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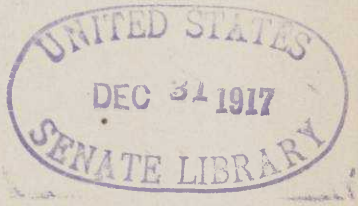
CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1916



ERNEST KNAEBEL

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE, Chief Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.
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.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1916.

EWING, COMMISSIONER OF PATENTS, *v.* UNITED STATES EX REL. FOWLER CAR COMPANY.

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

No. 721. Argued April 17, 1917.—Decided May 7, 1917.

When an applicant for a patent admits that the invention shown in his application was made at a date subsequent to the date upon which another application for the same invention was filed, and by amendment of his application adopts the prior applicant's claims, he thereby concedes the priority of the other's invention, its utility and the sufficiency of the claims.

In such a case the Commissioner of Patents can not be required by mandamus to declare an interference.

Under Rev. Stats., § 4904, the duty of the Commissioner to declare an interference arises only when, in the exercise of his judgment upon the facts presented, he is of opinion that a senior application will be interfered with by a junior one; the mere fact that the junior application covers the same ground or that the junior applicant asserts an interference is not enough to require the Commissioner to act.

The judicial remedy for determining priority of invention is by suit in equity between the parties, not by mandamus against the Commissioner in an attempt to control the administrative discretion conferred upon him by Rev. Stats., § 4904.

45 App. D. C. 185, reversed.

THIS writ is directed to a judgment of the Court of Appeals of the District of Columbia which affirmed a judgment of the Supreme Court of the District of Columbia in mandamus commanding the Commissioner of Patents "to declare or direct to be declared an interference between the application of William E. Fowler, Sr., filed May 22, 1915, for Improvements in Car Floor Construction, and the application for a similar invention" of an unnamed applicant "pursuant to the statute and rules in such cases made and provided."

The judgment was rendered upon motion of petitioner's attorney upon the petition, rule to show cause and answer. It was affirmed by the Court of Appeals.

As the Fowler Car Company and Ewing, Commissioner of Patents, were petitioner and respondent, respectively, in the court below, we shall so designate them here.

The facts as stated by the petition are as follows:

William E. Fowler, Sr., was the first and original inventor of certain new and useful improvements in car floor construction.

On May 22, 1915, he applied for a patent in the usual form and manner and his application was accepted and became known and designated as application serial No. 29794.

On May 19, 1915, he duly assigned his right, title and interest in the invention to the Fowler Car Company, which company appointed Charles C. Linthicum its attorney.

On November 18, 1915, the Commissioner of Patents wrote to Linthicum stating that "there is another application pending, claiming substantially the same invention as that defined" in certain of the claims which were set out. He further stated: "In order to determine whether it is necessary to declare an interference you are requested to obtain a statement from Fowler setting forth when he conceived the invention defined in the above quoted claims, when he disclosed it to others, and when he re-

duced it to practice. This statement will not be made a part of the record and will be returned to you."

Fowler replied that he had conceived the subject-matter of the claim quoted in the Commissioner's letter on or about April 16, 1915, disclosed the same to others and made drawings on or about the same date but had not reduced the same to practice by constructing any full-sized devices.

On November 23, 1915, Linthicum filed an amendment to Fowler's application in which all of the claims suggested by the Commissioner were inserted. Of these claims Linthicum said: "It is thought that these claims appear in a co-pending application and they are inserted at this time with the request that, if such claims do appear in a co-pending application an interference be declared."

To this communication the Commissioner replied as follows:

"Sir: Enclosed please find the statement of William E. Fowler, Sr., made in response to the request in my letter of November 18, 1915.

"The dates of invention claimed by Fowler are subsequent by several months to the filing date of the application of the other party. The other party's case will be passed to issue as soon as possible and when patented will be cited as a reference against such claims in Fowler's application as it may be found to anticipate. An interference will not be declared."

Section 483, Rev. Stats., provides: "The Commissioner of Patents, subject to the approval of the Secretary of the Interior, may from time to time establish regulations, not inconsistent with law, for the conduct of proceedings in the Patent-Office."

Pursuant to this authority regulations known as "Rules of Practice in the United States Patent Office" have been established by the Commissioner by and with the approval of the Secretary of the Interior and now govern

the declaration of interferences between pending conflicting applications and have the force and effect of law, binding as well upon the Commissioner as upon the applicant for patents.

It is further alleged that it clearly appears from the correspondence recited and under the statute and rules that an interference exists between the Fowler application and that of the applicant unknown to petitioner, which applications disclose and claim the same patentable invention and it is the duty of the Commissioner to declare an interference and to call upon each applicant for the sworn preliminary statement required by Rule 110.

That if the unknown applicant receive a patent and thereafter petitioner's (Fowler's) application is put in interference with it and petitioner afterwards be awarded priority over the unknown applicant and receive a patent, in order to get rid of the menace of the outstanding patent to such unknown applicant petitioner will have to file a bill in equity under the provisions of § 4918, Rev. Stats., for the cancellation of such patent or the owner of the outstanding patent may file such bill against petitioner, all of which possibility of litigation may be prevented if the Commissioner be required to discharge his plain duty under the statute and rules and declare an interference when the rights of both parties are in the application stage and before either party receives a patent. That conduct of the Commissioner is a matter of public concern and for over a quarter of a century his predecessors have, without exception, regarded the interference rules as imposing upon them the legal duty of declaring an interference under the circumstances detailed. And petitioner is advised and believes that unless the Commissioner be restrained a patent in due course will be issued to the unknown applicant and petitioner is without remedy unless the court by writ of mandamus shall interpose in its behalf.

Mandamus was prayed.

A rule to show cause was issued and the Commissioner's action stayed until the determination of the cause.

The Commissioner in his answer admitted the filing of the applications as alleged and the correspondence with Linthicum, but denied the legal conclusion drawn by petitioner therefrom. He alleged that an interference as defined by the rules of the patent office is a proceeding for the purpose of determining the question of priority of invention and that when an applicant informs the office that the invention shown in his application was made at a date which was subsequent to the date upon which another application for the same invention was filed, the statute does not require that an interference be established between his application and the prior application. That in asking the later applicant to inform the office of the date of its invention the Commissioner was only asking for information upon which he might form, as required by § 4904, Rev. Stats., an opinion whether a situation existed where the statute required that the later application should be put into interference with the earlier application, and that the rules do not require or contemplate a declaration of interference where it is known that the later applicant made his invention subsequently to the filing of the earlier application; in other words, they do not contemplate the declaration of an interference except where there is a possible conflict in the dates of invention.

The answer further denied that petitioner had shown injury or threatened injury and alleged that the only injury averred in the petition was that if the application of petitioner be put in interference with the patent granted upon the other application, and if priority should be awarded to petitioner and a patent granted to it a bill in equity under § 4918, Rev. Stats., would be necessary to get rid of the menace of the outstanding patent. That the date of Fowler's invention being subsequent to the filing

date of the other party, there would be no ground of awarding priority to Fowler. That even if interference should be declared, "a litigation to be conducted between the application owned by the petitioner and the patent issued to the other party would be no longer or more expensive than a litigation to be conducted between the two applications. No suit could be brought under section 4918 of the Revised Statutes either by or against this petitioner, unless it were proved that Fowler was the first inventor and a patent issued to him; but, as above stated, the date upon which Fowler states he conceived the invention is subsequent to the date upon which the other application was filed."

There was detail of the business of the Patent Office and of the inconvenience to its administration if the right insisted upon by petitioner were allowed.

A discharge of the rule was prayed.

The Solicitor General, with whom *Mr. Assistant Attorney General Warren* and *Mr. R. F. Whitehead* were on the brief, for petitioner.

Mr. George L. Wilkinson, with whom *Mr. Melville Church* was on the brief, for respondent.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court.

The case is not in broad compass. It depends upon a few simple elements. Section 4904, Rev. Stats., provides: "Whenever an application is made for a patent which, *in the opinion* of the Commissioner, would interfere with any pending application, or with any unexpired patent, he shall give notice thereof to the applicants, or applicant and patentee, as the case may be, and shall direct the primary examiner to proceed to determine the question

of the priority of invention. And the Commissioner may issue a patent to the party who is adjudged the prior inventor, unless the adverse party appeals from the decision of the primary examiner, or of the board of examiners-in-chief, as the case may be, within such time, not less than twenty days, as the Commissioner shall prescribe."

The duty prescribed by this section and the other duties of the Commissioner, it was provided (§ 483, Rev. Stats.), might be regulated by rules established by the Commissioner, subject to the approval of the Secretary of the Interior. And rules were established. They define an interference to be a proceeding instituted for the purpose of determining the question of priority of invention between two or more parties claiming the same patentable invention (Rule 93) and provide that an interference shall be declared between two or more original applications containing conflicting claims (Rule 94). Before the declaration of an interference all preliminary questions must be settled by the primary examiner, the issue clearly defined and the claims put in such condition that they will not require alteration (Rule 95). Whenever the claims of the co-pending applications differ in phraseology they must be brought to expression substantially in the same language and claims may be suggested to the applicants and if not followed the invention covered by them shall be considered as disclaimed. The declaration of an interference will not be delayed by the failure of a party to put his claim in condition for allowance (Rule 96). Each party to the interference will be required to file a concise statement, under oath, showing (1) the date of original conception of his invention, (2) the date upon which a drawing of it was made, (3) the date of its disclosure to others, (4) the date of its reduction to practice, (5) the extent of its use, and (6) the date and number of any foreign application. If a drawing has not been made or the invention has not been reduced to practice or dis-

closed to others or used to any extent, the statement must specifically disclose these facts (Rule 110).

Priority of invention is necessarily the essential thing, and to determine it interference proceedings are provided. But are they considered as a matter of course on the mere assertion or appearance of a conflict? Upon the answer to the question the controversy here turns. The Commissioner contends for a negative answer and supports the contention by the language of § 4904 reinforced by the assertion that there is no necessity for proceedings to determine what is already apparent as in the pending case by the admission of respondent. The mere fact of asserted antagonism does not put the proceedings in motion, is the contention. There must be the precedent and superintending judgment of the Commissioner. The law requires, it is said, his opinion to be exercised upon the effect of a conflict in applications, and such indeed is the language of § 4904. It provides that "whenever an application is made for a patent which, *in the opinion* of the Commissioner, *would interfere with any pending application*. . . . he shall give notice thereof . . . and shall direct the primary examiner to proceed to determine the question of priority of invention."

In opposition to this view petitioner replies that the only fact upon which the Commissioner is to exercise an opinion is the fact of the conflict in the applications, and, that fact ascertained, the duty is imperative upon the Commissioner to declare an interference. "Interference," it is said, "is a question of fact; it exists or it does not exist. If it exists then priority must be determined in the way pointed out by the statute and the rules." Other conditions than priority in time determine priority of invention, it is insisted; that the rules of the Patent Office and the motions for which they provide contemplate such conditions, and that in twenty-five years of practice under them "the question of interference in fact, the question

of seniority of the parties, the patentability of the claim to one or the other, and a number of other questions became *inter partes*, and it often happens that the interference is dissolved because of mistake in declaring it or the burden of proof shifted on the ground that the senior party is not entitled to his original filing date as his effective date for the reason that he did not disclose the invention in his case as originally filed, or that his application discloses an inoperative embodiment of the invention, or that he was not entitled to make the claims, or that the junior party had an earlier filed case disclosing the invention, or that the issues as formed did not apply to the structures of the two parties."

The result of the practice is declared to be that it "prevents a judgment of record based solely upon an *ex parte* consideration by the Commissioner and affords each of the parties an opportunity to contest the right of the other party to a judgment."

If there are such possibilities in some interferences they are precluded in petitioner's case. Seven claims of a prior application were adduced by the Commissioner as making a conflict with the invention claimed by petitioner. The latter, through its attorney, adopted six of the claims and directed that they be inserted in its application. It did not intimate the existence of any circumstances which would overcome the priority of invention as determined by the difference in times of the conceptions of the contending applicants.

The conceptions were thus established to be identical and that that of Fowler did not come to him until some months after the filing of the other application. And it is to be observed that the priority was complete. There was not only the precedent conception but there was its expression in claims; and that it was practical, a useful gift to the world, petitioner concedes by adopting the claims. There were, therefore, all of the elements of a completed

invention—one perfected before the filing of petitioner's application—all that the preliminary statement required by Rule 110 could disclose.

This, then, was the situation presented to the Commissioner. There was nothing shown to change it, there is nothing alleged in the petition for mandamus to change it, and there is only urged that an experience of twenty-five years has demonstrated that in interference proceedings circumstances may be shown that determine against the date of filing or the claim of invention.

If it could be conceded that there is antagonism between § 4904, and the rules, the former must prevail. *Steinmetz* v. *Allen*, 192 U. S. 543, 565. But there is no antagonism. The former provides that "whenever an application is made for a patent which, *in the opinion* of the Commissioner, would interfere with any pending application . . . he shall direct the primary examiner to proceed to determine the question of priority of invention." The section, therefore, commits to the opinion (judgment) of the Commissioner the effect of an application upon a pending one—whether it will interfere with a pending one; something more, therefore, than the fact of two applications, something more than the mere assertion of a claim. The assertion must be, in the opinion of the Commissioner, an interference with another. And it is this other that is first in regard, not to be questioned except at the instance of the Commissioner by an exercise of judgment upon the circumstances. And there is no defeat of ultimate rights; there may be postponement of their assertion remitted to a suit in equity under § 4918.

But anterior to such relief petitioner contends that "there is a fundamental and basic right of opposition on the part of any applicant, whether junior or senior, to prevent the wrongful grant of a patent to his opponent." It is further contended that the declaration of an interference and the motions which are permitted to be made

under the rules "prevent a judgment of record based solely upon an *ex parte* consideration by the Commissioner and affords each of the parties an opportunity to contest the right of the other party to a judgment." There indeed seems to be a less personal right claimed, the right of opposition in the interest of the public, displacing the superintendency of the Commissioner constituted by the law. It is to be remembered that the law gives the Commissioner both initial and final power. It is he who is to cause the examination of an asserted invention or discovery and to judge of its utility and importance; [1] it is he who is to judge (be of opinion) whether an application will interfere with a pending one; [2] and it is he who, after an interference is declared and proceedings had, is the final arbiter of its only controversy, priority of invention.[3]

The contentions of petitioner put these powers out of view, put out of view the fact that the so-called "judgment of record" is, as the action of the Commissioner may be said to be, but a matter of administration. A suit in equity may follow and be instituted by either party and even in it nothing can be determined but priority of invention. "There is but one issue of fact in an interference suit. That issue relates to the dates wherein the interfering matter was respectively invented by the interfering inventors. If the complainant's invention is the older, the defendant's interfering claim is void for want of novelty. And the complainant's interfering claim is void for want of novelty, if the defendant's invention is found to antedate the other." Walker on Patents, § 317, 3d ed.

Such suit, therefore, is the judicial remedy the law provides. Section 4904 concerns and regulates the administration of the Patent Office, and the utility of the dis-

[1] Section 4893, Rev. Stats.; *Butterworth* v. *Hoe*, 112 U. S. 50.

[2] Section 4904.

[3] Section 4910.

cretion conferred upon the Commissioner is demonstrated by his answer in this case.

Judgment reversed and case remanded with instructions to reverse the judgment of the Supreme Court of the District of Columbia and direct it to discharge the rule and dismiss the petition.

THE KRONPRINZESSIN CECILIE.[1]

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

No. 922. Argued April 16, 17, 1917.—Decided May 7, 1917.

Upon the facts stated in the opinion, *Held*, that the master and owners of the German Steamship "Kronprinzessin Cecilie" were justified in apprehending that she would be seized as a prize, and her German and other passengers detained, if she completed her voyage to Plymouth and Cherbourg on the eve of the present war; that return to this country before Plymouth was reached was a reasonable and justifiable precaution; and that libelants have no cause of action for failure to deliver their shipments of gold at those ports, although, *semble*, the risk did not fall within the exception of "arrest and restraint of princes, rulers or people" expressed in their bills of lading.

In an ordinary contract of carriage, not made in the expectation that war may intervene before delivery, peril of belligerent capture affords an implied exception to the carrier's undertaking, the contract being silent on the subject.

The court rejects the argument that although a shipowner may give up the voyage to avoid capture after war is declared he is never at liberty to anticipate war; and holds that where war is reasonably and correctly anticipated, liability for non-delivery of freight can not depend upon a nice calculation that delivery might have been made and capture avoided if the voyage had gone on.

238 Fed. Rep. 668, reversed.

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[1] The docket title of this case is: *North German Lloyd, Claimant of the Steamship "Kronprinzessin Cecilie," Petitioner*, v. *Guaranty Trust Company of New York and National City Bank of New York.*

THE case is stated in the opinion.

Mr. Joseph Larocque and *Mr. Walter C. Noyes*, with whom *Mr. Joseph D. Bedle* was on the brief, for petitioner:

The case is indistinguishable from *The Styria*, 186 U. S. 1. In that case and in *Nobel's Explosives Co.* v. *Jenkins* (1896), L. R., 2 Q. B. 326, the masters acted under orders from their owners which were just as peremptory as the order received by Captain Polack in this case. In this case as in those the action taken was in accordance with master's independent judgment. In the *Styria Case* there was no actual restraint or danger, either existing or *in futuro*.

Justification of the ship's return did not depend on the existence of an actual state of war. *The Styria, supra; The Teutonia* (1872), L. R., 4 P. C. 171.

If the officers and directors of a corporation which owns a ship owe a duty to passengers, crew and cargo, as well as to the ship itself, to use modern means of communication to inform the master of impending dangers which come to their knowledge, such duty must carry with it a corresponding right. If the duty be to protect the different interests from threatening danger, then, when the duty is performed, liability cannot grow out of the performance of it. Such officers and directors in these days of wireless telegraphy may owe the duty of taking even peremptory action for the protection of all interests. But if they do owe such duty, and exercise their best judgment, they are entitled to the benefit of it. Every consideration which makes the judgment of the master controlling as relating to all interests must operate to give the same effect to the judgment of the owner, when he is required to act for the protection of all.

To exonerate the ship it was not essential that both ship and cargo be exposed to a common peril.

The German cargo owners and the German and Austrian passengers and members of the crew were entitled to just as much consideration as were the Guaranty Trust Company and National City Bank. *The Teutonia, supra; The San Roman* (1873), L. R., 5 P. C. 301. The uniform course adopted by all German shipowners in issuing warnings to their ships on July 30th and 31st, 1914, is in itself a clear indication that the interruption of the Cecilie's voyage was fully justified.

The order received by wireless from the Imperial Marine Office may, in itself, be considered a restraint. At least, it shows that in the opinion of the German Government, English, French and Russian ports would not be safe for German vessels on and after August 1, 1914, and; therefore, constitutes authoritative and conclusive proof of the wisdom of Captain Polack's course.

