of the Interior. *Wellsville Oil Co.* v. *Miller* 6

LESSOR AND LESSEE. Joint liability for torts. See **Railroads,** 2, 3.

LICENSE. See **Franchise and License; Patents for Inventions.**

License to packing company to use railroad's land for warehouse, including switch track, *held* not to render switch track a private track. *Swift & Co.* v. *Hocking Valley Ry.* 281

LIEN. See **Foreclosure.**

LIMITATIONS. See **Adverse Possession.**

The seven year statute of limitations of Washington does not apply when the claim of title accompanying possession is not made in good faith. *Baker* v. *Schofield* 114

MANDATE. See **Procedure,** XIII.

MARITIME CASES. See **Admiralty.**

MASTER AND SERVANT. See **Carriers; Employers' Liability Act; Negligence; Workmen's Compensation Laws.**

MORTGAGE. See **Foreclosure.**

MUNICIPALITIES. See **Franchise and License.** PAGE

City ordinance granting franchise to construct water works construed with respect to duration of corporate franchise. *Owensboro* v. *Owensboro Water Works Co.* 166

NATIONAL BANKS:

1. The cashier of a national bank may be authorized by its directors to sell corporate shares acquired as the result of a loan made upon the shares as security. *Union Natl. Bank* v. *McBoyle.* 26

2. Whether rules adopted to govern the bank's business confer such authority upon the cashier is a question involving the interpretation of the rules and not the meaning of the National Bank Act. *Id.*

3. Where defendant, as receiver, purchased realty with bank's money, and under apparent authority from court assigned the contract for cash paid bank, the assignee acting secretly for the receiver as an individual, the transaction was a gross breach of defendant's duty as receiver and, in a suit by his successor to regain the property, defendant is estopped to claim the purchase beyond the powers of the bank. *Baker* v. *Schofield* 114

NATURALIZATION ACT:

1. Section 9 of the act requires final hearings on petitions to be held in open court; hearing in chambers not sufficient. *United States* v. *Ginsberg* 472

2. Under § 15, a certificate of citizenship granted on a state of facts showing petitioner not qualified is subject to annulment in independent suit by the United States. *Id.*

NAVIGABLE WATERS. See **Waters and Water Rights.**

NEGLIGENCE. See **Admiralty,** 7–9; **Carriers,** 4, 5, 9 *et seq.*; **Employers' Liability Act,** (3); **Safety Appliance Act.**

1. A State may provide that failure to safeguard dangerous machinery shall be negligence. *Bowersock* v. *Smith* 29

2. In such cases it may also abolish defenses of contributory negligence, assumption of risk, and fellow servant doctrine, and place burden on defendant to show compliance with the act. *Id.*

NEGLIGENCE—*Continued.* PAGE

3. Where carrier defends action for damage due to delay in delivering goods on ground that delay was caused by a strike, evidence that goods were received after strike and that delay was due to preferring other goods *held* sufficient evidence of negligence to go to the jury. *Pennsylvania R. R.* v. *Olivit Bros.* 574

See **Burden of Proof.**

4. A State may set aside or alter rules of negligence, assumption of risk, and fellow servant doctrine, at least if some just substitute be provided. *New York Cent. R. R.* v. *White* ... 188
Hawkins v. *Bleakly* 210
Mountain Timber Co. v. *Washington* 219

5. It may also provide that where an employer has rejected a workmen's compensation act the presumption shall be that injury was due to his negligence and that burden of proof shall be upon employer. *Hawkins* v. *Bleakly* 210

6. Under the law of Kentucky failure of a railroad company to take notice of places where numerous people are accustomed to cross or be upon the tracks and to moderate speed, maintain lookouts and give signals, resulting in death or injury, is actionable negligence. *McAllister* v. *Ches. & Ohio Ry.* 302

7. Under Kentucky laws lessor and lessee railroads are jointly liable for injuries or death inflicted on persons on tracks, not trespassers, by negligence of lessee in operating trains. *Id.*
See *Chicago & Alton R. R.* v. *McWhirt* 422

8. Where there is substantial evidence of negligence to support verdict, this court will not disturb finding of state court. *St. Joseph & G. I. Ry.* v. *Moore* 311

NEUTRALITY. See **Admiralty; International Law.**

NONRESIDENTS. See **Constitutional Law,** XIV, (2), (a); **Service of Process.**

1. State has power to seize intangible as well as tangible property to satisfy obligations of absent owners. *Pennington* v. *Fourth Natl. Bank* 269

2. Under Tennessee law, nonresident personal representatives of decedents leaving assets in the State are regarded as citizens for purposes of suit. *Memphis Street Ry.* v. *Moore* 299

NONRESIDENTS—*Continued.* PAGE

3. This, however, does not prevent resort to federal courts. *Id.*

4. Joinder of resident and nonresident defendants to prevent removal to federal court. *McAllister* v. *Ches. & Ohio Ry.*... 302
Chicago & Alton R. R. v. *McWhirt* 422

NORTHWEST TERRITORY:

Iowa was not a part of the Northwest Territory, nor subject to the Ordinance of 1787. *Hawkins* v. *Bleakly*..... 210

NOTICE. See **Constitutional Law,** XIV, (2); **Carriers,** 3, *et seq.*; **Service of Process.**

1. *Quære:* Whether in rendering summary judgment against sureties on appeal bonds notice is essential. *Pease* v. *Rathbun-Jones Co*..... 273

2. Notice waived by invoking trial court's decision on merits upon undisputed state of facts. *Id.*

ORDINANCE OF 1787:

Iowa was not a part of the Northwest Territory, nor subject to the Ordinance of 1787. *Hawkins* v. *Bleakly*..... 210

ORDINANCES. See **Franchise and License.**

PARTIES: See **Abatement and Revivor; Cause of Action,** 3; **Executors and Administrators; Indians,** 6.

1. In a suit by a State to enjoin Secretary of Interior from issuing patent to an individual for land which one has entered and paid for under the coal land law, the individual is a necessary party. *New Mexico* v. *Lane*..... 52

2. A suit to restrain a state officer from levying a tax under a law claimed to be unconstitutional is a suit against him as an individual, and, in absence of statute, abates upon expiration of term of office. *Pullman Co.* v. *Knott*..... 447

PATENTS FOR INVENTIONS:

1. The monopoly of use granted by the patent law can not be made a means of controlling the prices of the patented articles after they have been, in reality even though not in form, sold and paid for. *Straus* v. *Victor Talking Mach. Co.*. 490

PATENTS FOR INVENTIONS—*Continued.* PAGE

2. The patent owner can not maintain control of title and condition use of machines by means of license notices attached to them and license contracts with dealers where there has been substantially a sale and the real object is to fix price at which the machine may be sold. *Id.*

3. In such case, as to purchasers not in privity with the patent owner, the restrictions of the " license notices " are to be treated as void attempts to control prices after sale, and in buying from the dealers and reselling to the public at prices lower than the notices prescribe, such purchasers do not violate the rights secured to the patent owner by the patent law. *Id.*

4. The grant by patent of the exclusive right to use is limited to invention described in claims, and patent owner can not, by notices attached to the patented articles, reserve the right to determine the materials which may be used in their operation, nor does the patent law authorize him to dispose of such articles subject to conditions as to use or royalty to be imposed thereafter in his discretion. *Motion Picture Co.* v. *Universal Film Co.* 502

5. In determining how far patentee may restrict the use after sale of the patented article, weight must be given to the rule restricting the patent right to the invention described in the claims, and to the principle that the patentee receives nothing from the patent law beyond the right to restrain others from manufacturing, using or selling his invention, and to the object of that law which is to promote science and useful arts and not to create private fortunes. *Id.*

6. The extent to which the use of a patented machine may validly be restricted to specific supplies or otherwise by special contract between the patent owner and a purchaser or licensee is a question outside of the patent law and not involved in this case. *Id.*

PATENTS FOR LAND. See **Indians; Public Lands.**

PENALTIES:

1. Whether a provision in a statute for penalties is unconstitutional will not be determined in a suit not concerning penalties. *Wilson* v. *New* 332

PENALTIES—*Continued.* PAGE

2. A provision in a 10-hour law for overtime and extra pay *held* in nature a penalty to deter from excess of the 10-hour limit. *Bunting* v. *Oregon* 426

PERJURY. See **Criminal Law,** 8–9.

PERSONAL INJURIES. See **Employers' Liability Act; Negligence; Safety Appliance Act; Workmen's Compensation Laws.**

PLEADING:

1. Trial court, in sound discretion, may allow new cause of action to be set up by amendment of complaint. *Thomsen* v. *Cayser* 66

2. A petition for removal based on fraudulent joinder of resident and nonresident defendants must allege specific facts supporting the charge. *McAllister* v. *Ches. & Ohio Ry.* 302
Chicago & Alton R. R. v. *McWhirt*. 422

3. Allegations sufficiently charging joint liability of lessor and lessee railroad companies for death to person on track caused by negligence of lessee in operating train. *McAllister* v. *Ches. & Ohio Ry.* 302

POLICE POWER. See **Constitutional Law,** XIV.

POLITICAL QUESTIONS:

Whether guaranty of republican form of government has been violated is not a judicial question, but a political one addressed to Congress. *Mountain Timber Co.* v. *Washington* 219

POWER COMPANIES. See **Public Lands,** 2–15; **Constitutional Law,** XIV, (4), (c).

PREFERENCES. See **Bankruptcy Act; Interstate Commerce Acts,** 6–8.

PRESUMPTION. See **Constitutional Law,** XIV, (2), (b); XV.

PRINCIPAL AND SURETY. See **Sureties.**

PRIVATE TRACKS. See **Interstate Commerce Acts,** II, 1.

PRIZE. See **Admiralty**, 1–6. PAGE

PROCEDURE. See **Alimony; Attachment; Constitutional Law; Damages; Disbarment; Jury; Naturalization Act; Parties; Pleading.**

I. Suing *in Forma Pauperis*, p. 725.
II. Removal of Causes, p. 725.
III. Raising Federal Question, p. 726.
IV. Saving Points for Review. Waiving Errors, p. 726.
V. Directing Writ of Error, p. 726.
VI. Certiorari, p. 727.
VII. Certified Questions, p. 727.
VIII. Abatement, Revivor and Substitution, p. 727.
IX. Scope and Limitations of Review, p. 728.
X. Following State Construction and Rulings, p. 728.
XI. Administrative Constructions, p. 729.
XII. Findings of Fact, p. 729.
XIII. Executing Mandate, p. 729.
XIV. Costs, p. 730.
XV. Appeal Bonds. Enforcement of, p. 731.

I. **Suing in Forma Pauperis.**

1. The act of Tennessee providing that nonresidents qualifying as personal representatives shall be treated as citizens of the State for the purpose of suing and being sued, was not intended to exclude them from the federal courts but merely to permit them to sue *in forma pauperis*. *Memphis Street Ry.* v. *Moore*. 299

II. **Removal of Causes.**

1. An allegation in a petition for removal that the plaintiff's motive in joining resident and nonresident defendants is to prevent removal to the federal court is not in itself sufficient ground for removal, but specific facts supporting the charge of fraud must be alleged. *McAllister* v. *Ches. & Ohio Ry.*. . . 302
Chicago & Alton R. R. v. *McWhirt* 422

2. When a petition states a case of joint liability in tort under the state law against resident and nonresident defendants, the case is not removable as a separable controversy if the removal petition fails to aver facts showing the joinder fraudulent. *Id.*

3. An action governed by the Federal Employers' Liability

PROCEDURE—*Continued.* PAGE

Act is not removable on the ground of diverse citizenship. *St. Joseph & G. I. Ry.* v. *Moore* 311