The majority of the Circuit Court of Appeals have confused principles which are peculiar to the law of marine insurance with those which are applicable to cases arising under bills of lading.

Policies of insurance are contracts of indemnity. To warrant a recovery under a policy covering arrest and restraint of princes, etc., it is not sufficient to show that the subject of insurance was in danger of loss, or that a loss was actually sustained through fear of a peril insured against, or in attempting to avoid such peril. The peril insured against must have operated directly upon the subject of insurance. See *Olivera* v. *Union Ins. Co.*, 3 Wheat. 183; Phillips on Insurance, vol. 1, § 1114. This rule is largely aimed at fraudulent and factitious claims of constructive loss. *Hadkinson* v. *Robinson*, 3 Bos. & Pul. 388. It is based also on the consideration that the thing insured is not totally destroyed. *Ibid.*

A bill of lading constitutes the contract between the shipper and carrier, and where the latter undertakes to exercise reasonable care to prevent a loss from an excepted

peril, there is a corresponding assent by the former that the carrier may adopt reasonable precautions to avoid such peril.

It would be an absurdity to hold that the performance of a duty creates a liability for damages.

In the case of a bill of lading, even though the excepted peril be the proximate cause, this will not protect the carrier if the negligence of his servants be a contributing cause, nor if after a loss without such contributory negligence they fail to take reasonable care to minimize the damage. In the latter case the carrier will be responsible for the increased damage although not liable for the original damage. It being the duty of the carrier not to expose the shipper's goods to a restraint, he incurs no liability by performing this duty, even if the precautions adopted involve a deviation from his course.

The true rule is as follows: A reasonable apprehension of capture or other imminent peril justifies a master in deviating from his direct course and taking such steps as a prudent man would take for the purpose of avoiding danger, and in so doing he is entitled to consider the safety of his ship as well as the cargo, and the safety of the belligerent as well as of the neutral cargo. *Nobel's Explosives Co.* v. *Jenkins, supra; Pole* v. *Cetovich* (1860), 9 C. B. (N. S.) 430; *The Teutonia* (1872), L. R., 4 P. C. 171, 179; *The San Roman, supra,* p. 306.

The libelants are not entitled to a refund of the prepaid freight.

Mr. J. Parker Kirlin, with whom *Mr. Charles R. Hickox* was on the brief, for the Guaranty Trust Company of New York:

The Kronprinzessin Cecilie was a common carrier, liable as an insurer for failure to deliver the libelant's gold in England unless excused by the terms of the bill of lading. *Liverpool Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397;

Propeller Niagara v. *Cordes*, 21 How. 7, 22; 1 Parson's Ship & Adm., p. 171; Moore on Carriers, p. 306.

The failure to complete the voyage and deliver the cargo is not excused by restraint of princes or other exceptions in the bill of lading. The voyage was not abandoned because of "arrest and restraint of princes." The master received specific and definite orders from his owners to turn back. This message was designedly false in its statement of fact, for war had not broken out between Germany and England, France or Russia, or between any two. The master accepted the message as an order and acted accordingly. His testimony shows that unless and until he received the order from the owners he never intended to abandon his voyage. The exception of "enemies" and "arrest and restraint of princes," is found in juxtaposition with other exceptions dealing with loss or damage caused by violence or by uncontrollable forces. It is, of course, to be construed as *ejusdem generis* with the other excepted causes; that is, it is to be limited to actual arrests and restraints by force, or to steps taken to avoid the reasonable certainty of an arrest and restraint by force, in case the voyage should be continued. In *The Styria*, 186 U. S. 1, the exception was merely "restraints of princes." Having been introduced into the contract by the shipowners, the exception is to be construed against them. *The Caledonia*, 157 U. S. 134, 137; *Compania* v. *Brauer*, 168 U. S. 104, 118; Carver, Carriage by Sea, 5th ed., § 77.

Recalling the vessel and abandoning the voyage from fear or in the expectation that war might break out is quite a different thing from taking such a step to escape the moral certainty of an arrest and restraint.

An arrest involves an actual seizure by hostile forces. *Olivera* v. *Union Ins. Co.*, 3 Wheat. 183, 189. A justifiable fear may be equivalent to an actual arrest but only in such cases as *Nobel's Explosives Co.* v. *Jenkins* (1896), 2 Q. B. 326, where arrest was a practical certainty. The law in

America is clear that a defense, based on an exception of "arrest and restraint of princes" where there is no actual arrest, must establish a danger of capture that was imminent, apparently remediless and morally certain. *Craig* v. *United Insurance Co.*, 6 Johns. 226; *Corp* v. *United Insurance Co.*, 8 Johns. 277; *Oliver* v. *Maryland Insurance Co.*, 7 Cranch, 487; *Smith* v. *Universal Insurance Co.*, 6 Wheat. 176; *Richardson* v. *Maine Ins. Co.*, 6 Massachusetts, 102.

While these cases arose under policies of insurance, the clause of restraint of princes received the same construction that would be given to it in a charter party or bill of lading. *The Xantho* (1887), L. R., 12 App. Cas. 503; *Hamilton* v. *Pandorf* (1887), L. R., 12 App. Cas. 518; *The G. R. Booth*, 171 U. S. 450. In case of a deviation to avoid an arrest the shipper must be able to recover his loss either from his insurer, on the ground that the certainty of arrest which is thus avoided is equivalent to an actual arrest within the meaning of his policy, or from the carrier on the ground that the danger was so remote and uncertain that the deviation was not justified. 1 Parson's Ship. and Adm., p. 172.

The law in England on the subject accords completely with the decisions in our courts. *Hadkinson* v. *Robinson*, 3 Bos. & Pul. 388; *Forster* v. *Christie*, 11 East, 205; *Atkinson* v. *Ritchie*, 10 East, 530; *Nickels* v. *London & Provincial Marine & General Insurance Co.*, 6 Com. Cases, 15; *Kacianoff* v. *China Traders Insurance Co.* (1914), 3 K. B. 1121; *Becker* v. *London Assurance Corporation* (1915), 3 K. B. 410, affirmed (1916), 2 K. B. 156; *Mitsui* v. *Watts, Watts & Co.* (1916), 2 K. B. 826, affirmed by House of Lords March 16, 1917.

The directors were not justified in speculating on the future and assuming that war would break out. *Janson* v. *Driefontein* (1902), A. C. 484, 497, 498; *People* v. *McLeod*, 25 Wend. 483.

In making this shipment on a German rather than a British steamer it cannot be said that the libelant assumed any risk other than in accordance with the terms of the bill of lading. It must be inferred that both parties expected that the contract would be completely carried out unless in the happening of contingencies mentioned in the bill of lading that might prevent performance. It is not to be presumed, in the absence of all evidence, that either France or England would have committed the hostile act of attempting to arrest and detain this German vessel before a state of war between them and the German Empire existed. *Prinz Adalbert*, the *Kronprinzessin Cecilie*, 1916, 32 Times L. R. 378. The liability of the petitioner is to be determined by the posture of affairs that existed. *The Savona* (1900), Prob. 252, 259. The claimant has been unable to produce any proof that the vessel could not have completed the voyage without the intervention of any excepted peril. On the contrary there is no reason on this record to doubt that if the steamer had proceeded on her voyage, she would have reached Plymouth, discharged her cargo, and left in safety.

The abandonment of the voyage would not have been justified if it resulted from an exercise of the master's discretion. If the master can be considered as having exercised any discretion or concurred in judgment with what the owners ordered, it could only be on the assumption that the facts given to him by the owners, in their message, were true. They deliberately told the master a falsehood because they did not dare to rely on his discretion if they told him the truth. The owners' hands are not clean in the matter and they should not be permitted to gain any benefit from their own wrong. *King* v. *Delaware Insurance Co.*, 6 Cranch, 74. The owner cannot justify its order by assuming there was a shortage of coal. The duty of supplying the vessel with a sufficient

quantity of coal for the expected contingencies of the voyage in all its stages was on the shipowner. *The Vortigern* (1899), Prob. 140; *Thin* v. *Richards* (1892), 2 Q. B. 141; *McIver* v. *Tate Steamers* (1903), 1 K. B. 362; *Greenock S. S. Co.* v. *Maritime Ins. Co.* (1903), 2 K. B. 657.

The possibility of increased political tension must have been in the owners' minds when the vessel sailed, and they were bound to supply sufficient coal to meet such expected contingencies.

The master had no general discretion to deviate from the voyage except under the compulsion to avoid an excepted peril, imminent, pressing and which had begun to operate. *Morrison* v. *Shaw S. & A. Co.* (1916), 1 K. B. 747, 758; 1 Parson's Ship. & Adm., p. 21; *The Julia Blake*, 107 U. S. 418, 427, 428; *Blackenhagen* v. *London Assurance Co.*, 1 Camp. 454. His action was not for or in the interest of the shippers. It was not for the success of the voyage but for the sake of the ship. *Nobel's Explosives Co.* v. *Jenkins, supra*, and *The Styria, supra*, do not apply.

The master had no general discretion to violate the contract for the sake of other goods and passengers. The case is not one in which the doctrines of general average could have application.

It is a necessary inference from *The Julia Blake, supra*, and other recent authorities that the ordinary authority of a master has lessened very much in recent years. The telegraph has enabled the owner to perform much of the master's work in foreign ports. The system of printed bills of lading, and the extensive development of regular lines of steamers, with their accompanying agents and branches abroad, have converted the master into little more than the chief navigator of the ship. The master had no right to disobey the owners' orders. *Codwise* v. *Hacker*, 1 Caines, 526; *Robinson* v. *Hinckley*, 2 Paine, 547, 20 Fed. Cas. 1013; *The Roebuck*, 1 Asp. Mar. Law Cas., N. S. 387.

The telegram received by the master on the night of August 1, 1914, twenty-four hours after the steamer had turned back towards New York, purporting to be signed "Country's Naval Office," could not be used to justify the wrongful deviation made twenty-four hours earlier, even if it had been pleaded or properly proved.

If the abandonment was not due, in a legal sense, to an arrest and restraint of princes, it constituted a wrongful deviation, and all clauses in the bills of lading that may have been designed to bar or limit any of the libelant's claims for damages were thereby nullified.

Mr. James M. Beck, with whom *Mr. Carl A. Mead* and *Mr. Edward E. Blodgett* were on the brief, for the National City Bank of New York.

Mr. Justice Holmes delivered the opinion of the court.

This writ was granted to review two decrees that reversed decrees of the District Court dismissing libels against the Steamship Kronprinzessin Cecilie. 238 Fed. Rep. 668. 228 Fed. Rep. 946, 965. The libels alleged breaches of contract by the steamship in turning back from her voyage from New York and failing to transport kegs of gold to their destinations, Plymouth and Cherbourg, on the eve of the outbreak of the present war. The question is whether the turning back was justified by the facts that we shall state.

The Kronprinzessin Cecilie was a German steamship owned by the claimant, a German corporation. On July 27, 1914, she received the gold in New York for the above destinations, giving bills of lading in American form, referring to the Harter Act, and, we assume, governed by our law in respect of the justification set up. Early on July 28 she sailed for Bremerhaven, Germany, via the mentioned ports, having on board 1892 persons, of whom

667 were Germans, passengers and crew; 406, Austrians; 151, Russians; 8, Bulgars; 7, Serbs; 1, Roumanian; 14, English; 7, French; 354, Americans; and two or three from Italy, Belgium, Holland, &c. She continued on her voyage until about 11.05 P. M., Greenwich time, July 31, when she turned back; being then in 46° 46′ N. latitude and 30° 21′ W. longitude from Greenwich and distant from Plymouth about 1070 nautical miles. At that moment the master knew that war had been declared by Austria against Servia, (July 28,) that Germany had declined a proposal by Sir Edward Grey for a conference of Ambassadors in London; that orders had been issued for the German fleet to concentrate in home waters; that British battle squadrons were ready for service; that Germany had sent an ultimatum to Russia, and that business was practically suspended on the London Stock Exchange. He had proceeded about as far as he could with coal enough to return if that should prove needful, and was of opinion that the proper course was to turn back. He reached Bar Harbor, Maine, on August 4, avoiding New York on account of supposed danger from British cruisers, and returned the gold to the parties entitled to the same.

On July 31 the German Emperor declared a state of war, and the directors of the company at Bremen, knowing that that had been or forthwith would be declared, sent a wireless message to the master: "War has broken out with England, France and Russia. Return to New York." Thereupon he turned back. The probability was that the steamship, if not interfered with or prevented by accident or unfavorable weather, would have reached Plymouth between 11 P. M. August 2, and 1 A. M. August 3, and would have delivered the gold destined for England to be forwarded to London by 6 A. M., August 3. On August first at 9.40 P. M., before the earliest moment for probably reaching Plymouth, had the voyage kept on, the master received a wireless message from the German Imperial

Marine Office: "Threatening danger of war. Touch at no port [of] England, France, Russia." On the same day Germany declared war on Russia. On August 2, Germany demanded of Belgium passage for German troops, and seized two English vessels with their cargoes. Explanations were offered of the seizures, but the vessels were detained. The German Army entered Luxembourg, and there were skirmishes with French troops. On August 3 Germany was at war with France, and at 11 P. M., on August 4, with England. On August 4 some German vessels were detained by England, and early on the fifth were seized as prize, *e. g.*, *Prinz Adalbert* [1916] P. 81. No general history of the times is necessary. It is enough to add that from the moment Austria declared war on Servia the great danger of a general war was known to all.

With regard to the principles upon which the obligations of the vessel are to be determined it is plain that, although there was a bill of lading in which the only exception to the agreement relied upon as relevant was "arrest and restraint of princes, rulers or people," other exceptions necessarily are to be implied, at least unless the phrase restraint of princes be stretched beyond its literal intent. The seeming absolute confinement to the words of an express contract indicated by the older cases like *Paradine* v. *Jane*, Aleyn, 26, has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money,) some, at least, which, if they had been dealt with, it cannot be believed that the contractee would have demanded or the contractor would have assumed. *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180, 185. Familiar examples are contracts for personal service, excused by death, or contracts depending upon the existence of a particular thing. *Taylor* v. *Caldwell*, 3 Best & Smith, 826, 839. It has been held that a laborer was excused by the prevalence of cholera in the place where he had undertaken to work. *Lakeman* v. *Pollard*, 43 Maine,

463. The same principles apply to contracts of shipment. If it had been certain that the vessel would have been seized as prize upon reaching England there can be no doubt that it would have been warranted in turning back. See *Mitsui & Co., Limited,* v. *Watts, Watts & Co., Limited,* [1916] 2 K. B. 826, 845. *The Styria,* 186 U. S. 1. The owner of a cargo upon a foreign ship cannot expect the foreign master to run greater risks than he would in respect to goods of his own nation. *The Teutonia,* L. R. 4 P. C. 171. *The San Roman,* L. R. 5 P. C. 301, 307. And when we add to the seizure of the vessel the possible detention of the German and some of the other passengers the proposition is doubly clear. Cases deciding what is and what is not within the risk of an insurance policy throw little light upon the standard of conduct to be applied in a case like this. But we see no ground to doubt that Chief Justice Marshall and Chief Justice Kent would have concurred in the views that we express. *Oliver* v. *Maryland Insurance Co.,* 7 Cranch, 487, 493. *Craig* v. *United Insurance Co.,* 6 Johns. 226, 250, 253. See also *British & Foreign Marine Ins. Co., Limited,* v. *Samuel Sanday & Co.,* [1916] A. C. 650.

What we have said so far we hardly suppose to be denied. But if it be true that the master was not bound to deliver the gold in England at the cost of capture it must follow that he was entitled to take reasonable precautions to avoid that result, and the question narrows itself to whether the joint judgment of the master and the owners in favor of return was wrong. It was the opinion very generally acted upon by German shipowners. The order from the Imperial Marine Office if not a binding command at least shows that if the master had remained upon his course one day longer and had received the message it would have been his duty as a prudent man to turn back. But if he had waited till then there would have been a question whether his coal would hold out. Moreover if

he would have been required to turn back before delivering, it hardly could change his liability that he prophetically and rightly had anticipated the absolute requirement by twenty-four hours. We are wholly unable to accept the argument that although a shipowner may give up his voyage to avoid capture after war is declared he never is at liberty to anticipate war. In this case the anticipation was correct, and the master is not to be put in the wrong by nice calculations that if all went well he might have delivered the gold and escaped capture by the margin of a few hours. In our opinion the event shows that he acted as a prudent man.

We agree with the counsel for the libellants that on July 27 neither party to the contract thought that it would not be performed. It was made in the usual form and, as we gather, charged no unusual or additional sum because of an apprehension of war. It follows, in our opinion, that the document is to be construed in the same way that the same regular printed form would be construed if it had been issued when no apprehensions were felt. It embodied simply an ordinary bailment to a common carrier subject to the implied exceptions which it would be extravagant to say were excluded because they were not written in. Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs. The case of *The Styria*, 186 U. S. 1, although not strictly in point tends in the direction of the principles that we adopt.

Decree reversed.

MR. JUSTICE PITNEY and MR. JUSTICE CLARKE dissent, upon grounds expressed in the opinions delivered by Circuit Judges Dodge and Bingham in the Circuit Court of Appeals—238 Fed. Rep. 668.

CHICAGO LIFE INSURANCE COMPANY ET AL. *v.* CHERRY.

ERROR TO THE APPELLATE COURT FOR THE FIRST DISTRICT OF THE STATE OF ILLINOIS.

No. 171. Argued April 18, 1917.—Decided May 7, 1917.

In an action on a sister state judgment a state court may inquire whether there was personal jurisdiction in the prior proceedings, notwithstanding the question was raised by the judgment defendant and affirmatively decided against him after full hearing both in the trial court which rendered the judgment and in the appellate courts of the same State to which he took the case for review.

The claim that a money judgment by a state court violates due process for want of jurisdiction over the defendant's person is not sustainable if the jurisdiction was questioned by him by plea in abatement and by proceedings in the state courts of review, and sustained after fair hearings before the judgment became finally effective.

A judgment rendered in such circumstances, being sued upon in the courts of another State, was sustained upon the ground that the matter of personal jurisdiction could not be reopened. *Held*, that no violation of due process was involved, since the original judgment satisfied due process and the reason assigned for upholding it, if erroneous, amounted only to a mistake concerning the law of the State in which the judgment was rendered.

A decision of a state court upholding a judgment of another State raises no question in this court under the Full Faith and Credit Clause.

What documentary matter should be filed with the declaration in an action in a state court upon a sister state judgment is a local question not reviewable by this court.

190 Ill. App. 70, affirmed.

THE case is stated in the opinion.