III. **Raising Federal Question.** See **Jurisdiction,** II, (8), d-f.

1. When a carrier sued in a state court for damages to an interstate shipment alleges in its answer that notice was not given as required by the bill of lading, the attention of the court is sufficiently challenged to a claim of federal right based on the Carmack Amendment, and when the court decides that the bill of lading is not controlling, it necessarily denies the federal claim in the sense of Jud. Code, § 237. *St. Louis, I. Mt. & So. Ry.* v. *Starbird* 592

IV. **Saving Points for Review. Waiving Errors.**

1. Where no exception was taken to the rulings of the trial court concerning the point relied on later as a ground for certiorari from this court, the certiorari, if granted, will be dismissed. *Tyrrell* v. *District of Columbia*..... 1

2. Objection going to the form of the decree, if not taken on a first appeal to the Circuit Court of Appeals, may be deemed waived on a second. *Pease* v. *Rathbun-Jones Co.*.. 273

3. Objections that a summary judgment on an appeal bond was not preceded by notice and deprived the sureties of the right of trial by jury are waived by invoking the trial court's decision of the merits upon an undisputed state of facts. *Id.*

4. Error in suing out writ of error in name of plaintiff after he had died while case was in Court of Appeals *held* waived by stipulation of counsel in that court that administrator might be substituted. *McCluskey* v. *Marysville & Northern Ry.*..... 36

5. When parties in the Circuit Court of Appeals, desiring to shorten the litigation by bringing the merits directly to this court, consent that a final judgment may be entered against them in lieu of one remanding the cause for a re-trial, the consent is not a waiver of errors relied on, and a final judgment entered as requested is reviewable here. *Thomsen* v. *Cayser*..... 66

V. **Directing Writ of Error.**

1. For review in this court of a final judgment of the Circuit Court of Appeals directing that an action be dismissed, the

PROCEDURE—*Continued.* PAGE

writ of error should go to that court; and its efficacy is not impaired by the circumstances that, before allowance of the writ by that court, the trial court, obeying the mandate, has entered judgment of dismissal and has adjourned for the term before any application has been made to recall its action. *Thomsen* v. *Cayser* 66

VI. **Certiorari.**

1. It is the duty of this court to dismiss a certiorari upon discovering that the question which induced the issuance of the writ does not arise on the record, because no exception was taken to the ruling of the trial court. *Tyrrell* v. *District of Columbia* 1

2. In controversies arising in bankruptcy proceedings (e. g., suit by trustee to set aside preference,) judgments and decrees of the Circuit Courts of Appeals may be reviewed only by certiorari. *Staats Co.* v. *Security Trust & Savgs. Bank* ... 121

3. Amendment of Rule 37. § 4, concerning applications for writs of certiorari and notice thereof..... 623

VII. **Certified Questions.**

1. An order of the District Judge allowing a writ of error from this court containing a recital that the judgment was based solely upon lack of jurisdiction supplies the place of the certificate required by § 238, Jud. Code. *McAllister* v. *Ches. & Ohio Ry.*..... 302

2. When several questions are certified under § 239, Jud. Code, and answers to part will dispose of the case, answers to the rest may be omitted. *United States* v. *Ginsberg* 472

3. The questions whether a corporation sued in the District Court was doing business in the State, and whether process was served on its authorized agent, being vital to the jurisdiction of the District Court, either, if duly raised, is subject to be reviewed directly by this court, in fact and in law, upon a certificate under Jud. Code, § 238. *Phila. & Reading Ry.* v. *Mc Kibbin*..... 264

VIII. **Abatement, Revivor and Substitution.**

1. Under Rev. Stats. of Texas, Art. 1206, a suit against a corporation is not abated by its dissolution pending appeal. *Pease* v. *Rathbun-Jones Co.*..... 273

PROCEDURE—*Continued.* PAGE

2. Error in suing out writ of error in name of plaintiff after he had died while the case was in the Court of Appeals *held* waived by stipulation of counsel in that court that administrator might be substituted. *McCluskey* v. *Marysville & Northern Ry.* 36

3. A suit to restrain a state official and his successors in office from estimating, levying and assessing a tax under a state law claimed to be unconstitutional is a suit against him as an individual and, in the absence of statute, abates when his term of office expires, and cannot be revived against his successor. *Pullman Co.* v. *Knott* 447

IX. **Scope and Limitations of Review.**

1. This court can not be controlled by an agreement of counsel on a subsidiary question of law. *Swift & Co.* v. *Hocking Valley Ry.* 281

2. It can not decide fictitious cases. *Id.*

3. A stipulation of counsel, made only for the purpose of reviewing a judgment on demurrer, and declaring a proposition which, tested by the petition, is erroneous in fact and in law, though accepted by the state court, will be treated by this court as a nullity. *Id.*

4. The former decision of this court having directed an injunction to hold the land and timber intact until Congress should have reasonable opportunity to make new provisions for disposing of them consistently with the interest of the railroad company, and an act having been passed accordingly after entry of the decree in the District Court, this court, upon a review of the decree based on an alleged departure from its former mandate, may properly determine the validity of the act as a matter involved in the decree's execution. *Oregon & Cal. R. R.* v. *United States* 549

X. **Following State Construction and Rulings.** See *infra*, XII.

1. Although a federal question involved in state court proceedings be settled by interlocutory judgment, so that the decision becomes binding on the state tribunals as the law of the case before a final judgment occurs, this court is none the less free to determine the question when the final judgment is brought here by writ of error. *Grays Harbor Co.* v. *Coats-Fordney Co.* 251

PROCEDURE—*Continued.* PAGE

2. Where a stipulation of counsel made for the purpose of reviewing a particular judgment contradicts the record and states a mooted or fictitious case, this court will treat it as a nullity, although the state courts give it effect. *Swift & Co.* v. *Hocking Valley Ry.* 281

3. Where no conflict with the Federal Constitution or laws is involved, a construction of a state statute by the highest court of the State is accepted by this court as conclusive. *Memphis Street Ry.* v. *Moore* 299

XI. **Administrative Constructions.**

1. This court will not readily disturb a construction of a land law by the Land Department which, though differing from an earlier one, has been adopted on full consideration and long consistently adhered to by the Department, and upon the faith of which large acreages have been acquired and large expenditures have been made. *California* v. *Deseret Water Co.* 415

XII. **Findings of Fact.** See **Employers' Liability Act,** and *supra,* X.

1. State courts' findings followed in absence of clear proof to contrary. *Hendersonville &c. Co.* v. *Blue Ridge Ry.* 563

2. The rule that concurrent findings of fact by two lower courts will not be disturbed unless clearly wrong is applied in support of findings of fraud and breach of fiduciary duty resulting in a trust. *Baker* v. *Schofield* 114

3. Where there is substantial evidence of negligence to support the verdict in an action for personal injuries, this court will not disturb the findings of a state court. *St. Joseph & G. I. Ry.* v. *Moore* 311

4. This court will not disturb a verdict rendered in a state court and appealed by that court to a state appellate court where the question concerns sufficiency of evidence of negligence and assumption of risk, and the ruling in regard to it is not clearly erroneous. *Seaboard Air Line Ry.* v. *Lorick* .. 572

XIII. **Executing Mandate.** See IX, 4, *supra.*

1. A decree of the District Court that plaintiff "do have and recover" a stated sum, with provisions establishing a

PROCEDURE—*Continued.* PAGE

lien and for foreclosure, was affirmed by the Circuit Court of Appeals with directions that "such execution and further proceedings be had as according to right and justice, and the laws of the United States, ought to be had." *Held*, that a decree of the District Court directing foreclosure sale, and that execution issue for any deficiency, was consistent with, and did not exceed, the affirmance. *Pease* v. *Rathbun-Jones Co.*. 273

2. The amount of deficiency becoming fixed by the sale, the insertion of the amount in the execution was but a clerical act. *Id.*

XIV. **Costs.**

1. *Quære:* Whether Rule 29, of this Court—Rule 13, 5th C. C. A.—intends that the sureties on a supersedeas bond shall not be bound to pay deficiency decrees in foreclosure cases, but shall pay only the costs and damages resulting from the delay caused by the appeal? *Pease* v. *Rathbun-Jones Co.*..... 273

2. Section 152, Jud. Code, permitting costs against the United States in claims cases, although appearing in the chapter entitled "The Court of Claims," is not confined to cases in that court but applies also when the District Court is exercising concurrent jurisdiction under § 24. This conclusion results from a consideration of the Tucker Act, of Mar. 3, 1887, and §§ 294 and 295 of the Code, read in connection with the repealing section, 297. *United States* v. *Cress*..... 316

3. Under Rule 24, costs in this court are not allowable in cases where the United States is a party. *Oregon & Cal. R. R.* v. *United States*..... 549

4. Where the United States obtained a decree declaring railroad land grants forfeited for breaches of conditions by the railroad company, and upon appeal the decree was reversed because the conditions broken were not conditions subsequent but statutory covenants, and relief against the company by injunction was decreed accordingly, costs of the litigation in the District Court were properly awarded by that court to the United States. *Id.*

PROCEDURE—*Continued.* PAGE

XV. **Appeal Bonds. Enforcement of.**

1. Federal courts, sitting in equity, may render summary judgment against sureties on appeal bonds. *Pease* v. *Rathbun-Jones Co.* 273

2. *Quære:* Must notice be given in such cases? *Id.*

3. *Quære:* Whether Rule 29 of this court—Rule 13, 5th C. C. A.—intends that the sureties on a supersedeas bond shall not be bound to pay deficiency decrees in foreclosure cases, but shall pay only the costs and damages resulting from the delay caused by the appeal? *Id.*

PROCESS. See **Service of Process.**

PUBLICATION:

Service by. See **Service of Process.**

PUBLIC LANDS. See **Constitutional Law,** X; **Indians.**

As to damages for unlawful occupancy and use of reserved lands of the United States—See **Damages,** 6–7.

1. In an original suit in this court to enjoin issuance of a patent to an entryman for land entered and paid for by him under the coal land law, on the ground that title was vested in the State by virtue of a school land grant, the entryman is an indispensable party. *New Mexico* v. *Lane* 52

2. The power to regulate the use of lands of the United States and to prescribe the conditions upon which rights in them may be acquired by others is vested exclusively in Congress. *Utah Power Co.* v. *United States* 389

3. The inclusion of public lands within a State does not diminish this power or subject the lands or interests in them to disposition by the state power. *Id.*

4. The Act of May 14, 1896, relating exclusively to rights of way and the use of land for electric power purposes, superseded the provisions of Rev. Stats., §§ 2339 and 2340, in so far as they were applicable to such rights of way. *Id.*

5. Rev. Stats., §§ 2339 and 2340, did not grant rights of way for power-houses, transmission lines, or subsidiary structures. *Id.*

6. Sections 18–21 of the Act of Mar. 3, 1891, relate to rights

PUBLIC LANDS—*Continued.* PAGE

for ditches, canals and reservoirs for irrigation purposes and call for filing of maps, to be effective when approved by the Secretary of the Interior; the Act of May 11, 1898, permits rights so approved to be used for power development as subsidiary to the purpose of irrigation; but neither act applies where no maps have been filed or approved, where the rights claimed include power-houses, etc., and irrigation is not the purpose of the use. *Id.*

7. Whether or not the Act of Feb. 15, 1901, superseded other earlier right of way provisions, it obviously took the place of the Act of May 14, 1896. *Id.*

8. The Act of Feb. 1, 1905, makes no provision for electric power-houses, etc., but only grants rights of way for ditches, canals and reservoirs for diverting, storing and carrying water. *Id.*

9. The purposes mentioned therein do not include the generating of electricity for commercial disposition, even though some of the current is sold in adjacent or distant towns for power, lighting and heating, or to persons engaged in mining, milling or reducing ores. *Id.*

10. The United States is not estopped by acts of its officers in entering into an agreement for the use of federal lands by a power company, not sanctioned by law. *Id.*