Mr. Charles A. Atkinson, with whom *Mr. Chilton P. Wilson* and *Mr. Charles J. O'Connor* were on the briefs, for plaintiffs in error:

The decisions of the Tennessee courts to the effect that they had jurisdiction over plaintiffs in error do not preclude the courts of Illinois from examining the record facts in the Tennessee courts to determine the question of jurisdiction. *D'Arcy* v. *Ketchum*, 11 How. 165; *Harkness* v. *Hyde*, 98 U. S. 476; *Haddock* v. *Haddock*, 201 U. S. 572; *Thompson* v. *Whitman*, 18 Wall. 457; *Sheldon* v. *Wabash Ry. Co.*, 105 Fed. Rep. 785; *Gilman* v. *Gilman*, 126 Massachusetts, 26; and other cases. A court cannot acquire jurisdiction by the mere assertion of it. *Gould* v. *Glass*, 19 Barb. 179; *Harkness* v. *Hyde, supra; In re Eichoff*, 101 California, 600; *Williamson* v. *Berry*, 8 How. 495; Brown on Jurisdiction, 2d ed., § 26. In raising the question plaintiffs in error merely filed pleas to the jurisdiction of the person; they entered no general appearance. In a suit upon a judgment recovered in another State against a foreign corporation there is no presumption of jurisdiction arising from the judgment alone. *Galpin* v. *Page*, 18 Wall. 350; *Settlemier* v. *Sullivan*, 97 U. S. 444. The rule of *res judicata* is inapplicable; it applies only where the court has jurisdiction of both the person and the subject-matter.

The Tennessee decisions were based upon the peculiar statutes of that State (Code of Tennessee, §§ 4543, 4545) which provide for service of process upon any agent of a foreign corporation found within the county where the suit is brought "no matter what character of agent such person may be," or, if such agent cannot be found, the one who represented the corporation at the time the transaction out of which the suit arose took place. It is submitted that these provisions are unconstitutional in that they authorize the service of process and a method of acquiring jurisdiction without an opportunity to the defendant to be heard, and thus deprive plaintiffs in error of their property without due process of law. *Scott* v. *McNeal*, 154 U. S. 34; *Thompson* v. *Whitman, supra;*

St. Clair v. *Cox*, 106 U. S. 350; *Goldey* v. *Morning News*, 156 U. S. 158.

Where a foreign corporation is not transacting business in the State where the judgment was rendered, the court can only acquire jurisdiction by an entry of appearance or waiver of service. *Pennoyer* v. *Neff*, 95 U. S. 714; *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364; *Mutual Life Insurance Co.* v. *Spratley*, 172 U. S. 602; *Goldey* v. *Morning News*, 156 U. S. 518; and other cases.

The Federal Life Insurance Company was not doing business in Tennessee at the time of service, nor was service had upon its duly authorized agent. The service, therefore, was ineffectual to confer jurisdiction. *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co., supra; Goldey* v. *Morning News, supra.* The return of the sheriff stating that the person served was served as agent of the Chicago Life Insurance Company, it being agent of the Federal Life at the time of the delivery of the policy, is ineffective, as service upon an agent of an agent. *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co., supra; International T. B. Co.* v. *Heart*, 136 Fed. Rep. 129; *Union Pacific R. R. Co.* v. *Miller*, 87 Illinois, 45.

Service of process on the Insurance Commissioner as agent of the Chicago Life Insurance Company was also invalid. Section III, c. 253, of the Acts of Tennessee, requires service upon the Insurance Commissioner by the proper officer of the county in which the commissioner may have his office. The record fails to show that the Chicago Life was licensed to do business in Tennessee or that it was doing business there at the time of service. The statute does not and the Chicago Life did not authorize the commissioner to accept service for it. Where a statute provides the manner of service of process that method must be followed. *Settlemier* v. *Sullivan, supra; Farmer* v. *Mutual Life Association*, 50 Fed. Rep. 829, 831;

Hebal v. *Amazon Insurance Co.*, 33 Michigan, 400; *Bennett* v. *Supreme Tent of K. & M. of W.*, 82 Pac. Rep. 744; *Eisenhofer* v. *New Yorker Zeitung Pub. & Prtg. Co.*, 86 N. Y. Supp. 438. It follows that the process issuing out of the Circuit Court of Chester County, directed to the sheriff of Davidson County, and served on the Commissioner in the latter county as agent of the Chicago Life, did not confer jurisdiction upon the Circuit Court of Chester County, where the suit was brought.

The case of *Forsyth* v. *Hammond*, 166 U. S. 506, does not apply to the case at bar. In bringing action in the Supreme Court of Indiana, Mrs. Forsyth submitted herself to the jurisdiction of that court and the question whether the court had jurisdiction over her was not involved. In the present case the suing out of a writ of error in the Court of Civil Appeals and petitioning for a certiorari from the Supreme Court were not the bringing of an original or a new action in either of those courts. *Nations* v. *Johnson*, 24 How. 195, 204; *Pennoyer* v. *Neff*, 95 U. S. 714, 734. If the Circuit Court of Chester County did not have jurisdiction of plaintiffs in error, neither that court nor the Court of Civil Appeals had power to render judgment against them. *Goldey* v. *Morning News*, 156 U. S. 518; *Harkness* v. *Hyde*, 98 U. S. 476; *Walling* v. *Beers*, 120 Massachusetts, 549; *Fisher Sons & Co.* v. *Crowley*, 57 W. Va. 312.

Mr. Vernon R. Loucks, with whom *Mr. Fred H. Atwood* and *Mr. Charles O. Loucks* were on the brief, for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit in Illinois upon a judgment recovered in Tennessee against the insurance companies, plaintiffs in error. They pleaded and set up at the trial that there never was a valid service upon them in Tennessee and

that the judgment was void. The defendant in error (the plaintiff) showed in reply, without dispute, that the defence was urged in Tennessee by pleas in abatement, that, upon demurrer to one plea and upon issue joined on the other, the decision was for the plaintiff, and that the judgment was affirmed by the higher courts. The plaintiff had judgment at the trial in Illinois, the judgment was affirmed by the Appellate Court and a writ of certiorari was denied by the Supreme Court of that State. The insurance companies say that the present judgment deprives them of their property without due process of law. Other sections of the Constitution are referred to in the assignments of error but they have no bearing upon the case.

The ground upon which the present judgment was sustained by the Appellate Court was that as the issue of jurisdiction over the parties was raised and adjudicated after full hearing in the former case it could not be reopened in this suit. The matter was thought to stand differently from a tacit assumption or mere declaration in the record that the court had jurisdiction.

A court that renders judgment against a defendant thereby tacitly asserts, if it does not do so expressly, that it has jurisdiction over that defendant. But it must be taken to be established that a court cannot conclude all persons interested by its mere assertion of its own power, *Thompson* v. *Whitman*, 18 Wall. 457, even where its power depends upon a fact and it finds the fact. *Tilt* v. *Kelsey*, 207 U. S. 43, 51. A divorce might be held void for want of jurisdiction although the libellee had appeared in the cause. *Andrews* v. *Andrews*, 188 U. S. 14, 16, 17, 38. There is no doubt of the general proposition that in a suit upon a judgment the jurisdiction of the court rendering it over the person of the defendant may be inquired into. *National Exchange Bank* v. *Wiley*, 195 U. S. 257. *Haddock* v. *Haddock*, 201 U. S. 562, 573. But when the power of the court in all other respects is established, what acts of the

defendant shall be deemed a submission to its power is a matter upon which States may differ. If a statute should provide that filing a plea in abatement, or taking the question to a higher court should have that effect, it could not be said to deny due process of law. The defendant would be free to rely upon his defence by letting judgment go by default. *York* v. *Texas*, 137 U. S. 15. *Western Life Indemnity Co.* v. *Rupp*, 235 U. S. 261, 272, 273. If without a statute a court should decide as we have supposed the statute to enact, it would infringe no rights under the Constitution of the United States. That a party that has taken the question of jurisdiction to a higher court is bound by its decision was held in *Forsyth* v. *Hammond*, 166 U. S. 506, 517. It can be no otherwise when a court so decides as to proceedings in another State. It may be mistaken upon what to it is matter of fact, the law of the other State. But a mere mistake of that kind is not a denial of due process of law. *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93, 96. Whenever a wrong judgment is entered against a defendant his property is taken when it should not have been, but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights. The decision of the Illinois courts, right or wrong, was not such a denial. If the Tennessee judgment had been declared void in Illinois this court might have been called upon to decide whether it had been given due faith and credit. *National Exchange Bank* v. *Wiley*, 195 U. S. 257. But a decision upholding it upon the ground taken in the present case does not require us to review the Tennessee decision or to go further than we have gone. An objection that a copy of the document sued upon should have been filed with the declaration is a matter of state procedure and not open here.

Judgment affirmed.

GULF, COLORADO & SANTA FE RAILWAY COMPANY *v.* TEXAS PACKING COMPANY ET AL.

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

No. 334. Argued December 6, 1916.—Decided May 7, 1917.

A case involving rights arising from through bills of lading issued under the Carmack Amendment is reviewable by this court upon writ of error to a state court. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592.

By request of the shipper and by action of the carriers in dealing with the freight accordingly, a shipment governed by the Carmack Amendment and bills of lading thereunder may be diverted from the original destination and the original bills of lading be continued in force as applicable to the new destination.

When the bill of lading provides that the liability of any carrier for damage to goods shall be computed on the basis of the value of the goods—the *bona fide* invoice price to the consignee—at place and time of shipment, the difference between that value and the value of the goods when delivered at a new destination, to which they have been diverted under such bill of lading by consent of the parties, is a proper measure of damages suffered in transit.

So *held* when the goods were damaged when they reached the original destination and were sold, in bad condition, by the shipper at the new destination.

In such case the shipper discharges his duty to the carrier when he sells the goods at the new destination for the best price obtainable.

Under the Carmack Amendment an initial carrier sued for negligent damage to goods is not entitled to recover over against a connecting carrier which did not contribute to such damage.

172 S. W. Rep. 195, affirmed.

THE case is stated in the opinion.

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

Mr. W. O. Cox and *Mr. Frederick S. Tyler* for defendant in error Texas Packing Company, submitted.

MR. JUSTICE DAY delivered the opinion of the court.

Defendant in error, Texas Packing Company, brought its action in the District Court of Bell County, Texas, against the Gulf, Colorado & Santa Fe Railway Company, plaintiff in error, to recover damages growing out of a series of shipments of dressed poultry from Temple, Texas, to St. Louis, Missouri, but which were re-routed over the line of the Wabash Railroad Company from St. Louis to Chicago. The shipments were on bills of lading among the terms of which was the following: "Iced to full capacity at Temple with crushed ice adding 12% salt. Re-ice at all regular icing stations with crushed ice using 12% salt." The Packing Company in its petition, after averring the necessity of proper icing and the contract to that effect between it and the carrier, alleged negligence on the part of the carriers in failing to re-ice the poultry properly and regularly, as a result of which plaintiff claimed damages in the sum of $12,202.87.

The Santa Fe Company answered, denying the allegations of the petition, and alleging the absence of a contract of carriage from Temple to Chicago, and averred by way of cross-petition that, under the terms of the bills of lading, its obligation was to carry the shipments and deliver them within a reasonable length of time to its connecting line en route to destination, and that it did within a reasonable time carry and safely deliver the shipments in good and proper condition, or in such condition as they were received by it, to its connecting line, the Wabash Railroad Company; that, under the terms of the bills of lading, the liability of each carrier was distinctly limited to all such loss and injury as occurred while the shipments were in its possession, and that there was no loss or injury to the shipments while the same were in its

possession; that any loss or injury thereto was the result of the negligence of the plaintiff or the Wabash Railroad Company, and that it is not responsible herein for any of the losses or injuries complained of in plaintiff's petition; that the Santa Fe Company, being the initial carrier, was made responsible under the act of Congress for all loss or injury occurring en route, but that under said act it is entitled to vouch in the Wabash Railroad Company and recover over and against it for any loss or injury occasioned to the shipments in question through its negligence, and that, if there was any negligence of any carrier which resulted in loss to plaintiffs, the same was the negligence of the Wabash Railroad Company.

Accordingly, the Wabash Railroad Company was made a defendant and filed an answer, asserting that it was not a proper party to the suit, and denying that it was guilty of the negligence complained of. It further averred that the shipments were delivered at Chicago in the same condition as when it (the Wabash Company) had received them, and that it received and transported the shipments by virtue of a contract with the plaintiff to which the Gulf, Colorado & Santa Fe Railway Company was not a party or in any way interested, and prayed a dismissal with its costs.

It appears from the record that the shipments were separately billed from Temple, Texas, to St. Louis, Missouri, at dates varying from December 24th to December 30th, 1910; that upon January 4th, 1911, the shipper requested the carrier's agent, at Temple, by telephone, to divert the five cars from St. Louis to Chicago; that the agent said he would, asked where the bills of lading were, and upon being told that they were in St. Louis, said that the carrier's representative in St. Louis would perhaps see that the notations of the diversion were made upon the bills; that no new bills were issued, and that thereupon the shipments were continued to Chicago.

Concerning the stipulation as to icing in transit at "all regular icing stations," there is testimony tending to show the cars were in fact re-iced en route to St. Louis at all but one regular station,—Shawnee, Oklahoma, but the failure to re-ice at this point resulted in a lapse of from 28 to 54 hours without ice and salt.

Upon the issues made the jury found for the Packing Company against the Santa Fe Railway Company, and upon the issue between the Santa Fe and Wabash Companies the verdict was in favor of the Wabash Company. The District Court rendered judgment accordingly, and the case was taken to the Court of Civil Appeals, where the judgment of the District Court was affirmed. 172 S. W. Rep. 195.

As the case involves rights set up and denied which arose upon through bills of lading issued under the Carmack Amendment, it is properly reviewable here. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592. Indeed, both parties admit that the federal statute controls, and the case must be decided under its provisions.

As required by the Texas statute (Art. 1639 of the Revised Statutes of Texas, 1911), the Court of Civil Appeals made findings of fact, in which it said:

"The verdict of the jury is amply supported by testimony, and we therefore make findings of fact to the effect that appellant breached its contract of shipment, as alleged in appellee's petition, and that, as a result of that breach, the property which was shipped was injured and damaged to the extent found by the jury and that the proof failed to show that any of the damage referred to was caused by the Wabash Railroad Company."

The plaintiff in error, in urging certain grounds for the reversal of the judgment of the Court of Civil Appeals, contends that the District Court erred in charging the jury as to the measure of damages. On that subject the District Court charged the jury as follows:

"(4) If you find for the plaintiff you will assess the damages at the difference between the invoice price of said poultry, to-wit, the sum of Twenty Two Thousand Two Hundred Thirty-Eight and 56/100 ($22,238.56) Dollars, and the value of said poultry at the time the same was delivered to plaintiff or its agents, the Western Cold Storage Company in Chicago, by the carrier, with six per cent interest per annum from January 15th, 1911."

This interstate shipment was governed by the terms of the Carmack Amendment, requiring the initial carrier to issue a receipt or bill of lading, and as this court frequently has held, with the effect of making such contract the measure of liability between the parties. It is insisted that inasmuch as the bill of lading made St. Louis the point of destination, it is immaterial what the value of the property was in Chicago, to which point the goods were shipped, having been sold in transit to a company in that city. On this point the record shows that the bills of lading covered the shipment of five cars of dressed poultry from Temple, Texas, to St. Louis, where they were consigned to the "order of the Texas Packing Company, notify St. Louis Refrigerating and Cold Storage Company." There is testimony to show that the poultry while in transit was sold in Chicago, and that while the cars were in St. Louis on the sidetrack of the St. Louis Refrigerating & Cold Storage Company the shipper called upon the agent of the Santa Fe Company at Temple to divert the cars to Chicago. The testimony also shows that the agent promised to do so; said that he would wire a representative of the railway company in St. Louis to divert the cars; that no new bills of lading were issued; that the agent asked for the original bills of lading and was told that they were in St. Louis, and said that the representative of the carrier there would perhaps call at the bank and make the proper notations thereon.

It is fairly inferable from the evidence that the bills of

lading originally issued were continued in force by the action of the parties, simply changing the place of destination, and remained binding contracts when the Santa Fe Company accepted the diversion of the shipment from St. Louis to Chicago.

The bills of lading contained this stipulation:

"The amount of any loss or damage for which any 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 under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

The testimony showed that the invoice price of the poultry at Temple to the Packing Company was $22,238.56, and that the poultry was worth at least that sum at Temple at the time of shipment. We think that in taking this sum as the basis of computing damages the trial court did but enforce the stipulation in the bills of lading. That sum was the *bona fide* invoice price to the consignee, which the bills provided was to be the basis of recovery in case of loss or damage. We think the court properly charged the jury to take the difference between this invoice price and the value of the poultry at the time the same was delivered in Chicago in arriving at the amount of damages. No question is raised in this case as to the right of the plaintiff to recover also the freight paid. See *Pennsylvania R. R. Co.* v. *Olivit Bros.*, 243 U. S. 574.

The testimony shows that the poultry reached St. Louis in poor condition and that the cars were there re-iced and forwarded to Chicago, where the poultry was delivered, still in bad condition, and really unfit for market. It was

nevertheless sold for the best price which could be obtained. When the poultry reached Chicago in that condition, the consignee discharged its duty to the Railway Company when it sold the damaged goods for what could be obtained for them.

The testimony shows that the poultry was taken to a storage company at Chicago, where it was kept until it could be sold, and ultimately realized the sum of $10,035.69. The jury returned a verdict, under the instruction of the court to deduct the value of the property at Chicago from the invoice price, in the sum of $9,000 and interest. Evidently, in this state of the record, no harm was done to the rights of the plaintiff in error in assessing the sum which the jury awarded against it.

We cannot agree with the contention of the plaintiff in error that the value of the deteriorated poultry at Temple or St. Louis should have been taken as the sum to be deducted from the invoice basis of value.

Apart from the stipulation of these bills of lading, the ordinary measure of damages in cases of this sort is the difference between the market value of the property in the condition in which it should have arrived at the place of destination and its market value in the condition in which, by reason of the fault of the carrier, it did arrive. *New York, Lake Erie & Western R. R. Co.* v. *Estill*, 147 U. S. 591, 616. The stipulations of these bills of lading changed this rule in the requirement that the invoice price at the place of shipment should be the basis for assessing the damages.

The poultry in fact had no market price at Temple or elsewhere. It was badly deteriorated, and when the shipper sold it at the point of destination for the best price it would bring he did all that could be fairly required of him to save the carrier from resulting loss.

The trial court charged that the Santa Fe Company was entitled to a recovery against the Wabash Railroad Com-

pany if the jury found that the Santa Fe Company and Wabash Railroad Company were both guilty of negligence in the handling of the poultry, in which event the jury were told that the Santa Fe Company would be entitled to a verdict against the Wabash Railroad Company for that part of the sum to which the Wabash Company had contributed by its negligence to plaintiff's injury. It is urged by the plaintiff in error that the Santa Fe Company as the initial carrier, regardless of its own negligence, was entitled to recover against the Wabash Company in proportion as the negligence of that company contributed to the loss; and it is contended that the testimony tends to show that the Wabash Railroad Company did not properly re-ice and otherwise care for the poultry in transit. The record shows no proper exception reserved upon which to base this criticism; and the question becomes immaterial in view of the verdict of the jury in favor of the Wabash Railroad Company, and the express finding of the Court of Civil Appeals that the proof failed to show that any of the damages had been caused by the Wabash Railroad Company.

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

Affirmed.

VAN DYKE ET AL. *v.* GEARY ET AL., MEMBERS OF THE CORPORATION COMMISSION OF THE STATE OF ARIZONA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

No. 52. Argued March 23, 1917.—Decided May 7, 1917.

In a case governed by Judicial Code, § 266, where the jurisdiction of the District Court is invoked upon constitutional questions, this court, upon appeal from an order denying preliminary injunction, has jurisdiction to review the whole case. *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298.

Extension of the power of the Corporation Commission to the regulation of water systems belonging to individuals, as provided in the Public Service Corporation Act of Arizona (Rev. Stats., 1913, Title 9, c. XI), is permitted by the Constitution of Arizona, Art. XV.

In the absence of an authoritative decision of the Supreme Court of the State to the contrary, a contemporaneous construction of the state constitution by an act of the legislature which is reasonable in itself and designed to accomplish the obvious purpose of the constitutional provision in question should be followed by this court.

Art. IV, pt. 2, § 13, of the Arizona Constitution requiring that acts of the legislature shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, is sufficiently complied with by the Arizona Public Service Corporation Act, *supra*, although that act applies to individuals as well as corporations, while its title refers to corporations and makes no mention of individuals.

One who uses his property in supplying a large community with water thereby clothes such property with a public interest and subjects the business to public regulation.

Where it is conceded that the purpose of a water system is to supply water to the residents and inhabitants of a particular townsite, though not to outsiders or the public generally, the mere fact that the lots of the townsite were originally purchased from the owner of the water system with the oral understanding that water could be secured from that system for use on the lots has no tendency to support the claim that the system furnishes water only to particular individuals

in pursuance of private contracts made with such lot purchasers and is hence devoted exclusively to private use.

The fact that service is limited to a part of a town does not prevent a water system from being a public utility.

Water rates fixed by a state commission upon a basis of a net annual return of 10% of the value of the property employed, allowing an annual depreciation charge of 3½%, *Held* not confiscatory, the valuation of the water system and estimate of operating expenses having been made by the state commission and concurred in by the District Court after careful inquiry by both, the evidence presented to this court being conflicting, and the District Court having appropriately protected the complaining party by providing that application for injunction may be renewed after one year if the rates appear too low.

218 Fed. Rep. 111, affirmed.

THE case is stated in the opinion.

Mr. William C. Prentiss, with whom *Mr. F. C. Jacobs* was on the brief, for appellants.

Mr. Samuel Herrick, with whom *Mr. Wiley E. Jones*, Attorney General of the State of Arizona, and *Mr. R. Wm. Kramer* and *Mr. Geo. W. Harben*, Assistant Attorneys General of the State of Arizona, were on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

In 1909 Ida A. Van Dyke and her husband organized a corporation under the name of the Miami Townsite Company to acquire a tract in Gila County, Arizona, and establish a town thereon. A large part of Miami is now located on that land. In order to supply residents and others thereon with water for domestic, commercial and fire purposes, the Van Dykes introduced a water system which developed rapidly. In October, 1913, the Arizona Corporation Commission, a public service com-

mission with the usual powers of regulation, instituted before itself a proceeding to have the rates charged by the water system declared excessive, and to have reasonable rates established. The Van Dykes, who were duly served, filed a "plea in bar"; alleged that the plant was the individual property of Ida A. Van Dyke; that the business was operated by her with her husband as manager, and not by a corporation; and denied not only the validity of the order but also the jurisdiction of the commission over them. The objection to the jurisdiction was overruled; and the commission proceeded to a hearing on the merits, at which the Van Dykes offered no evidence. On May 1, 1914, after an elaborate report, an order was entered greatly reducing the water rates. The Van Dykes promptly filed a motion for a rehearing, which was denied. Thereupon they applied to the commission to stay the operation of the order pending proceedings for review in the state court. This application also was denied. Then they filed, in the District Court of the United States for the District of Arizona, this suit against the members of the commission, the Attorney General of the State and the county attorney to enjoin the enforcement of the order and the prosecution for penalties for failure to observe the same; and to have the order itself cancelled.

Both plaintiffs and defendants are citizens and residents of Arizona. Jurisdiction of the federal court was invoked solely on the ground that the order of the commission, if enforced, would deprive plaintiffs of their property in violation of the Fourteenth Amendment; and that the penalties prescribed by the Arizona statute for failure to obey the order are so severe as to prevent resort to the remedies therein provided for testing in the state courts the validity of the orders. An interlocutory injunction was applied for; and the case was heard before three judges under § 266 of the Judicial Code. The jurisdiction of the court was sustained under the rule declared

in *Ex parte Young*, 209 U. S. 123; but the court refused relief against the order reducing water rates, saying:

"The evidence submitted by the complainants does not afford this Court a satisfactory basis on which to adjudicate the question of the value of the property used as a water plant, and therefore the Court cannot say that the rates prescribed by the Corporation Commission are confiscatory, and there is no basis on which an order could be made declaring them illegal. If hereafter it shall appear that under actual operation of the plant under these rates, the return allowed by such Corporation Commission operates as a confiscation of the property of complainant, Ida A. Van Dyke, she may, at the expiration of one year, again present her evidence to the Court and obtain appropriate relief on the facts then presented.

"The Court will retain jurisdiction of the case with permission to complainant, Ida A. Van Dyke, if so advised, after the expiration of one year, to renew her application for an injunction against the rates established by the Corporation Commission as confiscatory. In the meantime the rates established will remain in force."

From an order entered in accordance with this opinion the Van Dykes appealed; and this court has jurisdiction to review the whole case. *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298.

The errors alleged are, in substance, as follows:

First: That the Arizona Constitution and Public Service Corporation Act were construed and applied to subject property owned and operated by a natural person to regulation, as a public service corporation.

Second: That a water system established for the purpose of furnishing water only to purchasers of lots from the Miami Townsite Company was treated as a public water system.

Third: That the rates fixed are confiscatory.

These alleged errors will be considered in their order.

1. *Whether the Arizona Corporation Commission had jurisdiction to regulate a water system owned by an individual.*

Arizona was admitted as a State February 14, 1912; and on that date its constitution, which had been adopted December 9, 1910, took effect. By Article XV it created (§ 1) a corporation commission with full power to establish reasonable rates in the public services; and declared (§ 2) that corporations engaged in furnishing water "shall be deemed public service corporations." The Arizona Public Service Corporation Act (Ariz. Rev. Stats. 1913, Tit. 9, c. XI) provides that the term "public service corporation" shall include "water corporation," § 2278 (z); that "water corporation" shall include "every corporation or *person* . . . owning, controlling, operating, or managing any water system for compensation within this State," § 2278 (x); that the term "person" includes an individual, § 2278 (d); and that the term "water system" shall include all property used in the supply or distribution of water "for municipal, domestic, or other beneficial use," § 2278 (w). It is clear that the legislature intended that the powers of the Corporation Commission should extend to plants owned and operated by individuals, and that the language used by it was adequate to express that intent. But it is insisted that provisions of the Arizona Constitution forbid the grant of such a power by the legislature; and the question resolves itself into this: Are the terms "corporation" and "public service corporation" in Article XV of the constitution, used in the limited sense of incorporated companies, or do they include all public utilities both incorporated and unincorporated and whether they be firms or individuals?

Article XV, entitled "The Corporation Commission," consists of nineteen sections,[1] and confers broad powers of

[1] Included are the following:

"Section 1. A Corporation Commission is hereby created to be com-

regulation. The character of the service, that is, whether it is public or private, and not the character of the ownership, determines ordinarily the scope of the power of regulation. The need of such regulation and the manner of exercising it are the same whether a public utility is incorporated or not; and the purpose of a public service commission could easily be frustrated if concerns owned by individuals were excluded from its operation. The District Court accordingly declined to give a technical mean-

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posed of three persons, who shall be elected at the general election to be held under the provisions of the enabling Act approved June 20, 1910, and whose term of office shall be co-terminous with that of the Governor of the State elected at the same time, and who shall maintain their chief office, and reside, at the State Capital. . . .

"Sec. 2. All corporations other than municipal engaged in carrying persons or property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.

"Sec. 3. The Corporation Commission shall have full power to, and shall, prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the State, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations; Provided, that incorporated cities and towns may be authorized by law to exercise supervision over public service corporations doing business therein, including the regulation of rates and charges to be made and collected by such corporations: Provided further, That classifications, rates, charges, rules, regulations, orders, and forms or systems prescribed or made by said Corporation Commission may from time to time be amended or repealed by such Commission."

ing to the term "public service corporation," and interpreted it in the broad popular sense as embracing all public utilities. That construction is in line with numerous decisions holding that statutes imposing certain liabilities on "railroad corporations" embrace all railroads whether individually or corporately owned.[1]

It is contended that Article XIV, entitled "Corporations other than Municipal," renders this liberal construction of Article XV inadmissible. Section 1, of Article XIV defines "'corporation,' as used in this article . . . to include all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or co-partnerships"; and § 16 provides that the records of "all public service corporations" shall at all times be subject to the inquisitorial powers of the State. It is argued that the term "public service corporation," thus excluding individually-owned utilities, could hardly have a different meaning in the very next article of the constitution. But the answer is that Article XIV deals only with the organization, incorporation, management and powers of technical corporations, and the definition therein of "corporation" is for that reason expressly limited by the phrase "*as used in this Article.*" This is significant and is entirely in harmony with the view that the term as used in some other article having a wholly different purpose, should bear a different and broader construction.

Furthermore, the powers of the Arizona Corporation Commission are not limited to those expressly granted by the constitution. Section 6 of Article XV authorizes the legislature to "enlarge the powers and extend the duties of the Corporation Commission"; and the legislature, by

[1] *Union Pacific Ry. Co.* v. *De Busk*, 12 Colorado, 294, 304; *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Lightheiser*, 168 Indiana, 438; *Schus* v. *Powers-Simpson Co.*, 85 Minnesota, 447, 450–451; *Lewis* v. *Northern Pacific Ry. Co.*, 36 Montana, 207, 218.

defining "water corporation" to include "persons" owning a water utility, clearly extends the powers of the commission to individually-owned concerns. So that even if the commission was not originally vested by the constitution with power over utilities owned by individuals, it now has that power directly by legislative enactment. In other words the constitution prescribed a certain minimum of power with which the commission was intrusted; it authorized the legislature to enlarge from time to time the scope of the commission's duties; and the legislature extended them to water concerns owned by individuals.

This construction of the Arizona Constitution by the District Court is in harmony with the contemporaneous construction evidenced by the Public Service Corporation Act (*supra*) enacted at the first session of its legislature. In the absence of an authoritative decision of the Arizona Supreme Court to the contrary, this legislative construction, reasonable in itself and designed to accomplish the obvious purpose of the constitutional provision, ought not to be set aside by this court. *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 305.

Appellants contend also that even if the legislature had power to extend the jurisdiction of the Corporation Commission to water systems owned and operated by individuals, the Public Service Corporation Act was, in this respect, invalid under Article IV, Part 2, § 13 of the Arizona Constitution, because this purpose was not expressed in the title of that act.[1] Constitutional provisions re-

[1] The Arizona Constitution (Art. IV, Part 2, § 13) provides that:

"Every Act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be embraced in the title."

The Act is entitled:

"An Act relating to Public Service Corporations, Providing for the

quiring the subject of legislative acts to be embraced in the title are not to be given a strained and narrow construction for the purpose of nullifying legislation. The "subject," as expressed in the title, is the regulation of "public service corporations"; and the provision in the act that "public service corporations" shall include "persons" owning a public utility is a matter obviously connected therewith.

2. *Whether the Van Dyke Water System is a private business.*

The Van Dyke system appears to be the only water supply of the inhabitants of the original town of Miami (not including the "additions"). The number of water takers is not shown. But it appears that the large consumers who used meters numbered, at the time of the commission's investigation, 675, yielding a revenue of $11,378.10; and that the number of small takers must have been much larger, since the revenue derived from the flat rates was $14,517.35. "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." *Munn* v. *Illinois*, 94 U. S. 113, 126. The property here in question was devoted by its owners to supplying a large community with a prime necessity of life. That Mrs. Van Dyke pumps the water on her own land, stores it in tanks on her own land and thence conducts it through pipes all upon her own land (the strips reserved in the streets for conduits being owned by her), and delivers it to purchasers at the boundary line between her and their properties; and that lot purchasers bought with the understanding that they might purchase water from Mrs. Van Dyke's water system at rates fixed by her—are

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Regulation of the Same, Fixing penalties for the Violation Thereof, and Repealing Certain Acts; with an Emergency Clause."

all facts of no significance; for the character and extent of the use make it public; and since the service is a public one the rates are subject to regulation.

Counsel contend that the use is not public, because water is furnished only to particular individuals in fulfillment of private contracts made with the purchasers of townsite lots. But there is nothing in the record to indicate that such is the fact. Purchasers seem to have bought merely with the oral understanding that water could be secured from the Van Dyke system. Affidavits filed by appellants state expressly that their water system is operated "for the purpose of supplying the residents and inhabitants of said Miami Townsite with water, and not for the purpose of supplying persons outside of said townsite, or the public generally with water." The offer thus is to supply all the "inhabitants" within the given area; and that of course includes sub-vendees, tenants and others with whom the Van Dykes had no contract relations. The fact that the service is limited to a part of the town of Miami does not prevent the water system from being a public utility. See *Del Mar Water &c. Co.* v. *Eshleman*, 167 California, 666, 681–3.

3. *Whether the rates fixed are confiscatory.*

The commission decided that the net return to the owner upon the value of the property employed should be at the rate of at least ten per cent., after allowing an annual depreciation charge of three and one-half per cent. Water rates prescribed on this basis obviously cannot be held confiscatory unless either the valuation placed upon the property used was grossly inadequate or the cost of operation greatly underestimated. These elements are largely matters of fact and opinion, as to which both the commission and the District Court, after careful examination, found against the appellants. The case is presented to us on contradictory affidavits dealing with the items

of value which go to make up the water system. We cannot say "that it was impossible for a fair-minded board to come to the result which was reached." *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 442; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 18. And the provision in the order of the District Court by which it retained jurisdiction of the case with permission to Mrs. Van Dyke to renew her application for an injunction after one year, if the rates fixed appeared to be confiscatory, afforded her appropriate protection.

The decree of the District Court is

Affirmed.

MR. JUSTICE MCREYNOLDS dissents.

TOLEDO RAILWAYS & LIGHT COMPANY *v.* HILL ET AL., EXECUTORS OF KIRK.

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

No. 200. Argued April 23, 1917.—Decided May 21, 1917.

An objection to the jurisdiction of the District Court based on the defendant's being a corporation not doing business in the State and upon want of representative capacity in the person served, is not waived by answering to the merits after a motion to quash the service is overruled, where the answer reasserts the jurisdictional point also, where the defendant participates in the trial only by reiterating the objection and where the judge presiding treats the ruling on the motion as conclusive because made by an associate.

Provision made by a corporation for payment of its bonds and coupons at an office in a particular State and payment of coupons accordingly does not constitute such a doing of business in that State as renders the corporation liable to be sued there. So *held* where the action was upon some of the bonds.

There is no merit in the proposition that as a basis for determining jurisdiction the property of a corporation must be regarded as translated from its home State to another State when mortgaged to a trust company of the latter to secure bonds made payable there.
Reversed.

THE case is stated in the opinion.

Mr. Robert Burns, with whom *Mr. Charles A. Frueauff* was on the brief, for plaintiff in erorr.

Mr. Howard S. Gans, with whom *Mr. Paul M. Herzog* and *Mr. Arthur S. Levy* were on the briefs, for defendants in error.

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

Averring themselves to be citizens of the United States, the one residing in the City of New York and the other in Boston, Massachusetts, the defendants in error in April, 1914, sued in the Supreme Court of the State of New York to recover from the plaintiff in error the principal and interest of certain bonds issued by the plaintiff in error, alleged to be a corporation created by the laws of Ohio. The summons was served upon a director and vice-president of the corporation residing in the City of New York. The corporation, appearing specially for that purpose, on the ground of diversity of citizenship removed the cause to the District Court of the United States for the Southern District of New York and, on the filing of the record in that court, again solely appearing for such purpose, moved to vacate the service of summons on the ground that the corporation was created by the laws of the State of Ohio, and was solely engaged in carrying on its business at Toledo in that State, that is, in the operation of street railways and the furnishing of electrical energy for light and other purposes. The motion to vacate expressly alleged that the corporation was prosecuting no

business in the State of New York and that the person upon whom the summons was served, although concededly an officer of the corporation, had no authority whatever to transact business for or represent the corporation in the State of New York. On the papers, affidavits and documents submitted the motion to vacate was refused and an answer was subsequently filed by the corporation setting up various defences to the merits and besides reasserting the challenge to the jurisdiction. At the trial, presided over by a different judge from the one who had heard and adversely disposed of the challenge to the jurisdiction, the court, treating the ruling on that subject as conclusive, declined therefore to entertain the request of the corporation to consider the matter as urged in the answer. After this ruling the corporation refused to take part in the trial on the merits except to the extent that by way of objections to evidence, requests for rulings and instructions to the jury it re-stated and re-urged its previous contention as to jurisdiction. There was a verdict and judgment for the plaintiff and this direct writ of error to review alone the ruling as to jurisdiction was prosecuted, the record containing the certificate of the trial judge as required by the statute.

Upon the theory that as there was diversity of citizenship the challenge to the jurisdiction involved merely authority over the person, it is insisted that even if the objection be conceded to have been well taken, it was subject to be waived and was waived below and therefore is not open. This must be first disposed of. The contention rests upon the proposition that because after the motion to vacate had been overruled an answer to the merits was filed, therefore the right to assail the jurisdiction was waived. But this disregards the fact that the answer did not waive, but in terms reiterated, the plea to the jurisdiction. It further disregards the fact that the court treated the subject as not open for consideration

because of the previous ruling on the motion to vacate. Moreover, as it has been settled that the right to review by direct writ of error a question of jurisdiction may not be availed of until after final judgment (*McLish* v. *Roff*, 141 U. S. 661), it follows that the contention must be either that there is no right to review at all or that it can only be enjoyed by waiving all defence as to the merits and submitting to an adverse judgment. The contention, however, has been conclusively adversely disposed of. *St. Louis Southwestern Ry. Co.* v. *Alexander*, 227 U. S. 218.