11. Laches on the part of government officers is no defense to a suit to enforce public rights, and any exceptions to the rule are inapplicable in a suit by the United States to enforce its policy respecting land held in trust for all the people. *Id.*

12. The discretion of Congress to control the use of federal lands through administrative regulations is not narrowly confined. *Id.*

13. Such regulations where they exceed the power or authorization of Congress are void, but not where they are merely illiberal, inequitable or unwise. *Id.*

14. Parties whose use of federal lands can be legitimated only by complying with an act of Congress can not complain of regulations adopted in its execution until they obtain a license under the act and conform, or offer to conform, to such regulations as are lawful. *Id.*

PUBLIC LANDS—*Continued.* PAGE

15. The acts of Congress providing or recognizing that rights to the use of waters in streams running through public lands may be acquired in accordance with local laws do not authorize the appropriation of rights of way through lands of the United States. *Id.*

16. When a forest reservation is made to include a school section previously surveyed, the State may waive its right to the section and select other lands in lieu. *California* v. *Deseret Water Co.* 415

17. A construction of a land law by the Land Department which, though differing from an earlier one, has been adopted on full consideration and long consistently adhered to, and upon the faith of which large acreages have been acquired and large expenditures made, will not readily be disturbed by this court. *Id.*

18. The Oregon-California Railroad Grants made no distinction between timber and other lands; title to all was vested in the railroad company for transmission to actual settlers upon the terms prescribed by the acts. *Oregon & Cal. R. R* v. *United States* 549

19. While the company could use the lands as a basis of credit, it could not by trust deed convey an interest in either land or timber exempt from the obligations of the granting acts or the power of the government to compel their performance. *Id.*

20. The acts not being instruments of conveyance, Congress, in order to overcome a situation due to breaches of obligation which made the original scheme impracticable, had power to resume title and dispose of the land under conditions assuring the company the equivalent of its interest in the grants—$2.50 an acre. *Id.*

21. The "Chamberlain-Ferris Act" examined and found to accord with the power of Congress and the principles laid down by this court in 238 U. S. 393. *Id.*

22. This court having directed an injunction to hold the land and timber intact until Congress should make new provisions for their disposition consistently with the interest of the railroad company, and an act having been passed

PUBLIC LANDS—*Continued.* PAGE

accordingly after entry of the decree in the District Court, this court, upon review of the decree based on departure from its former mandate, may determine validity of the act as a matter involved in the decree's execution. *Id.*

23. A charge of perjury may be based upon a valid regulation of the Land Department requiring an affidavit, if the oath be taken " before a competent tribunal, officer or person." *United States* v. *Morehead* 607

24. Regulations of the Land Department concerning public lands must be deemed valid if not unreasonable, inappropriate, or inconsistent with acts of Congress. *Id.*

25. A regulation requiring applicants for soldiers' homesteads to make oath in their declaratory statements that their claims are for their exclusive benefit, for purpose of actual settlement, and not either directly or indirectly for the benefit of another, and that agents filing such statements have no right or interest in the filing thereof, is valid. *Id.*

26. A regulation providing that such statements, when filed by agent, be executed before any officer authorized to administer oaths generally is valid; and if such oath be material and false the person making it before a state officer violates the federal perjury statutes. *Id.*

PUBLIC OFFICERS:

1. The United States is not estopped by acts of its officers or agents in agreeing to do or cause to be done what the law does not sanction. *Utah Power Co.* v. *United States*..... 389

2. So *held* in regard to agreement for the use of public lands by a power company. *Id.*

3. A suit to restrain a state officer from levying a tax under a law claimed to be unconstitutional is a suit against him as an individual and, in absence of statute, abates upon expiration of term of office. *Pullman Co.* v. *Knott* 447

4. Land Department, by regulation, may provide for verifying entry papers before state officers, and such oaths may afford foundation for charge of perjury. *United States* v. *Morehead*..... 607

RAILROADS. See **Carriers; Corporations; Employers' Liability Act; Interstate Commerce Acts; Negligence; Safety Appliance Act.** PAGE

1. Right of Congress to regulate hours of service and wages as between railroads and their employees. *Wilson* v. *New* .. 332

2. Under the law of Kentucky, lessor and lessee railroad companies are jointly liable for injury or death inflicted on persons on the tracks, not trespassers, by the negligence of the lessee. *McAllister* v. *Ches. & Ohio Ry.* 302

3. A State may enact that any railroad of the State, leasing its road to a company of another State, shall be jointly liable for actionable torts of the latter committed in the operation of the road. *Chicago & Alton R. R.* v. *McWhirt* 422

REAL PROPERTY. See **Easements.**

REBATES. See **Interstate Commerce Acts,** 6, 7, 10; **Anti-Trust Act,** 1

RECEIVERS. See **Laches; National Banks.**

REGULATIONS:

Of Land Department. See **Public Lands,** 12–14, 17, 23–26.

REMOVAL. See **Procedure,** II.

REPUBLICAN FORM OF GOVERNMENT. See **Constitutional Law,** XI.

RETROACTIVE CONSTRUCTION. See **Constitutional Law,** XIV, (2), (c).

REVIVOR AND SUBSTITUTION. See **Abatement and Revivor.**

RIGHT OF WAY. See **Public Lands,** 2–15.

RIPARIAN RIGHTS. See **Waters and Water Rights.**

RULE 24:

Under this rule, costs in this court are not allowable in cases where the United States is a party. *Oregon & Cal. R. R.* v. *United States* 549

RULE 29: PAGE

Quære: Whether the rule intends that sureties on a supersedeas bond shall pay deficiency decrees in foreclosure cases, or merely the costs and damages resulting from the delay caused by the appeal? *Pease* v. *Rathbun-Jones Co.* 273

RULE 37:

Amendment of § 4 623

SAFETY APPLIANCE ACT:

1. The act, as amended in 1903, makes absolute the duty to provide grab-irons or hand-holds on ends, as well as sides, of locomotive tenders. *St. Joseph & G. I. Ry.* v. *Moore* 311

2. Claimed equivalents cannot satisfy the law. *Id.*

3. Interstate carriers are liable to employees injured in discharge of duty whenever failure to comply with act is proximate cause of injury, irrespective of physical position occupied by employee or nature of work upon which engaged. *Louis. & Nash. R. R.* v. *Layton* 617

4. So *held* where failure of couplers in switching operation resulted in plaintiff's being thrown from car while preparing to release brakes. *Id.*

5. Under Georgia Employers' Liability Act, defenses of assumed risk and contributory negligence eliminated when violation of Federal Safety Appliance Act contributes to cause the injury. *Id.*

SALE. See **Foreclosure.**

SATISFACTION. See **Sureties.**

SCHOOL LANDS. See **Indians,** 8; **Public Lands,** 1, 16.

SERVICE OF PROCESS:

1. Money judgment based on service by publication after defendant had left State to establish new domicile is invalid, though action began before actual change and while defendant's family continued to reside in State. *McDonald* v. *Mabee* 90

2. *Quære:* Whether judgment would be valid if summons had been left at defendant's abode while family was in State and before new domicile was acquired? *Id.*

SERVICE OF PROCESS—*Continued.* PAGE

3. Such judgment is invalid for want of due service as well in State or rendition as elsewhere. *Id.*

4. A power of attorney by which a Colorado fire insurance company consented that service on a Missouri officer should be deemed service on the company so long as the latter had any liabilities outstanding in Missouri, *held* to authorize service in a suit there upon a policy issued in and insuring buildings in Colorado. *Penna Fire Ins. Co.* v. *Gold Issue Mining Co.* 93

5. A corporation of one State may not be summoned in another in an action *in personam*, without its consent, unless it is present doing business. *Phila. & Reading Ry.* v. *McKibbin* 264

See **Jurisdiction, I.**

6. Process must be served on a duly authorized agent. *Id.*

7. That corporations subsidiary to another are doing business in a State does not warrant finding that the other is present there, doing business. *Id.*

8. *Quære:* Whether a corporation doing business in a State may be served there on a cause of action arising in another State and unrelated to the business in the first? *Id.*

9. A corporation *held* not estopped from contesting the jurisdiction, on the ground that it is not doing business in the State, by an arrangement of counsel designed to facilitate attempted service on one of its officers while in the State on private business. *Id.*

SERVITUDE, TO NAVIGATION. See **Waters and Water Rights.**

SEVENTH AMENDMENT. See **Constitutional Law, XIII.**

STATE INSURANCE:

System of state insurance, under Workmen's Compensation Laws, for compensation of employees injured or killed. *New York Cent. R. R.* v. *White* 188
Hawkins v. *Bleakly* 210
Mountain Timber Co. v. *Washington* 219

STATES:

State powers. See **Constitutional Law.**
State courts. See **Jurisdiction.**

STATES—*Continued.* PAGE

State statutes. See Table of Statutes Cited, and title **Statutes.**

State laws and construction, following. See **Procedure.**

STATUTES:

See Table of Statutes Cited. Also **Anti-Trust Act; Bankruptcy Act; Criminal Law; Employers' Liability Act; Indians; Interstate Commerce Acts; Naturalization Act; National Banks; Public Lands; Safety Appliance Act; Tucker Act; Workmen's Compensation Laws.**

I. **Principles of Construction.**

1. While mere legislative declaration can not give character to a law or turn illegal into legal operation, there is a presumption that the purpose of an act is the purpose expressly declared by the legislature and confirmed by the state court. *Bunting* v. *Oregon* 426

2. If the terms of an act may be accommodated to its declared purpose, the court will not hold that a legislature, while intending one thing, through improvidence of language, effected another. *Id.*

3. A direction by Congress that a patent be issued an individual for land assigned him as an Indian allotment is to be regarded, not as a proposal by the government which upon acceptance makes a contract, but as a law amendable and repealable at the will of Congress, subject to the qualification that rights created by the execution of such provision can not be divested or impaired. *United States* v. *Rowell* 464

4. Acts of Congress granting land should not be treated as mere conveyances when functioning as laws carrying out a public policy. *Oregon & Cal. R. R.* v. *United States* 549

II. **Particular Statutes and Ordinances.**

1. *Ordinance of 1787.* Iowa not subject to. *Hawkins* v. *Bleakly* 210

2. *Revised Statutes, § 764.* Providing review by this court of appellate judgments of Circuit Courts in *habeas corpus* cases. Repealed by Judiciary Act of 1891 and Jud. Code, § 289. *Horn* v. *Mitchell* 247

3. *Act of June 12, 1838.* Establishing Iowa Territory. Con-

STATUTES—*Continued.* PAGE

strued with respect to guaranty of trial by jury and *held* superseded by state constitution. *Hawkins* v. *Bleakly* 210

4. *Act of Aug. 19, 1890.* Adopting International Regulations for preventing collisions at sea. Under Art. 16, duty to stop engines upon hearing fog signal of another vessel is imperative. *Lie* v. *San Francisco & Portland S. S. Co.* 291

5. *Tariff Act of 1913.* Provision granting 5 per cent. discount on goods imported in American bottoms not intended to impair reciprocal commercial treaty agreements with foreign nations; discount suspended entirely during existence of agreements. *Five Per Cent. Discount Cases* 97

6. *Chamberlain-Ferris Act of June 9, 1916.* Accords with power of Congress and principles laid down in *O. & C. R. R. Co.* v. *United States*, 238 U. S. 393. *Oregon & Cal. R. R.* v. *United States* 549

7. *Federal Corrupt Practices Acts.* Not in effect adoption of all state primary laws as acts of Congress. *United States* v. *Gradwell* 476

8. *Act of Sept. 3, 5, 1916.* Establishing 8-hour day for employees of interstate carriers. As between carriers and employees affected, it fixes permanently an 8-hour standard for work and wages, and, for the period defined by the act, a scale of minimum wages. *Wilson* v. *New* 332