Leaving aside the capacity of the person upon whom the summons was served, which we shall hereafter consider, the facts upon which the question of jurisdiction depends are briefly these: The corporation was created by the laws of the State of Ohio, had its principal establishment and business at Toledo and carried on no business in the State of New York unless the contrary conclusion results from the following statement: In 1901 the corporation issued its bonds and secured the same by mortgage. The trustee under the mortgage was The United States Mortgage and Trust Company of the City of New York and the bonds were delivered to that company to be certified in accordance with the provisions of the deed. The bonds were subject to registry and became due and were payable on July 1, 1909, "at the fiscal office of said Company in the City of New York" and the semi-annual interest coupons were also payable "at the fiscal office of said Company in the City of New York." Prior to 1909, when the company defaulted in the payment of the principal and interest on its bonds, the interest coupons were paid at the office of a commercial firm in New York representing the company for such purpose, but that representation wholly ceased after the default and from that date until this suit was brought, about five years later, the company had no office for any purpose in the State of New York and transacted no business therein.

The reason which controlled the court below and the sole contention here relied upon therefore was and is that the provision for the payment of the bonds and coupons at an office in the City of New York constituted a doing of business in New York so as to afford jurisdiction there and that such result continued to operate years after the office for such purpose had ceased to exist upon the ground that, for the purpose of jurisdiction over the corporation, it must be conclusively presumed to have continued to maintain an office in the City of New York for the purpose stated. But we think from either point of view the contention is without merit: The first because the mere provision for a place of payment in the City of New York of the bonds and the coupons annexed to them at their maturity and their payment at such place was in no true sense the carrying on by the corporation in New York of the business which it was chartered to carry on, however much it may have been an agreement by the corporation to pay in New York an obligation resulting from the carrying on by it of its business in the State of Ohio. And this view necessarily disposes of the proposition in the second aspect, since the indulging in the fiction of the existence of an office for the payment of coupons could not produce an effect greater than that which could be produced by the real existence of the office.

So far as concerns the capacity of the person upon whom the summons was served irrespective of the doing of business by the corporation in the State, we do not expressly notice the various contentions by which under such a view jurisdiction is sought to be supported, but content ourselves with saying that we think they are all plainly without merit.

Although what we have said in substance meets and disposes of all the contentions relied upon to sustain the jurisdiction, we have not expressly noticed them all because of their obvious want of merit,—a situation which

is illustrated by the mere statement of a contention made that as the trustee under the mortgage was a New York corporation in whom the title to the mortgaged property for the purposes of the trust was vested, therefore all the property of the corporation must be metaphysically considered to have been translated from the State of Ohio to the State of New York and used as a basis of jurisdiction in such latter State.

Reversed and remanded with directions to dismiss the complaint for want of jurisdiction.

MEISUKAS *v.* GREENOUGH RED ASH COAL COMPANY.

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

No. 229. Argued May 2, 1917.—Decided May 21, 1917.

The right to challenge the jurisdiction of the District Court over the person of the defendant is not waived by a special appearance for that purpose, by a postponement of the hearing at the instance of the plaintiff for the purpose of enabling him to be fully heard on the subject of jurisdiction reserving the right of defendant to plead to the merits if jurisdiction be sustained, or by an order of the court, *sua sponte*, directing plaintiff to amend his complaint so as to disclose citizenship more fully before the hearing on the jurisdictional question.

A motion to quash is a proper mode of attacking service and jurisdiction thereon depending in the District Court; the Conformity Act does not require resort to a demurrer for this purpose even though the state procedure does. So *held* where the motion was based on the grounds that defendant corporation was not doing business or possessed of property in the State and on want of representative capacity in the person served.

Affirmed.

THE case is stated in the opinion.

Mr. Jesse C. Adkins, with whom *Mr. Alvin C. Cass*, *Mr. Baltrus S. Yankaus* and *Mr. Frank J. Felbel* were on the brief, for plaintiff in error.

Mr. Charles W. Pierson, with whom *Mr. Clifton P. Williamson* was on the brief, for defendant in error.

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

Alleging himself to be a citizen of New York and a resident in the eastern district, the plaintiff in error sued below to recover from the defendant in error the amount of damages alleged to have been by him suffered as the result of an explosion of dynamite while he, the plaintiff, was engaged as a servant of the defendant in working in a coal mine belonging to and operated by it near Shamokin, Pennsylvania. The defendant was alleged to be a corporation created under the laws of the State of Pennsylvania and a resident of that State having its principal place of business at Shamokin. It was alleged, however, as a basis for jurisdiction that the corporation carried on business in the State of New York and had property therein. The summons was personally served upon the president of the corporation who was found in the Borough of Manhattan in the southern district.

Upon the complaint and summons and an affidavit of its president, the corporation, appearing specially "for the sole and single purpose of objecting to the jurisdiction of this court over the defendant in this action," moved "to set aside and declare null, void, and of no effect the attempted service of the summons" upon the ground that the corporation had no property in the State of New York and transacted no business therein and although its pres-

ident was personally served while temporarily in the southern district of New York he was there engaged in the transaction of no business for or on account of the corporation and had no authority so to do. A hearing was ordered on the motion. At the hour fixed for the hearing at the request of the plaintiff it was continued, the court, however, in express terms subjecting the continuance to the condition that the defendant should not lose his right to plead to the merits if on the hearing on the question of jurisdiction on the postponed day authority to entertain the cause was sustained. In addition the plaintiff was ordered within six days to file an amended complaint "showing whether the plaintiff is an alien or a citizen of the United States, and if a citizen whether native born or naturalized, and the date and place of such naturalization, if any." The amended complaint was filed showing the plaintiff to be an alien and subsequently on the hearing on the motion to quash the summons an affidavit for the purpose of supporting the jurisdiction was filed on behalf of the plaintiff. It is true, however, to say that this affidavit did not rebut the facts as to the non-doing of business and the absence of property of the corporation in the State of New York and the want of authority on the part of its president upon whom the summons had been served to represent the corporation or transact any business in New York in its behalf. The summons was quashed and the suit dismissed and the direct appeal which is before us on the question of jurisdiction was then taken.

Despite some apparent contention to the contrary there is no room for any controversy concerning the facts upon which the court below based its action, that is, the non-doing of business by the corporation in New York and the absence of authority in its president to represent it there. Indeed the argument freely admits this and proceeds upon the theory that although the facts clearly

establish the correctness of the ruling below if they are considered, yet they are not subject to be so considered because the challenge to the jurisdiction was waived by the proceedings which were taken to question it. Generically this would seem to rest upon the proposition that because there was a special appearance on the face of the summons and complaint challenging the jurisdiction, thereby the right to so challenge was waived. But the contrary has been so long established and is so elementary that the proposition need be no further noticed.

Although this be true, the argument further is that the right to be heard on the challenge to the jurisdiction was lost because of the postponement of the hearing on that subject which was granted. This, however, in a different form but embodies the error involved in the proposition just disposed of. But aside from this, as the continuance was granted at the request of the plaintiff and for the purpose of enabling him to be fully heard on the subject of jurisdiction, no further reference to the proposition is required. Again, it is urged that because as a condition of the continuance the court reserved the right of the defendant to plead to the merits if on the hearing jurisdiction was found to exist, therefore the question of jurisdiction was waived,—a conclusion which is again too obviously wrong to require more than statement to refute it. Moreover, it is insisted that as the order directing the plaintiff to amend so as to fully disclose citizenship before the day for the hearing on the motion as to jurisdiction was an exercise of jurisdiction resulting from some suggestion of the defendant, therefore the question of jurisdiction was not open. But this disregards the fact that the order in question was expressly made by the court doubtless in the discharge of its duty to see to it that from no point of view was its jurisdiction abused.

Finally, it is said that as under the local law the right to challenge the summons and the jurisdiction resting

on it could only have been raised by demurrer, therefore under the Conformity Act (§ 914, Rev. Stats.) the motion to quash the summons could not be entertained and on the contrary should have been disregarded. We do not stop to discuss the proposition since it is too clear for discussion that its want of merit is foreclosed by previous decisions of this court which have recognized and upheld the practice of challenging the jurisdiction under circumstances like those here present by way of motion to quash instead of by demurrer. *Goldey* v. *Morning News*, 156 U. S. 518; *Wabash Western Railway* v. *Brow*, 164 U. S. 271; *St. Louis Southwestern Ry. Co.* v. *Alexander*, 227 U. S. 218.

Affirmed.

AMERICAN EXPRESS COMPANY *v.* UNITED STATES HORSE SHOE COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 248. Argued April 30, 1917.—Decided May 21, 1917.

Concurrent findings of state trial and appellate courts as to the fact of negligence will not be overturned by this court in the absence of clear error. *Baltimore & Ohio R. R. Co.* v. *Whitacre*, 242 U. S. 169.

A carrier's printed form of contract for interstate transportation of livestock, plainly intending to adjust the rates in each case proportionately to valuations to be made by the shipper which should limit the carrier's liability, specified minimum or primary valuations for various kinds of animals with corresponding tariff rates and left blanks for insertion of the shipper's valuations connected with the statement that the same were declared by the shipper in order to avail himself of the alternative rates. In a case where the blanks for valuations by the shipper were left unfilled at execution but the rate charged and inserted in the contract was in accordance with the carrier's tariff as applied to the primary valuations, *Held* that these

were the valuations adopted by the parties and that the carrier's liability was limited accordingly.

Failure to post rates which are duly made out and filed with the Interstate Commerce Commission does not affect their validity or the duty of a shipper to take notice of them.

A clause in a carrier's merchandise rate schedules providing that rates there must not be applied to livestock shipments, *construed* as intended to leave the provisions of the livestock schedule concerning rates and valuations for independent interpretation uninfluenced by provisions in the merchandise schedules.

The effect of a contract made and signed by a shipper in lawful accord with established rate sheets may not be avoided by the suggestion that through neglect or inattention he did not read it.

250 Pa. St. 527, reversed.

THE case is stated in the opinion.

Mr. Charles F. Patterson, with whom *Mr. Francis R. Harbison* was on the brief, for plaintiff in error.

Mr. W. Pitt Gifford for defendant in error.

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

The subject-matter of this suit is the liability, if any, of the plaintiff in error, the Express Company, for the failure to safely deliver a colt which was entrusted to it by the agent of the defendant in error at Milwaukee, Wisconsin, for transportation to Erie, Pennsylvania, and if there was any liability, the amount thereof. The controversy is here to review the action of the court below in affirming a judgment of the trial court rendered on a verdict of a jury finding that there was liability and fixing the amount at $1,916.70. 250 Pa. St. 527. Jurisdiction to review rests upon the interstate commerce character of the shipment involving various alleged misconstructions of the Act to Regulate Commerce and conse-

quent deprivation of federal rights asserted to have arisen from the course of the trial in the court of first instance as also from the action of the court below in affirming. These contentions in the courts below concerned both the existence of liability and, if any, the amount. As the result, however, of the conclusion of both courts as to the fact of negligence and the absence of any ground for clear conviction of error on the subject (*Great Northern Ry. Co.* v. *Knapp,* 240 U. S. 464, 466; *Baltimore & Ohio R. R. Co.* v. *Whitacre,* 242 U. S. 169), as well as because of the limitations resulting from the errors assigned and relied upon, the question of liability may be put out of view, thus reducing the case to a question of the amount, and that turns on whether there was a limitation of liability and the right to make it.

The printed form of contract (express receipt) which was declared on and made a part of the complaint contained a caption under a title "Notice to Shippers" directing their attention to the fact that they must value their property to be shipped and that the charges for transportation and the sum of recovery in case of loss would be based upon valuation. The contract itself was entitled "Limited Liability Live Stock Contract." Its first clause described the carriage which was to be provided for with appropriate blanks to enable the insertion of the livestock which it covered and the rate to be paid for the service with a proviso that the charge was based upon valuation fixed by the shipper. The second clause stated a demand by the shipper for rates to be charged for the carriage and that he was offered "by said Express Company alternative rates proportioned to the value of such animals, such value to be fixed and declared by the shipper, and according to the following tariff of charges, viz:" This was followed by clause 3 which contained enumerations of various classes of animals fixing a primary valuation for each class, for instance: "For . . . horses . . . $100."

"For . . . colts . . . $50." The fourth and fifth clauses provided that after ascertaining the rate to be charged for all classes of animals embraced in clause 3 by applying to those classes the rate provided by the tariff sheets filed according to law with the Interstate Commerce Commission, there should be added to such rate a stated percentage of the amount by which the declared valuation of the shipper exceeded the primary valuation fixed by the terms of clause 3. The fifth clause also concluded with the declaration that the shipper, in order to avail himself of the alternative rates, had declared a value as follows, and contained blanks for the insertion of said valuation.

There was filled in this blank contract, as signed by the parties and as sued on, in the first clause a statement of the animals shipped, a mare and colt, and of the rate, $75. In the third clause containing the enumeration of classes, in the class as to horses valued at $100 there was written "$100" and in the class as to colts valued at $50 there was written "$50." There was no filling of the blank at the end of the fifth clause stating the owner's valuation and that space therefore remained vacant.

There was evidence tending to show that the shipper was experienced in shipping horses and was informed of the right to value and that the rate as well as the recovery would depend upon valuation. Evidence was also admitted over objection of the company tending to show that the shipper was unaware of the valuation clauses and that he signed the contract without reading it. There was further evidence that on the contrary the shipper was fully informed by the agent and declared his purpose to fix the primary valuation and not to exceed it. In addition, evidence was tendered by the defendant which was rejected and objection reserved, tending to show that in consequence of the desire of the shipper not to change the primary valuation, that is to adopt the same, the figures

written into the clauses of § 3 of $100 as to the mare and $50 as to the colt, were written by the agent inadvertently in the wrong place, intending to write them at the space left vacant for the shipper's valuation at the end of clause 5, and that for the same reason the rate charged was based on the tariff as applied to the primary valuation as stated in the third clause of the contract.

Putting out of view the conflicting tendencies of the proof and looking at the subject-matter from the point of view of the contract, that it was one intended to limit liability, or in other words, to fix a rate according to value at the shipper's election and to regulate recovery in case of loss correspondingly, would seem too clear for anything but statement. It is true the intimation is conveyed in the argument that the alternative rate depended exclusively upon the making of a valuation by the shipper and that where this was not done, there was no valuation and no limitation and a consequent limited rate and unlimited liability. But the suggestion disregards the stating of a value in the different clauses of § 3 which are susceptible of no other explanation than that they were intended as a primary value to control as the basis for fixing the rates and as a rule of limitation if the shipper did not by making another and increased value become liable for a higher rate and possess the right to a greater recovery. To adopt the suggestion would require a disregarding of the plain terms of the contract and would leave no basis upon which to explain the rate fixed which clearly rested upon the tariff as applied to the articles and the statement as to value fixed in the third clause.

That it was in the power of the carrier under the Act to Regulate Commerce as amended to limit liability even in case of negligence by affording the shipper an opportunity to pay a higher rate and secure a higher recovery than the one initially fixed by the carrier, is so conclusively settled as to be beyond controversy. *Adams Express*

Company v. *Croninger*, 226 U. S. 491; *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639; *Missouri, Kansas & Texas Ry. Co.* v. *Harriman*, 227 U. S. 657; *Chicago, Rock Island & Pacific Ry. Co.* v. *Cramer*, 232 U. S. 490; *Great Northern Ry. Co.* v. *O'Connor*, 232 U. S. 508; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Robinson*, 233 U. S. 173; *Louisville & Nashville R. R. Co.* v. *Maxwell*, 237 U. S. 94; *Pierce Company* v. *Wells, Fargo & Company*, 236 U. S. 278; *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin*, 241 U. S. 319; *New York Central & Hudson River R. R. Co.* v. *Beaham*, 242 U. S. 148.

These rulings are decisive unless it be that for some reason they are inapplicable, and we briefly consider separately the grounds relied upon as demonstrating that result.

It is said the rate sheets filed with the Interstate Commerce Commission if they sustained the contract were not posted and therefore the contract must be treated as having nothing to rest upon. But the proposition is adversely disposed of by several of the cases above cited. *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 652; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97, 111; *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin*, 241 U. S. 319, 327; *New York Central & Hudson River R. R. Co.* v. *Beaham*, 242 U. S. 148, 151.

But it is urged the contract of limitation was void because it is shown to have been illegal, that is, repugnant to the official tariff sheets filed with the Interstate Commerce Commission which, properly authenticated, were offered in evidence. But, turning to the official tariff sheets as found in the record, it is apparent that the terms of the contract are substantially identical with the statement in the tariff sheets as to the rates concerning the shipment of livestock and indeed, comparing the two, it is impossible to reach any other conclusion than that the

provisions of the contract were copied from the provisions of the tariff sheets. In substance the argument rests upon the assumption which we have already disposed of, that is, that the contract only provided for a limitation in the event of a declaration of value by the shipper and left no room for such a limitation where the shipper obtained the lowest possible rate by making no valuation and accepting the primary limit of value stated in the contract by the carrier. The argument as we are now considering it, however, proceeds not solely upon the text of the contract and the tariff sheets concerning the carriage of livestock but additionally upon the effect produced upon such provisions by clauses in the tariff sheets relating to the valuation of merchandise. The argument is this: That as in the rate schedules dealing with merchandise valuation it is expressly provided that the primary limitation of value fixed shall be the measure of the charge and liability unless another and higher valuation be declared, such rule ought not to be deduced from the provisions as to livestock valuation where that stipulation is not found in express terms, and hence that in the absence of an express valuation in a livestock contract by a shipper no primary limitation on value is possible and thus the rule of the lesser the rate the greater the responsibility would necessarily in the case of livestock come to pass. Incongruous as this result would be, it is said that it should be applied since in the rate sheet concerning merchandise it is declared in paragraph *d* that "These charges must not be applied to Live Animals, Live Birds or Live Stock (see paragraph *g*)," that is, the livestock paragraph. But to give to the clause the import claimed for it would be to cause it to accomplish the very result which it was obviously intended to prevent, that is, the control or modification of the charges contained in livestock clauses by the provisions as to merchandise charges. Indeed the complete answer to the proposition is the one which we

have previously pointed out in considering the argument in another form of statement, that to accede to it would require a plain disregard of the fixing of a primary valuation by the terms of the contract and the sanction of the right to do so found in the express words of the rate sheets.

Finally it is said that the right to limit ought not to be recognized in the presence of a controversy and conflicting tendencies of proof as to whether the limitation of liability was called to the attention of the shipper and, if one aspect be accepted, of the possibility that the contract was signed by the shipper in ignorance of the clause. But here again the contention but overlooks the very foundation upon which the principle settled by the adjudged cases rests and disregards the express ruling in some of them that the effect of a contract made and signed by a shipper which is lawful from the point of view of the established rate sheets may not be avoided by the suggestion that by neglect or inattention the contract which was entered into was never read. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin*, 241 U. S. 319; *New York Central & Hudson River R. R. Co.* v. *Beaham*, 242 U. S. 148, 151.