9. *Georgia Employers' Liability Act.* Eliminates defenses of assumed risk and contributory negligence when violation of Federal Safety Appliance Act contributes to cause injury. *Louis. & Nash. R. R.* v. *Layton* 617

10. *Georgia Code, 1910, § 6116.* Affirmance of conviction by divided court, some of justices not hearing argument, but with notice and opportunity to defendant for reargument, not violation of due process. *Lott* v. *Pittman* 588

11. *Georgia Laws 1914, p. 271.* Authorizing reconstruction of county bridges and granting of new franchises. Street railroad which surrendered perpetual, unconditional franchise to use old county bridges in exchange for temporary revocable grant, cannot enjoin authorities from constructing new bridges under act and charging company one-third of cost for use of new structures. *Rome Ry. & Lt. Co.* v. *Floyd County* 257

STATUTES—*Continued.* PAGE

12. *Iowa Workmen's Compensation Law.* Constitutionality sustained. *Hawkins* v. *Bleakly*..... 210

13. *Kansas Laws 1903, c. 356; Gen. Stats. 1909, §§ 4676–4683.* Requiring safeguards about dangerous machinery, abolishing contributory negligence, assumption of risk and fellow servant doctrine, and shifting burden of proof. Does not violate due process when applied to employee who contracted to provide safeguards. *Bowersock* v. *Smith*..... 29

14. Statute applies to corporations as well as individuals. *Id.*

15. *Owensboro, Ky., Ordinances.* Granting franchise to construct and operate water works. Whether franchise granted for definite term or duration of corporate existence. *Owensboro* v. *Owensboro Water Works Co*..... 166

16. *Missouri Rev. Stats., 1909, § 7042.* Requiring power of attorney authorizing Insurance Superintendent to accept personal service for foreign corporations doing business, and while they have liabilities outstanding, in the State. Consent *held* to cover service in action on policy issued, and insuring buildings, in Colorado. *Penna. Fire Ins. Co.* v. *Gold Issue Mining Co*..... 93

17. Such construction does not deprive of due process, though party taken by surprise. *Id.*

18. *New York Workmen's Compensation Law.* Constitutionality sustained. *New York Cent. R. R.* v. *White*..... 188

19. *Oregon, Gen. Laws 1913, c. 102.* Limiting hours of employment in factories and providing extra pay for over-time. Upheld as valid state, health regulation. *Bunting* v. *Oregon*. 426

20. *Tennessee Acts 1903, c. 501*, making nonresident personal representatives of decedents leaving assets in State citizens thereof for purposes of suit, does not exclude resort to federal court. *Memphis Street Ry.* v. *Moore*..... 299

21. As construed by state supreme court, purpose of act is to permit them to sue *in forma pauperis*. *Id.*

22. *Texas Rev. Stats., Art. 1206.* Suit against corporation not abated by dissolution pending appeal. *Pease* v. *Rathbun-Jones Co*..... 273

STATUTES—*Continued.* PAGE

23. *Texas Crim. Stats., 1911, c. 3, Arts. 538, 539*—"*Bucket Shop*" *Law.* Contracts for purchase and sale of cotton for future delivery on cotton exchange not repugnant to, when actual delivery *bona fide* intended by parties. *Bond* v. *Hume* 15

24. *Id. Arts. 545, 546*, shifting burden of proof in criminal prosecutions under statute, afford no justification for holding, in action to enforce contract, that averments of petition must be taken to be untrue. *Id.*

25. *Washington Workmen's Compensation Act.* Constitutionality sustained. *Mountain Timber Co.* v. *Washington* .. 219

26. *Id. Section 4*, making it a misdemeanor to deduct premium from wages, not construed, in absence of constraining state construction, to prohibit employers and employees, in agreeing upon terms of employment, from taking into consideration fact that employer is a contributor to state insurance fund. *Id.*

27. *Id.* Injury to employee, held not engaged in interstate commerce, remediable only as provided by Washington Compensation Act. *Raymond* v. *Chicago, Mil. & St. P. Ry.* 43

28. *Washington, Rem. & Ball. Ann. Code, § 789.* Seven-year statute of limitations inapplicable when claim of title accompanying possession not made in good faith. *Baker* v. *Schofield*..... 114

29. *West Virginia Acts 1915, c. 26.* Rights of candidates for nomination for U. S. Senator in primary under West Virginia primary election law derived wholly from state law; conspiracy to debauch primary therefore not within Criminal Code, § 19. *United States* v. *Gradwell*..... 476

STOCKS:

1. National bank directors may empower cashier to sell corporate shares acquired by bank as result of loan made upon them as security. *Union Natl. Bank* v. *McBoyle*..... 26

2. Validity of contract for purchase and sale for future delivery on New York Cotton Exchange. *Bond* v. *Hume*.... 15

STRIKES. See **Carriers, 9.**

Interposition of Congress to prevent. See *Wilson* v. *New*.. 332

SUBSTITUTION OF PARTIES. See **Abatement and Revivor.** PAGE

SUPERSEDEAS. See **Sureties.**

SURETIES:

1. Federal courts sitting in equity may render summary judgment against sureties on appeal bonds. *Pease* v. *Rathbun-Jones Co.* 273

2. *Quære:* Is notice always essential in such cases? *Id.*

3. *Quære:* Whether Rule 29 of this court—Rule 13, 5th C. C. A.—requires sureties to pay deficiency decrees in foreclosure cases, or merely costs and damages resulting from the delay caused by the appeal? *Id.*

4. Since payment by principal obligor ends liability of the sureties, the latter cannot complain of a money decree against them, which has been paid by one of them apparently acting for the principal, in absence of a showing that he paid in satisfaction of his own liability. *Id.*

SURRENDER. See **Franchise and License, 7–8.**

TARIFF ACT:

1. The Act of 1913, § IV, par. J, sub-sec. 7, grants a discount of 5 per cent. on goods imported in American bottoms. *Five Per Cent. Discount Cases* 97

2. A proviso to the clause granting the discount that treaty rights shall not be impaired, construed as intended to respect treaty privileges with which the grant would be in conflict, not by extending discount to goods imported in foreign vessels but by suspending the grant entirely while the treaty provisions exist. *Id.*

TAXATION:

Suit to enjoin tax. See **Abatement and Revivor.**

The Constitution does not require a separate exercise of the state powers of regulation and taxation. *Mountain Timber Co.* v. *Washington* 219

TEXAS "BUCKET SHOP" LAW:

Construed. *Bond* v. *Hume* 15

TIME: PAGE

In computing time " from and after " a day named, that day should ordinarily be excluded, but not where the purpose of those whose words are construed will be defeated. *Owensboro* v. *Owensboro Water Works Co.* 166

" TRANSPORTATION." See **Interstate Commerce Acts,** 3.