As from what we have said it follows that the shipper should not have been permitted, after obtaining the lowest possible rate based upon a valuation to which his right of recovery in case of loss was limited, to recover upon the happening of the loss an amount wholly disproportionate and inconsistent with the rate paid contrary to the express terms of the contract, it results that the judgment below must be and it is reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY *v.* GOTSCHALL, ADMINISTRATRIX OF GOTSCHALL.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 251. Argued April 9, 1917.—Decided May 21, 1917.

Plaintiff's intestate, a brakeman, was thrown from a train carrying interstate commerce, and killed, as a result of couplers coming open while the train was in motion. *Held*, that, in view of the Safety Appliance Act, negligence might be inferred from the mere opening of the couplers.

A father who by the state law is entitled to the earnings of his son during minority may recover damages for the latter's death upon a cause of action under the Federal Employers' Liability Act.

130 Minnesota, 33, affirmed.

THE case is stated in the opinion.

Mr. William H. Bremner and *Mr. Frederick M. Miner* for plaintiff in error, submitted.

Mr. Lyle Pettijohn, with whom *Mr. W. R. Duxbury* was on the brief, for defendant in error.

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

Basing her cause of action upon the Federal Employers' Liability Act, the defendant in error as administratrix of the estate of Merlin E. Gotschall, deceased, sued to recover from the Railroad Company, plaintiff in error, damages resulting from his death alleged to have been occasioned by the negligence of the company while he was in its employ engaged in interstate commerce. On this writ of

error a reversal is sought of the action of the court below in affirming a judgment entered by the trial court on the verdict of a jury in favor of the plaintiff.

The evidence tended to show the following facts: Gotschall, a minor twenty years old, at the time in question was head brakeman on an extra freight train running from Albert Lea, Minnesota, to Minneapolis and transporting interstate commerce merchandise. As the train left Jordan, an intermediate station, Gotschall boarded a car toward the rear end and was proceeding along the tops of the cars toward the locomotive when the train separated because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brakes and a sudden jerk which threw Gotschall off the train and under the wheels.

The jury, under an instruction of the court, was permitted to infer negligence on the part of the company from the fact that the coupler failed to perform its function, there being no other proof of negligence. It is insisted this was error, since as there was no other evidence of negligence on the part of the company the instruction of the court was erroneous as from whatever point of view looked at it was but an application of the principle designated as *res ipsa loquitur*, a doctrine the unsoundness of which, it is said, plainly results from the decisions in *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658 and *Looney* v. *Metropolitan R. R. Co.*, 200 U. S. 480. We think the contention is without merit because, conceding in the fullest measure the correctness of the ruling announced in the cases relied upon to the effect that negligence may not be inferred from the mere happening of an accident except under the most exceptional circumstances, we are of opinion such principle is here not controlling in view of the positive duty imposed by the statute upon the railroad to furnish safe appliances for the coupling of cars. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210

U. S. 281, 294, 295; *Chicago, Burlington & Quincy Ry. Co.* v. *United States*, 220 U. S. 559, 575; *Delk* v. *St. Louis & San Francisco R. R. Co.*, 220 U. S. 580, 586; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 43.

Again it is insisted that error was committed in submitting the case to the jury because there was no evidence of pecuniary loss resulting to Gotschall's father, on whose behalf the suit was brought. But this disregards the undisputed fact that the deceased was a minor and, as under the Minnesota law the father was entitled to the earnings of his son during minority, the question is one not of right to recover, but only of the amount of damages which it was proper to award.

Affirmed.

OHIO RIVER CONTRACT COMPANY *v.* GORDON, JUDGE OF THE JEFFERSON CIRCUIT COURT.

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

No. 594. Argued April 9, 1917.—Decided May 21, 1917.

The fact that personal injuries sued for occurred while plaintiff was employed on work which defendant was performing under contract with the United States does not prevent a state court from entertaining the action.

An Indiana corporation, in constructing a canal for the United States on a federal reservation in Kentucky, carried the excavated materials over a railroad it had built for the purpose, to land belonging to another and dumped them there with such owner's consent. The dump and, in part, the railroad were within Kentucky and outside the reservation. *Held*, that without regard to whether the jurisdiction over the reservation was exclusively federal, the transport and deposit of the materials beyond its limits was such a doing of business in Kentucky as subjected the corporation to the jurisdiction of the courts of that State in a transitory action.

The corporation was sued in a Kentucky court for injuries suffered by an employee while engaged upon the work within the reservation, a summons being served in the reservation on an agent whom it had designated under the Kentucky law for receiving service of process in case of suit, and an alias summons being served on the agent while off the reservation at his home in Kentucky. *Held*, that, if the first service was void upon the ground that jurisdiction over the reservation was exclusively in the United States, the second was good, since the corporation did business in the State outside the reservation.

An action for personal injuries suffered on a reservation under exclusive jurisdiction of the United States, being transitory, may be maintained in a state court which has personal jurisdiction of the defendant.

170 Kentucky, 412, affirmed.

THE case is stated in the opinion.

Mr. W. Overton Harris, with whom *Mr. A. E. Richards* was on the brief, for plaintiff in error.

Mr. Matthew O'Doherty, with whom *Mr. Morton K. Yonts* was on the briefs, for defendant in error.

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

In July, 1914, one Haines sued the Ohio River Contract Company, the plaintiff in error, and Swisher, one of its employees, in the Circuit Court of Jefferson County, Kentucky, to recover damages resulting from personal injuries alleged to have been occasioned by the negligence of the defendants while Haines was in the employ of the company. The defendant company by appropriate pleadings challenged the power of the court to entertain the suit both because of the want of jurisdiction over the corporation and over the subject-matter of the suit. Briefly the facts were these:

The Contract Company was a corporation organized

under the laws of Indiana and had its principal place of business in that State. At the time in question it was engaged within the geographical limits of the State of Kentucky in constructing under a contract with the United States Government a canal with locks and dam on the Ohio River on a piece of land known as the Canal Reservation acquired by the United States by purchase or condemnation from the State of Kentucky with the consent of its legislature. While most of the work under the contract was performed on the land thus acquired, the earth and rocks excavated in the construction of the canal were hauled over railroad tracks laid by the defendant company on land outside of the canal reservation and, through an arrangement with the Kentucky and Indiana Terminal Railway Company, were dumped on its property in the State of Kentucky. The accident which gave rise to the injuries complained of occurred in the course of the work on the canal reservation. In conformity with a statute of Kentucky the company had designated an agent in the State upon whom process might be served in the event suits were brought against it in the State. The summons issued in the cause was served on the designated agent when he was on the land of the United States, but subsequently an alias summons was served on him at his home in Louisville.

Under these facts it was insisted the court was without jurisdiction (a) because when the accident occurred the company and the plaintiff were engaged in work under a contract with the United States Government; (b) because the cause of action arose on land acquired by the United States by purchase or condemnation with the consent of the legislature of Kentucky and therefore under Article I, § 8, clause 17, of the Constitution of the United States the jurisdiction of the Federal Government was exclusive; (c) because the service of the original summons was void, since it was made upon the land of the United States

where, it was insisted, state process cannot run; and (d) because the service of the alias summons was also void since the company transacted no business in the State and the person served was not its agent for any purpose in the State, but represented the company only in its work on the reservation. The objections of the company to the jurisdiction were overruled and the case was set down for trial. Thereupon the company, desiring a review of the jurisdictional questions and in order to avoid the consequences of the rule under the Kentucky practice that the appearance of a party on appeal operates as a waiver of a claim of want of jurisdiction over his person (*Western Indemnity Company* v. *Rupp*, 235 U. S. 261), applied to the court below for a writ of prohibition directed to the trial judge to restrain him from proceeding further in the cause. A temporary restraining order was granted, but on final hearing the petition was overruled and the writ of prohibition denied, and upon the theory, which was adequately presented below, that to subject the defendant corporation to the jurisdiction of the state court under the circumstances stated would be a violation of due process in conflict with the Fourteenth Amendment, this writ of error was prosecuted.

At the present term, on application of the plaintiff in error, an order was issued to restrain further proceedings in the cause in the courts below pending the decision of the case here.

We at once put out of view the contention that the trial court was without jurisdiction because the parties at the time of the accident were engaged in work under a contract with the United States Government since the want of merit in the proposition has been previously established. *Gromer* v. *Standard Dredging Company*, 224 U. S. 362, 371.

The remaining contentions are also we think without merit. Conceding for the sake of the argument only that

the canal reservation was within the exclusive legislative jurisdiction of Congress, it is clear from the facts we have stated that the business carried on by the corporation was not confined to the land owned by the United States, since it is admitted that in order to dispose of the material excavated in the construction of the canal a line of railway was built which extended beyond the reservation and connected with the tracks of the Kentucky and Indiana Terminal Railway, upon whose property all of the earth and rocks were dumped. This clearly constituted the doing of business within the State and subjected the corporation to the jurisdiction of the Kentucky courts. Assuming also for argument's sake only that the original summons was void because served on the agent designated by the company while he was on the reservation, the subsequent service of the alias summons on the agent at his home in Louisville was valid since, as we have seen, the company was doing business in the State. And finally, an action for personal injuries being in its nature transitory and susceptible of being brought in any jurisdiction in which the defendant may be impleaded, there is no foundation for the contention that the court had no jurisdiction over the subject-matter of the suit.

Affirmed.

CHESBROUGH *v.* WOODWORTH.

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

No. 179. Argued April 19, 20, 1917.—Decided May 21, 1917.

An action under Rev. Stats., § 5239, against a director of a national bank for damages sustained by an individual in consequence of violations of the National Bank Act, necessarily involves a federal question.

The court finds no reversible error in the views of the evidence or legal conclusions reached by the Circuit Court of Appeals in sustaining a judgment recovered under Rev. Stats., § 5239.
221 Fed. Rep. 912, affirmed.

THE case is stated in the opinion.

Mr. Thomas A. E. Weadock for plaintiff in error.

Mr. Edward S. Clark, with whom *Mr. John C. Weadock* was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action in ten counts charging plaintiff in error and one Joseph W. McGraw with violating the National Bank Act and alleging damages resulting to defendant in error therefrom.

In description of the parties we shall designate them respectively as plaintiff and defendants.

In all the counts defendant Chesbrough and McGraw are alleged to have been at certain dates directors of the Old Second National Bank, a national banking corporation organized and doing business under the National Bank Act of 1864 and the amendments thereto and having its office in the City of Bay City, Michigan.

The following violations of the act are charged: (1) Signing, attesting and permitting and assenting to the publication of a report of the conditions of the bank required to be made by § 5211 of such act, which report was false. (2, 3, 4, 5) The Comptroller of the Currency having made a requisition upon the bank for a report of the resources and liabilities of the bank upon a day specified as required by the act, the defendants permitted and assented to a violation of the act by signing, attesting and permitting and assenting to the publication of a false

report of the resources and liabilities of the bank and its condition at the close of business of such day. (6, 7, 8) Violation of the act in that defendants and each of them permitted and assented to the declaration of the semi-annual dividend, being payable December 1, 1902, knowing that it would necessarily be paid out of the capital stock of the bank and not out of net profits and knowing that losses had theretofore been sustained equal to or exceeding the undivided profits then on hand, and that the sums so declared as dividends exceeded the profits then on hand, after deducting therefrom losses and bad debts. (9) Defendants knowingly violated and permitted and assented to the violation of the act (§ 5200) in that they knowingly participated in, permitted and assented to the creation of certain liabilities to the bank, and knowingly permitted and assented to the continuance of the liabilities and the carrying of the same among the loans and discounts of the bank after defendants and each of them had knowledge of the nature and character of the liabilities and that they had been created and were being carried in violation of the act. The liabilities are set out. (10) Violations of the act (§§ 5199, 5200, 5204, 5211, 5239), being portions of a general design and conspiracy on the part of the defendants to deceive the public, including plaintiff, for the purpose of giving the stock of the bank a fictitious market value and enabling each of the defendants and his relatives and friends to dispose of certain shares of the stock then and there held by them at a price exceeding the value of the stock.

In each count damage is alleged to have been caused to plaintiff, he having purchased stock upon the faith of the action of defendants. The total amount of damage is alleged to be $35,000.

Plaintiff in error Chesbrough (the case is here on his writ of error, McGraw not having joined) filed a demurrer to the declaration, which was overruled. He then filed

several pleas, one of which alleged that he was not guilty of the wrongs and injuries complained of, and gave notice that under the latter he would "insist [upon] and give in evidence" certain matters of defense.

The case was tried to a jury. The 3d, 6th, 7th, 8th, 9th and part of the 10th counts were withdrawn from their consideration. A verdict was returned for plaintiff in the sum of $22,662.98, upon which judgment was entered. It was affirmed by the Court of Appeals. 221 Fed. Rep. 912.

This case had once before been to the Circuit Court of Appeals where its facts were reviewed and we may refer to the report of the case for them. 195 Fed. Rep. 875.

It there appears that in October, 1902, the bank reported a capital of $200,000, a surplus of $75,000 and undivided profits of $27,000. Its total loans and discounts were about $100,000.

On October 3, 1902, the bank held as loans (so considered by the court and the Comptroller of the Currency) the paper of the Maltby Lumber Company to the amount of $402,000, which had accumulated under the personal direction of the then president and practical manager of the bank. The Comptroller required that the loan be reduced to the permitted 10%. The Comptroller's letter was presented to the board. Inquiry during the next few weeks developed the general character of the Maltby paper and that most of it was not drawn against any real debt and in fact represented no liability, except Mrs. Maltby's. Its net worth shown by a statement of Maltby, who was called before the board, was about $188,000, but there were many suspicious circumstances about the inventory, and it did not appear how much of this primary liability to the bank was included among the debts. There was subsequently liquidation of the Maltby Company's affairs, and as it proceeded the bank charged off successive amounts of the Maltby paper. In this way the total loss charged off prior to the trial of the cause (first trial) was $223,000.

A comparatively small amount remained uncollected and not charged off. A generally similar situation existed as to another line of paper, of one Brotherton, upon which $47,000 had been written off as worthless before April, 1909. The shares of stock were $100 par value, and the writing off of these two items caused a loss in book value of $135 per share.

The defendants had been two of the directors for many years, during which time reports to the Comptroller were frequently made and published as required by the statute and as called for by him, and continuously until 1904 the entire Maltby line was carried at its face in the "loans and discounts" and was reported as part of the bank's assets. Plaintiff, at various dates from March to December, 1903, bought the bank stock at its supposed market value, averaging about $151 per share, and aggregating $15,000 par and $23,400 purchase price.

The case went to trial to a jury. Certain counts were withdrawn, and upon those submitted a verdict was returned and judgment entered upon it for the amounts plaintiff had paid for his stock, less its then book value, after deducting its pro rata share of the actual loss written off on account of the Maltby and Brotherton paper, with interest,—an average total of $167 per share.

The following were the rulings of the court below:

(1) The general demurrer was rightly overruled. The making and publishing of the reports are not merely for the information of the Comptroller but are to guide the public, and he who buys stock in a bank in reliance upon the reports has a right of action under § 5239, Rev. Stats., against any officer or director who, knowing its falsity, authorizes such report. "The one suffering such damages is within the statutory description 'any other person.'" The conclusion was deduced from *Yates* v. *Jones National Bank*, 206 U. S. 158, and *Yates* v. *Utica Bank*, 206 U. S. 181, and other cases in the state and federal courts.

(2) The damages in such a case are personal to the plaintiff. He sues in his own right, not for the association.

(3) Such action involves no direct showing of negligence; the sole primary issue is whether defendants caused or permitted to be made a statement of the bank's condition upon which statement plaintiff relied to his injury, and which statement defendants knew was materially false. And in the trial of this issue the detailed history of the entire transaction is admissible as tending to show whether the loans were in fact bad and whether defendants knew that fact. This scienter is the material condition and plaintiff can select one of the directors as sole defendant or join others with him.

(4) Considering the evidence, the court concluded that it justified a finding of liability against the defendants, but not to the extent of the judgment. The court was of opinion that the basis of loss to the bank, that is, the amount which should have been charged off, was taken in the verdict and judgment at the sum of $223,000 and should not have been greater than $135,000, excluding entirely, as not sustained by the evidence, the Brotherton debts. The court, therefore, reversed the judgment and remanded the case for a new trial.

Plaintiff moved to modify the opinion and judgment in such manner as to permit him to remit such part of it as the court thought was not supported by the evidence and that, as modified, the judgment be affirmed. The motion was denied.

The second trial resulted again, as we have said, in a verdict and judgment for plaintiff. In reaching them a basis beyond $135,000 was taken and the Circuit Court of Appeals held this was error but gave to plaintiff permission to file within thirty days from the filing of the opinion in the trial court a written election to reduce the judgment by the sum in which it exceeded the $135,000 basis.

This was done, and judgment entered accordingly.

The case on the facts involves two simple propositions —the scienter of defendant when he attested the report to the Comptroller and the circumstances under which two dividends were declared. Upon these propositions twice have juries held against defendant and twice has the Circuit Court of Appeals held that there was sufficient evidence to sustain their verdicts, modifying only as to certain items of damages. In consideration of our reviewing power and without reciting the testimony, it is enough to say that the findings on these propositions have substantial evidence to support them.

But it is urged that the plaintiff brought this action under § 5239, Rev. Stats., in the Circuit Court of the United States for the Eastern District of Michigan, in which all of the parties resided, and that not that court but the state court had jurisdiction.

The cited section provides for a forfeiture of the franchise of a national bank if its directors knowingly violate or knowingly permit the violation of any of the provisions of the National Bank Act and further provides that in case of such violation "every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

This section was considered in *Yates* v. *Jones National Bank*, 206 U. S. 158, 179, and it was held that the rule expressed by it is exclusive and precludes a common-law liability for fraud and deceit. To the same effect are *Thomas* v. *Taylor*, 224 U. S. 73, and *Jones National Bank* v. *Yates*, 240 U. S. 541. Necessarily a federal question is involved and there was jurisdiction in the courts below. § 5198, Rev. Stats.; § 4 of the Act of August 13, 1888, 25 Stat. 436. *Herrmann* v. *Edwards*, 238 U. S. 107, is not opposed to this view. It was there held only that the federal cause of action should be, in the absence of diverse

citizenship, stated in the bill to give the federal court jurisdiction, a condition that is complied with by the declaration in the present case.

Defendant attempts to distinguish the present case from the cases cited above and, in 77 assignments of error concentrated into 18 points, urges the contentions we have noted and contentions based on the rulings of the trial court in the admission and rejection of evidence and charges to the jury and the rulings of the Circuit Court of Appeals, and attempts to support them by an elaborate and minute argument. Indeed, the whole case is reviewed and all of the deductions made by the lower tribunals from the evidence combated and the contentions reviewed which were disposed of by the Circuit Court of Appeals, in whose decision we concur. To answer in detail would extend this opinion to repellent length. It is enough to say of them that they show no reversible error.