TREATIES:

1. Reciprocal commercial treaty agreements between this country and foreign nations *held* not intended to be impaired by Tariff Act of 1913 granting discount on goods imported in American bottoms. *Five Per Cent. Discount Cases* 97

2. The Treaty with Prussia, 1799, Art. 19, makes no provision for indefinite stay of vessels, and includes prizes only when in charge of vessels of war. *The Appam* 124

3. The treaty provides only for temporary asylum for certain purposes and was not intended to make an American port a harbor of refuge for captured prizes of a belligerent government. *Id.*

TUCKER ACT:

Action under, for damages to private land resulting from overflow caused by improvement of navigable waters. *United States* v. *Cress* 316

VENDOR AND VENDEE:

Foreclosure of vendor's lien. See **Foreclosure.**

1. In a suit to determine title to land, a decree by consent that title at the commencement of suit was, and has remained, in one party, and that the title be quieted in him, and providing that the decree shall operate as a release to him from the opposing parties, is not to be construed as a conveyance divesting their title but as an adjudication that they had none. *Donohue* v. *Vosper* 59

2. Such a decree therefore does not disturb the relation of warrantor and warrantee existing between two parties who consented to it and against whom it operated, and when one of them afterwards acquires title from the successful party, the covenant attaches by estoppel in favor of the warrantee. *Id.*

VENDOR AND VENDEE—*Continued* PAGE

3. The question being whether a decree operated to terminate the relation of warrantor and warrantee between two parties, their conduct in dealing with the property afterwards is *held* to be a practical construction that it did not. *Id.*

VERDICT. See **Instructions to Jury; Jury.**

WAGES:

Regulation of. See **Constitutional Law,** XII, (2); XIV, (4), 8.

Oregon law of 1913, an hours of service, not a wage, law. *Bunting* v. *Oregon* 426

WAIVER. See **Franchise and License,** 7–8.

1. When parties in Circuit Court of Appeals, to shorten litigation by bringing merits directly to this court, consent to final judgment in lieu of one remanding for re-trial, such consent is not a waiver of errors relied on. *Thomsen* v. *Cayser* 66

2. Objection that a summary judgment against sureties on an appeal bond was not preceded by notice is waived by invoking trial court's decision on the merits upon an undisputed state of facts. *Pease* v. *Rathbun-Jones Co.* 273

3. Objection going to form of District Court's decree, if not taken on a first appeal to the Circuit Court of Appeals, may be deemed waived on a second. *Id.*

4. Error in suing out writ of error in name of plaintiff after he had died *held* waived by stipulation of counsel that administrator might be substituted. *McCluskey* v. *Marysville & Northern Ry.* 36

WAR. See **Admiralty; International Law.**

WARRANTY. See **Vendor and Vendee.**

WATERS AND WATER RIGHTS:

As to laws governing rights of way over public land for ditches, canals, etc., and relation to development of water power. See **Public Lands,** 2–9.

1. The servitude to the interests of navigation of private lands forming the banks and bed of a stream is a natural

WATERS AND WATER RIGHTS—*Continued.* PAGE

servitude, confined to such streams as in their natural condition are susceptible of valuable public use in navigation, and confined to the natural condition of such streams. *United States* v. *Cress* 316

2. When navigable streams are improved by the federal government by means of locks and dams which raise the water above its natural level, they remain navigable waters of the United States for all purposes of federal jurisdiction and regulation. *Id.*

3. The power of the federal government to improve navigable streams in the interest of commerce must be exercised, when private property is taken, in subordination to the Fifth Amendment. *Id.*

4. When such improvement subjects private lands to periodical overflows, injuring though not destroying their value, the United States is liable *ex contractu* to make compensation. *Id.*

5. Upon payment, the United States acquires an easement to overflow the land, the fee, however, remaining in the private owner. *Id.*

6. The right to have the water of a non-navigable stream flow away from riparian land without artificial obstruction is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land itself. *Id.*

7. The acts of Congress providing or recognizing that rights to the use of waters in streams running through public lands may be acquired in accordance with local laws do not authorize the appropriation of rights of way through lands of the United States. *Utah Power Co.* v. *United States* 389

8. For a case in which the right to attack a state water adjudication was lost by laches and estoppel. See *Enterprise Irrig. Dist.* v. *Canal Co* 157

WATER WORKS:

Construction of ordinances granting franchise to construct and operate water works. *Owensboro* v. *Owensboro Water Works Co* 166

WORKMEN'S COMPENSATION LAWS: PAGE
New York Law upheld. *New York Cent. R. R.* v. *White* ... 188
Iowa Law upheld. *Hawkins* v. *Bleakly* 210
Washington Law upheld. *Mountain Timber Co.* v. *Washington* 219

Injuries to an employee while laboring in a tunnel under construction in Washington to shorten carrier's main line between interstate points (the tunnel never having been used in interstate commerce) are not remediable under the Federal Employers' Liability Act but only under the Washington Workmen's Compensation Act. *Raymond* v. *Chicago, Mil. & St. P. Ry* 43

WRIT. See **Execution; Injunction.**
Of error. See **Jurisdiction; Procedure.**
Summons. See **Service of Process.**

WRITINGS. See **Construction; Computation of Time.**