Judgment affirmed.

WOODWORTH *v.* CHESBROUGH.

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

No. 180. Argued April 19, 20, 1917.—Decided May 21, 1917.

Finding a verdict and judgment excessive, the Court of Appeals gave the party who had recovered them his option to submit to a reversal or obtain an affirmance by remitting part of the judgment. The party having acted on the latter alternative, *Held*, that his cross writ of error complaining of the reduction must be dismissed.

Cross writ of error to review 221 Fed. Rep. 912, dismissed.

THE case is stated in the opinion.

Mr. Edward S. Clark, with whom *Mr. John C. Weadock* and *Mr. H. M. Gillett* were on the briefs, for plaintiff in error.

Mr. Thomas A. E. Weadock for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is a cross writ of error taken by Frank T. Woodworth, defendant in error in No. 179, *ante*, 72, and is presented on the record in that case.

As stated in the opinion in No. 179, the Circuit Court of Appeals reversed the judgment obtained by Woodworth against Chesbrough on the ground that certain amounts computed in the judgment were not sustained by the evidence and, therefore, remanded the case for a new trial. Thereupon Woodworth moved to modify the opinion and judgment in such manner as to permit him to remit such part of it as the court thought was not supported by the evidence and that the judgment, as modified, be affirmed. The motion was denied.

A new trial was had, again resulting in a verdict and judgment for Woodworth. The Court of Appeals again decided that it was excessive but gave Woodworth permission to file a remission of the excess. This he did.

The remittitur recited that plaintiff remits from the judgment the sum of $7,708.56, leaving the amount of the judgment to be $16,005.44. It was stated that it was done in compliance with the opinion of the Circuit Court of Appeals "for the sole purpose of obtaining the entry of a final judgment herein, and of securing the affirmance of that part of the judgment which is not so remitted, and is intended to be without prejudice to plaintiff in any cross

proceeding hereafter prosecuted by him before the Supreme Court of the United States, which cross proceeding follows and continues to be in connection with any proceeding prosecuted in that court by defendant for the purpose of reviewing said judgment of the Circuit Court of Appeals."

The Court of Appeals then rendered the following judgment:

"This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, Northern Division, and was argued by counsel.

"The court having filed its opinion, and defendant in error, Woodworth, having thereupon filed in this court a certified copy of a remittitur filed by him in the court below whereby it appears that the judgment complained of herein has been reduced by the sum of seven thousand seven hundred eight dollars and fifty-six cents ($7,708.56) so that it now stands in the court below as a judgment for sixteen thousand five dollars and forty-four cents ($16,005.44) and costs, entered as of November 22, 1913, and bearing interest from the date at five per cent.

"It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause, as so reduced, and as so standing after such reduction, be, and the same is hereby affirmed; but that plaintiff in error, Chesbrough, recover the costs of this court.

"The remittitur so filed having contained the clause stating that it was intended to be without prejudice to plaintiff below (Woodworth) in the prosecution by him of a cross writ of error or proceeding in the Supreme Court if defendant below should proceed in that court to review this judgment, and this court being unwilling to embarrass the party, Woodworth, in his attempt to preserve any right of review to which he may be so contingently entitled, approval of such remittitur as a sufficient com-

pliance with the opinion on file, is not withheld because of the presence therein of such attempted reservation; but such approval is not to be taken to imply that such right of review can thereafter exist, or that such attempted reservation has any effect to make the remittitur other than absolute and unconditional."

In assertion of the right attempted to be reserved Woodworth prosecutes this writ of error.

A motion is made to dismiss the writ of error, and we think it should be granted. Woodworth is in the somewhat anomalous position of having secured a judgment against Chesbrough and yet seeking to retract the condition upon which it was obtained. This he cannot do. *Koenigsberger* v. *Richmond Silver Mining Co.*, 158 U. S. 41, 52. He encounters, besides, another obstacle: If the remittitur be disregarded the judgment entered upon it must be disregarded and the original judgment of the Circuit Court of Appeals restored, which, not being final, cannot be reviewed.

Dismissed.

UNITED STATES ET AL. *v.* ILLINOIS CENTRAL RAILROAD COMPANY.

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

No. 310. Argued April 13, 16, 1917.—Decided May 21, 1917.

An order of the Interstate Commerce Commission assigning a cause for hearing upon an issue of reparation is not an order in the sense of § 1 of the Commerce Court Act, 36 Stat. 539; Judicial Code, § 207; and the District Court has no jurisdiction to enjoin the Commission from proceeding with such hearing. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282.

Reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Underwood, with whom *Mr. Blackburn Esterline*, Special Assistant to the Attorney General, was on the brief, for the United States.

Mr. Joseph W. Folk for the Interstate Commerce Commission.

Mr. Robert V. Fletcher, with whom *Mr. Blewett Lee* was on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appeal from a decree cancelling an order of the Interstate Commerce Commission fixing a hearing of certain complaints made to it by certain coal companies for damages for alleged failure to furnish cars upon demand, and enjoining proceedings upon the complaints.

The decree was granted, three judges sitting, upon the petition of appellee, herein referred to as the railroad company.

The railroad company is an intrastate and interstate carrier of freight and passengers and among other commodities transports coal on its line, which, during the years 1911, 1912 and 1913, was shipped in interstate commerce by producers thereof on through rates established by the railroad company.

Certain coal companies, shippers over the lines of the railroad company, filed petitions before the Interstate Commerce Commission asking that damages be assessed against the railroad company for an alleged failure to supply a sufficient number of coal cars for their respective shipping needs.

The petitions were received by the Commission and

were by it treated as substantially presenting but a single complaint, were so numbered as to indicate the fact, and were thereafter in all proceedings treated and disposed of together by one report and order.

The railroad company filed an answer to each complaint in which it denied the jurisdiction of the Commission to award damages for failure to furnish coal cars and averred that in actions of such character exclusive jurisdiction is in the courts. In due course a hearing was had by the Commission and the railroad company objected to any further proceeding before it on the ground of want of jurisdiction, at least as to so much of the complaints of the coal companies as dealt only with damages, and moved that so much of the complaints as dealt with the demand for damages be dismissed.

At the argument of the motion counsel for the coal companies expressly declared that so much of the complaints as charged any undue and unlawful discrimination by the railroad company in the distribution of its cars was dismissed and it was stipulated that the complaints should be considered as so amended as to omit such charges. Thereafter the matter proceeded upon the sole issue of damages for alleged failure to furnish cars upon demand.

On January 30, 1915, four members of the Commission filed a report holding that the Commission had jurisdiction to consider the complaints and award whatever damages might be proved. Three members dissented. The reports are attached to the petition.

A petition for rehearing was made and denied and on August 18, 1915, the Commission entered its order assigning the cause for further hearing upon the issue of reparation. The following is the order entered:

"No. 6128—Vulcan Coal and Mining Company *vs.* Illinois Central Railroad Company. No. 6128 Sub-No. 1—St. Louis-Coulterville Coal Company *vs.* Illinois Cen-

tral Railroad Company. No. 6128 Sub-No. 2—Groom Coal Company *vs.* Illinois Central Railroad Company.

"The above-entitled cases are assigned for hearing October 1, 1915, ten o'clock a. m., at Hotel Jefferson, St. Louis, Mo., before Examiner Wilson.

"By the Commission."

In the appellee's petition in the District Court it alleged that the hearing would be proceeded with unless restrained, that the railroad company would be compelled to attend such hearing, would be put to great expense and that in all probability an order of reparation would be made; that the railroad company would be forced to defend at great trouble and expense three separate and several suits at law based on such awards, all of which would depend upon the same facts and principles of law, thereby subjecting the railroad company to a multiplicity of suits; and that if reparation should be awarded it would be placed at great disadvantage in defending suits based on the awards, since the Commission's finding of the ultimate facts is by statute made *prima facie* correct and no opportunity is given for a judicial review of the strength and competency of the evidence upon which such a finding rests.

A subpœna against the United States was prayed and an order annulling the order of the Commission and, pending the hearing, restraint of the Commission and its members from action.

The United States, appearing by its counsel, moved to dismiss the petition on the grounds that—(1) The action of the Commission did not constitute an order within the meaning of § 1 of the act entitled "An Act to Create a Commerce Court" and that the court, therefore, was without jurisdiction to enjoin or annul or suspend the same in whole or in part. (2) The petition is an attempt in advance of any action or order of the Commission to enjoin it from acting and proceeding on a complaint

brought and pending before it. (3) The Act to Regulate Commerce makes an order for the payment of money only *prima facie* evidence, cuts off no other defense, takes no question from court or jury nor in any wise denies due process of law; that "such an order is merely a rule of evidence, and notice of a hearing at which such an order may be entered is not an order within the meaning of section 1 of the act entitled 'An act to create a Commerce Court,' etc., approved June 18, 1910, and the court has no jurisdiction to enjoin, set aside, annul, or suspend the same in whole or in part."

The motion to dismiss was denied and the United States, without waiving it, moved to dismiss the petition on the ground that it was without equity and did not state a cause of action.

It was decreed that the Commission had no jurisdiction to hear and determine the complaints of the coal companies, that its order be cancelled, and it be permanently enjoined from further proceeding with the hearing of the complaints.

The Interstate Commerce Commission appeared in the suit and also moved to dismiss the petition on the grounds —(1) That the order of the Commission was merely a notice of a hearing and not a reviewable order. (2) That the principal office of the Commission is in Washington and suit to enjoin any of its proceedings must be brought in the District of Columbia, and not in the Eastern District of Illinois. (4) That irreparable injury was not shown.

After certain admissions and denials of the petition the Commission asserted its jurisdiction.

In support of the decree the contention of the railroad company is that the Interstate Commerce Commission has no jurisdiction to award damages for failure to furnish cars and that this was the only issue submitted to the Commission and the only issue decided by it. The Com-

mission having no jurisdiction, the further contention is that the railroad company can restrain its order because it will subject the company to the trouble and expense of the hearing, the probability of an order of reparation against it, and a multiplicity of suits, in which suits it will be confronted by the order of reparation as evidence without opportunity for judicial review of the strength and competency of the evidence.

The contentions and the recited consequences of the order of the Commission are met by opposing ones. The United States asserts that the action of the Commission fixing a day for the hearing of the complaints of the coal companies is not an order within the meaning of § 1 of the Act of June 18, 1910, creating the Commerce Court (36 Stat. 539), and the subsequent Act of October 22, 1913, abolishing that court and transferring the jurisdiction conferred upon it to the several district courts of the United States. (38 Stat. 208, 219.) It is only by virtue of those acts, it is said, that the United States can be sued and it is provided by them that the United States can only be sued in "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Commission makes the same contention and some others and both it and the United States insist that the action of the Commission was not an order within the meaning of the cited provision. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, 293, is adduced as authority for the insistence.

The Procter & Gamble Company was the owner of 500 railroad tank cars used for the transportation of its products over the lines of certain railroads, and the company filed a complaint before the Interstate Commerce Commission complaining of demurrage rules of the railroad companies, which had been approved by the Commission, as unjust and oppressive and alleging that to enforce them would create preferences and discrimina-

tions forbidden by the Interstate Commerce Act. The complaint was not sustained and an award of relief was denied.

Thereupon the Procter & Gamble Company filed a petition in the Commerce Court in which the company repeated its accusations against the demurrage rules and charged also that the order of the Commission dismissing its complaint was null and void and beyond the power of the Commission in that it sustained the validity of the rules.

The Commerce Court held that it had jurisdiction of the cause and that, for the purpose of jurisdiction, the refusal of the Commission to afford the relief prayed for was the exact equivalent of an order granting affirmative relief, and, as a corollary of this power, it was further decided that there was jurisdiction to award pecuniary relief for demurrage if any was illegally exacted. On the merits the court decided against the Procter & Gamble Company.

This court reversed the ruling and held that the Commerce Court had no jurisdiction as the order of the Commission neither compelled "the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission." The reasoning of the court explored the whole act and omitted no circumstance which could bear on its construction and its efficacy for the purpose for which it was enacted. Considering the first and second subdivisions of § 1, (§ 207 of the Judicial Code,) which deals with the jurisdiction of the Commerce Court, it was said that the first "provides for the enforcement of orders, that is, the compelling of the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission;" and that the second, "dealing with the same subject from a reverse point of view, provides for the contingency of a complaint made to the court by one seeking to prevent the enforcement of orders of the Commission such as are contemplated by the first

paragraph. In other words, by the coöperation of the two paragraphs, authority is given on the one hand, to enforce compliance with the orders of the Commission if lawful, and, on the other hand, power is conferred to stay the enforcement of an illegal order." Other provisions of the act were said to be as convincing.

It will thus be observed, as said by counsel for the Commission, "the power of a court 'to stay the enforcement of an illegal order' is, in a sense, reciprocal to its power to enforce compliance with an order of the Commission, 'if lawful.' . . . And just as the district court would have been powerless, in the instant case, to compel the appellee to attend the hearing with respect to which the notice had been given, so also was it without lawful authority to annul that notice or to enjoin the Commission from proceeding in the premises." And again, as other counsel say, the alleged order was nothing more than notice of a hearing which the railroad company might attend or not, as it saw fit.

The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding, the accident of the occasion—in effect, and, it may be contended, in form, but a continuance of the hearing. The fact that the continuance was to another day and place did not change its substance or give it the character described in *Procter & Gamble Co.* v. *United States*, one which constrained the railroad company to obedience unless it was annulled or suspended by judicial decree.

It is not necessary to pass upon the other contentions of appellants.

Decree reversed and cause remanded with directions to grant the motions to dismiss the petition.

WEST *v.* EDWARD RUTLEDGE TIMBER COMPANY ET AL.

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

No. 276. Argued May 7, 8, 1917.—Decided May 21, 1917.

The Act of March 2, 1899, c. 377, 30 Stat. 993, in providing for conveyance to the United States by the Northern Pacific Railroad Company of lands within the Mount Ranier National Park in exchange for public lands to be selected elsewhere, is to be construed as extending to that company's successor in title though no successor is named; and the Northern Pacific Railway Company, recognized as such successor by the Land Department both in the making of the conveyance of base lands and in the enjoyment of the right of lieu selection, is not to be denied that right upon the hypothesis that the Northern Pacific Railroad Company had ceased to exist before the date of the act.

In surveying and reporting on public lands, a deputy surveyor described them as suitable for grazing, if cleared, but more valuable for timber at the time. This having been accepted and acted upon by the Land Department as a description of the lands as nonmineral, *Held*, that they were to be regarded as "classified as nonmineral at the time of actual Government survey," for the purposes of lieu selection by the Northern Pacific Railway Company under the Act of March 2, 1899, *supra*.

Whether a preliminary lieu selection of unsurveyed public land may be said to designate the tract "with a reasonable degree of certainty," under the Act of March 2, 1899, *supra*, is a question in the nature of a question of fact to be determined upon the circumstances of each case. A description in terms of future survey may suffice if the land may be located therefrom with the aid of an adjoining survey already made.

Semble, that the rule limiting inquiry in this court to questions presented to the court below (*Montana Railway Co.* v. *Warren*, 137 U. S. 348) is not confined to questions of procedure and is not inflexible.

221 Fed. Rep. 30, affirmed.

SUIT by appellant West (he was plaintiff in the court below and we shall so refer to him) against appellees, the Edward Rutledge Timber Company and the Northern Pacific Railway Company (to be referred to as the timber company and railway company, respectively,) to have plaintiff declared the owner of certain described lands, the railway company and the timber company decreed to hold title thereto in trust for him, to compel a conveyance to him and to have his title to the lands quieted.

Plaintiff alleged himself qualified to locate and did locate and settle upon the lands, they being then unsurveyed and vacant, unoccupied and unreserved lands belonging to the United States as to which no claim of right or title to or interest in them had been made by any person, nor was there any evidence whatsoever upon the lands or any part thereof, or in the United States Land Office for the district (Coeur d'Alene Land District), or in the General Land Office in Washington showing any claim, right, title or interest in any other person, nor were there any marks, blazes, notices or any other evidence of the location, selection, claim or possession marked or traced upon the ground, or upon or near the same, nor had the boundaries thereof been traced or located by reference to any natural objects or monuments of any kind or character.

That on July 17, 1905, the official plat of the survey of the lands was filed in the local land office in Coeur d'Alene City, Idaho, and on that day the lands became open to entry under the homestead laws of the United States and on that day plaintiff duly made application to enter them under the homestead laws, which application was rejected by the local land office, and, on May 10, 1910, the order of rejection was approved by the Secretary of the Interior and the case finally closed.

That on June 21, 1901, the railway company filed in the General Land Office its selection list No. 61 which con-

tained the following pretended description, to-wit, "the Southeast Quarter of Section 20, Township 44 North, Range 3 E., B. M."

That the description was wholly imaginary and that no lands in the State of Idaho or elsewhere were or could be so designated or described for the reason that at the time of filing the list no such survey had been made or attempted. That neither the railway company nor the timber company knew or pretended to know what lands were referred to or knew that in the event of a survey the description would be applied to the lands occupied by plaintiff. That the description was wholly insufficient to locate the lands or any part or parcel thereof, rendering the list and selection of the railway company wholly void and of no effect whatsoever.

That on October 10, 1910, a patent to the lands was issued to the railway company.

That (this on information and belief) the railway company conveyed the lands to the timber company and that company now claims to have the legal title to the same.

That neither the railway company nor the timber company nor any agent or employee of either has ever been in possession of the lands, but plaintiff, ever since May 15, 1903, has been and now is in possession thereof; that neither the railway company nor the timber company has ever complied with the laws of the United States so as to entitle either of them to claim any interest in or right to the lands as against plaintiff.

That the decision of the local land office and the successive approval thereof by the Commissioner of the General Land Office and the Secretary of the Interior were and are wrongful, unlawful and based upon an erroneous construction of the law and upon a statement of facts concerning which there was and is no conflict.

That at the time the patent was issued to the railway

company plaintiff was and now is the owner of the lands and the issue of the patent to the railway company was contrary to and without authority of law and in violation of plaintiff's rights; that the railway company was without any right or authority at law to select or claim the lands or any part thereof and that the Act of Congress of March 2, 1899, upon and by virtue of which the railway company based its right to select and claim the lands, is unconstitutional and void and confers no right whatsoever upon the railway company to select or claim the lands or any part thereof against plaintiff.

The answer of the timber company admitted certain allegations of the bill of complaint but denied that the lands were vacant and open to settlement or that they were unclaimed or unsegregated or not marked or traced by boundaries, and alleged that the fact of their appropriation and segregation appeared on the records of the local land office and of the General Land Office and that the boundaries and lines of survey were duly and plainly traced and marked out upon the lands and located by monuments long prior to the time of plaintiff's settlement thereon, and that plaintiff had full knowledge thereof and did not enter upon the lands in good faith but only in the hope that the claim of the timber company and railway company might be defeated on technical grounds.

That on June 21, 1901, the railway company made selection of the lands under the provisions of the Act of Congress entitled "An Act To set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Ranier National Park," approved March 2, 1899, 30 Stat. 993, in lieu of an equal quantity of land relinquished to the United States pursuant to the provisions of the act. That such selection was duly made in accordance with the conditions of the act and the rules and regulations of the Land Department and described

as required by the act, and the selection was in all respects regular.

That on July 17, 1905, the official township plat was filed in the local land office and the railway company, in accordance with the provisions of § 4 of the act of Congress, filed a new selection list which conformed to the provisions of the act and the rules and regulations of the Land Department.

That at the time plaintiff made his alleged settlement upon the lands they had been surveyed and the lines of survey traced, and all other conditions are alleged to have been satisfied.

The timber company prayed that it be dismissed with costs.

The answer of the railway company was substantially the same as that of the timber company.

To the issues thus framed the evidence was addressed, upon which a decree was entered for defendants dismissing the bill, neither party to recover costs or disbursements from the other. 210 Fed. Rep. 189. It was affirmed by the Circuit Court of Appeals. 221 Fed. Rep. 30.

Mr. S. M. Stockslager, with whom *Mr. A. H. Kenyon* and *Mr. Seabury Merritt* were on the briefs, for appellant.

Mr. Charles Donnelly and *Mr. Stiles W. Burr*, with whom *Mr. Charles W. Bunn* and *Mr. James B. Kerr* were on the brief, for appellees.

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

The controversy in the case turns on the construction and application of the act of Congress. Because of it the land offices, local and general, rejected plaintiff's application to enter the lands as a homestead. By virtue of it the railway and its grantee, the timber company, assert

title. Its primary purpose was to set aside certain public lands as a national park to be known as the Mount Ranier National Park. An obstacle to the purpose was a grant of the desired lands to the Northern Pacific Railroad Company and their relinquishment had to be provided for. This was done (§ 3) by authorizing the company to select an equal quantity of public lands elsewhere, or, more specifically, within any State into or through which the railroad ran. There was qualification of the character of the lands to be selected. They were to be "nonmineral public lands, so classified as nonmineral at the time of actual Government survey, which has been or shall be made, . . . not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection."

It was provided (§ 4) that upon the filing by the railroad company of the selection at the local land office and payment of fees prescribed by law in analogous cases and the approval by the Secretary of the Interior, he should cause a patent to issue to the company conveying to it the lands so selected; that "in case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company . . . shall describe such tract in such manner as to designate the same with a reasonable degree of certainty"; and that within three months after the tract shall have been surveyed and the plats thereof filed a new selection shall be filed by the company describing the tract according to such survey. And, further, that in case the tract as originally selected and described in the list filed in the local land office shall not precisely conform to the lines of the official survey, the company shall be permitted to describe such tract anew, so as to work such conformity.

Construing the act by its words there would seem to be no difficulty in determining its meaning. It would seem to be simple in purpose and clear in provision to accom-

plish the purpose. But plaintiff raises various questions upon it. He asserts: (1) That the grant was to the Northern Pacific Railroad Company and could not be availed of by its successor through foreclosure, the Northern Pacific Railway Company. (2) That the lands were classified as mineral under the Act of Congress of February 26, 1895, 28 Stat., 683, and the classification approved by the Secretary of the Interior March, 1901, and the surveyor having failed to make any classification of the lands in terms as non-mineral they were not subject to selection. (3) That if the first and second contentions be untenable, the lands were not described "with a reasonable certainty" so as to bar the rights of settlers in good faith without actual or constructive notice.

(1) The argument advanced to support this proposition is that by the foreclosure proceedings the Northern Pacific Railroad Company ceased to exist and, if everything it had or had an interest in did not go out of existence with it, at least its rights under the Act of 1899 did, and yet counsel say plaintiff has nothing to do "with the question whether the conveyance of the lands to the United States under the provisions of the act conveyed a valid title." It would be somewhat anomalous indeed if the act conveyed to the United States a valid title but did not convey to the railroad anything substantial that could be transferred by sale under the decree of a court to the successor of that company. We might ask the question, Where in the world were the rights conveyed to the railroad company left—and if left at all, by whom were they to be enforced or availed of?

We agree with the District Court that as a mere matter of construction the contention of plaintiff must be rejected. In July, 1896 (*Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482, 490; *Northern Pacific Ry. Co.* v. *United States*, 176 Fed. Rep. 706), three years prior to the act of Congress, the railway company had become successor to the

railroad company, its vendor through the foreclosure proceedings of the lands the Government desired, and yet the latter company was designated in the act as the company to select the lands in compensation for those desired and taken by the Government for the Mount Ranier National Park. It may be, as said by the District Court, a matter of speculation why the railroad company rather than the railway company was named as grantee, but it is certain it was done in recognition of rights and not in mere jugglery to obtain lands for the National Park and convey nothing to either company in return—nothing to the railroad company because, according to the contention, it had gone out of existence; nothing to the railway company because, according to the contention, it had not succeeded to the rights of the railroad company. On the contrary, we must assume that the act was passed and the railroad company selected to consummate the exchange either by itself or by its successor, the railway company, or by both. And this was done and the two companies and the trustees of the railway company's mortgage joined in a deed of reconveyance to the United States. And this purpose of the act and what was done under it was recognized by the Land Department. *Davenport* v. *Northern Pacific Ry. Co.*, 32 L. D. 28; *Ferguson* v. *Northern Pacific Ry. Co.*, 33 L. D. 634; *Idaho* v. *Northern Pacific Ry. Co.*, 37 L. D. 135, 138. See also *Delany* v. *Same*, 45 L. D. 6. It is pertinently said by counsel for the railway company: "The government itself is satisfied with its title; and certainly it cannot, while retaining that title, deny to those from whom it was obtained the lands offered in exchange."

(2) As we have seen, the right was to select "an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual Government survey." The lands are in fact non-mineral, but the contention is that they were not so classified at the time of actual survey.

The deputy surveyor who made the survey reported that the lands, if cleared, would be suitable for grazing, but at the time of the report were more valuable for their timber. This, it is contended, is not a classification of the lands as non-mineral, that it was not a classification but an omission to classify—negative, not affirmative; inferential, not positive—and therefore not a compliance with the statute. We cannot concur. The report was accepted by the department as a description of the lands as non-mineral. They could be made suitable for grazing, was the report; pending that time they were more valuable for their timber. There was positive description of their character; words excluding some other character were not necessary. Classification is characterization through the selection of some quality or feature, and therefore lands may be classified as pasture (grazing), timber, arable or mineral. It is determined by surface indications. Minerals may be hidden under any surface, but a surveyor is not expected to explore for them that he may include or exclude reference to them in his reports. Such character is exceptional, besides, and considered by the land office as absent if not noted.[1]

The contention that the lands were classified as mineral under the Act of February 26, 1895, is answered by the admission made at the trial that the records do not show it.

(3) The act of Congress authorized the selection of an unsurveyed tract, but required it to be described "in such manner as to designate the same with a reasonable degree of certainty," and it was provided that when surveyed a new list was to be filed describing the tract "according to such survey."

The lands, we have seen, were designated by sectional

[1] *Davenport* v. *Northern Pacific Ry. Co.*, 32 L. D. 28; *Bedal* v. *St. Paul, M. & M. Ry. Co.*, 29 L. D. 254; *Idaho* v. *Northern Pacific Ry. Co.*, 37 L. D. 135; *St. Paul, M. & M. Ry. Co.*, 34 L. D. 211; *Northern Pacific Ry. Co.*, 40 L. D. 64.

number, township and range, and it is contended that such designation—"terms of future survey," as counsel term it—was not a description "with a reasonable degree of certainty."

This seems to have been the only contention submitted to the Court of Appeals and upon careful consideration the court decided against the contention upon the Act of 1899 and, in analogy, upon other acts of Congress in relation to the public lands and also upon the rules and decisions of the Land Department. It is not necessary to repeat the reasoning of the court. What was a description having "a reasonable degree of certainty" was to be determined by the circumstances. It was in the nature of a question of fact and had tests for decision, as the Court of Appeals pointed out. It had the aid of an adjoining survey and the lands could be readily located from such survey. It was pointed out that the act of Congress did not require exactness; it contemplated a subsequent readjustment. "The filing of the first list is in a sense preliminary to obtaining the patent. It initiates the right, and not as much particularity and exactness is ordinarily required as to where final stages are to be observed in clearing up and completing the transaction. In fact, by contemplation of the statute, the new selection is required to conform with the established survey and thus to correct the description in the primary selection. By reasonable intendment, therefore, we are impressed that the description contained in the Railway Company's list No. 61, under the conditions prevailing of the survey of Township 45 to the north and the proximity of the land in question thereto, designated the land with a reasonable degree of certainty, and must be held sufficient as a matter of law." For the premises from which this excerpt is the conclusion we refer to the opinion.

The Court of Appeals said that the question of the sufficiency of the description was "the single question

urged" for its decision and counsel for defendants contend that no other question is open to our review, and cite *Montana Railway Co.* v. *Warren*, 137 U. S. 348, 351. Plaintiff replies that the principle of that case applies only to questions of procedure and not to questions of jurisdiction or the foundation of the right, adducing *Rosen* v. *United States*, 161 U. S. 29; *Old Jordan Mining & Milling Co.* v. *Société Anonyme Des Mines*, 164 U. S. 261; *Gila Valley, Globe & Northern Ry. Co.* v. *Hall*, 232 U. S. 94. See also *Magruder* v. *Drury*, 235 U. S. 106, 113.

The distinction between questions seems to be artificial. The essential circumstance would seem to be that a review is sought of that which was not decided, not submitted at all or withdrawn from submission and which, if it had been submitted, might have been decided in favor of the appealing party.

However, in deference to the earnestness of counsel, we have considered the questions.

Affirmed.

E. I. DU PONT DE NEMOURS POWDER COMPANY ET AL. *v.* MASLAND ET AL.

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

No. 210. Argued May 4, 1917.—Decided May 21, 1917.

In a suit to enjoin defendant from using or disclosing secret processes of plaintiff's business, defendant, while in effect conceding that he learned them through his former confidential employment by plaintiff, denied that they were secret and insisted on his right to use them as processes well known to the trade and to reveal them to expert witnesses in making his defense. *Held*, that, during the taking of proofs, defendant might properly be enjoined from disclosing the

processes to experts or other witnesses, the restraint not extending to his own counsel, and that the trial judge in his discretion might reveal them to such persons, at such times, and under such precautions as he might deem necessary in the progress of the case.

In such a case the right of the defendant to make a full defense is limited by his duty to abstain from any fraudulent abuse of the trust which was reposed in him by the plaintiff.

The word "property," as applied to trade-marks and trade secrets, is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith.

224 Fed. Rep. 689, reversed.

THE case is stated in the opinion.

Mr. Edwin J. Prindle, with whom *Mr. Warren H. Small, Mr. John P. Laffey* and *Mr. Kenneth S. Neal* were on the brief, for petitioners.

Mr. George Wharton Pepper, with whom *Mr. John G. Johnson* and *Mr. Frank Smith* were on the brief, for respondents.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to prevent the defendant Walter E. Masland from using or disclosing secret processes the knowledge of which was acquired by the defendant while in the plaintiffs' employ. The defendant admits that he intends to manufacture artificial leather, to which some of the plaintiffs' alleged secret processes relate, but denies that he intends to use any inventions, trade secrets, or secret processes of the plaintiffs that he may have learned in any confidential relation, prefacing his denial, however, with the averment that many of the things claimed by the plaintiffs are well known to the trade. A preliminary injunction was refused at first. 216 Fed. Rep. 271. But before the final hearing the defendant proposed to employ

one or more experts and to make such disclosures to them as the preparation of the defence might require. Thereupon the District Court issued a preliminary injunction against disclosing any of the plaintiffs' alleged processes to experts or witnesses during the taking of proofs, but excepting counsel, with leave to move to dissolve the injunction if occasion to consult experts arose. Later a motion to dissolve was denied and the hearing was continued for a decision by the Appellate Court. 222 Fed. Rep. 340. The Circuit Court of Appeals reversed the decree. 224 Fed. Rep. 689. Before any further order was entered the writ of certiorari was granted by this court.

The case has been considered as presenting a conflict between a right of property and a right to make a full defence, and it is said that if the disclosure is forbidden to one who denies that there is a trade secret, the merits of his defence are adjudged against him before he has a chance to be heard or to prove his case. We approach the question somewhat differently. The word property as applied to trade-marks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them. These have given place to hostility, and the first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. It is the usual incident of confidential relations. If there is any disadvantage in the fact that he knew the plaintiffs' secrets he must take the burden with the good.

The injunction asked by the plaintiffs forbade only the disclosure of processes claimed by them, including the disclosure to experts or witnesses produced during the taking of proofs—but excepting the defendant's counsel. Some broader and ambiguous words that crept into the decree, seemingly by mistake, may be taken as stricken out and left on one side. This injunction would not prevent the defendant from directing questions that should bring out whatever public facts were nearest to the alleged secrets. Indeed it is hard to see why it does not leave the plaintiffs' rights somewhat illusory. No very clear ground as yet has been shown for going further. But the judge who tries the case will know the secrets, and if in his opinion and discretion it should be advisable and necessary to take in others, nothing will prevent his doing so. It will be understood that if, in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others it will rest in the judge's discretion to determine whether, to whom, and under what precautions, the revelation should be made.

Decree reversed and case remanded for further proceedings in conformity with this opinion.

NEVADA-CALIFORNIA-OREGON RAILWAY *v.* BURRUS.

ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

No. 237. Submitted April 30, 1917.—Decided May 21, 1917.

In an action against a carrier for breach of a contract to furnish an interstate train, the defendant objected when the trial opened that no rate for such trains had been filed with the Interstate Commerce Commission and, while the trial was in progress, offered an amend-

ment to the answer, setting up this defense. Under the state practice the defense was not cognizable unless pleaded, and the amendment, not having been suggested until months after the commencement of the action while other defenses had been interposed, was rejected by the state trial court as coming too late, and this ruling was affirmed by the State Supreme Court as a proper exercise of the trial court's discretion. It being evident that the decision merely enforced the state practice with no purpose to evade the claim of federal right, *Held*, that a writ of error from this court must be dismissed.

In the trial of an action against a carrier upon a contract for interstate transportation the plaintiff may be entitled to the presumption that the carrier filed such rates as were requisite to sustain the contract, the pleadings being silent on the subject.

Writ of error to review 38 Nevada, 156, dismissed.

THE case is stated in the opinion.

Mr. James Glynn for plaintiff in error.

Mr. Sardis Summerfield and *Mr. John E. Raker* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for breach of a contract to furnish plaintiff, (defendant in error,) a special train to carry him from Reno, Nevada, to Doyle, California, where his son was ill, and to bring the two back from that place. The plaintiff got a judgment, and the only question before us is whether any rights of the defendant under the Act to Regulate Commerce have been infringed. The ground on which such an infraction is alleged is that the trial court, after the trial had been going on for more than a day, refused to allow the answer to be amended so as to set up that no tariff rate for special trains had been filed by the defendant and that therefore the contract was illegal. The defendant had mentioned the point at the beginning of the trial but this was the first time that it was presented

in proper form under the state practice, although some months had elapsed since the beginning of the suit and demurrers and other defences had been interposed without suggesting this one. The Supreme Court of the State declined to overrule the discretionary judgment of the court below. 38 Nevada, 156.

Upon the question whether a claim of immunity under a statute of the United States has been asserted in the proper manner under the state system of pleading and practice "the decision of the state court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right." *Atlantic Coast Line R. R. Co.* v. *Mims*, 242 U. S. 532, 535. The most that could be said in this case was that the Supreme Court was influenced in its judgment by the fact that the railroad, after treating the plaintiff very badly, was trying to escape liability by an afterthought upon a debatable point of law—not at all by the fact that the law involved was federal. The plaintiff had tried the case relying upon the presumption which was sufficient as the pleadings stood. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin*, 241 U. S. 319. The court reasonably might decline to put him to procuring other evidence from a distance, on the last day of the trial, upon a new issue presented after his evidence was in. We perceive no reason why this court should interfere with the practice of the State.

Writ of error dismissed.

THE CHIEF JUSTICE and MR. JUSTICE CLARKE dissent.

ROWLAND ET AL., RAILROAD COMMISSIONERS OF THE STATE OF ARKANSAS, *v.* BOYLE, ADMINISTRATOR OF BOYLE, AND THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

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

No. 252. Argued February 24, 25, 1916; restored to docket for reargument June 12, 1916; reargued May 1, 2, 1917.—Decided May 21, 1917.

Giving weight to the opinion of the District Judge who tried the case, this court upon reviewing the evidence agrees with his conclusion that, as applied to the appellee railroad company, the two-cent passenger rate fixed by the Arkansas legislature, and freight rates fixed by the Arkansas Railroad Commission, are confiscatory.

An objection to evidence as hearsay is too late if not taken when the evidence was introduced.

While this cause was pending in the trial court, the appellee railroad company, for the purpose of allocating its expenses to intrastate and interstate freight and passenger traffic in Arkansas, caused minute and specific reports to be made by its employees of all facts that would throw light upon the problem in accordance with prescribed formulæ and introduced the results in evidence, exhibiting the work-sheets and other data to the appellant Railroad Commissioners, who had opportunity to question them and call for further investigation. *Held*, that the returns were made by the employees in the course of their business and that an objection that the evidence was hearsay could not in justice be entertained. *Held*, further, that the two months of investigation afforded a basis for argument as to constant conditions.

The possible inaccuracy of apportioning general road maintenance expenses between freight and passenger service by engine-ton-miles—considered and *held* not to affect the result of this case.

Whether adoption of the low rates fixed by the State would be followed by increased intrastate traffic and revenue—*Held*, too remote and conjectural a matter to disturb the conclusion.

222 Fed. Rep. 539, affirmed.

THE case is stated in the opinion.

Mr. Joseph M. Hill and *Mr. S. P. Freeling* for appellants.

Mr. S. T. Bledsoe and *Mr. John M. Moore,* with whom *Mr. W. F. Evans* was on the briefs, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity originally brought by Wilbur Boyle as a stockholder in the Railroad Company, now one of the appellees, to prevent it from paying, and the Railroad Commission of Arkansas from enforcing, freight rates established by the latter, and a two-cent passenger rate fixed by a statute of 1907, on the ground that both were confiscatory. A temporary injunction was issued, freight rates were adopted higher than those established by the State Commission and the three-cent passenger rate previously in force was restored, a bond being given for keeping accounts and refunding the difference if the final decision should uphold the action of the State. Later by agreement the experiment of a two-and-a-half-cent passenger rate was tried for eighteen months, and the final hearing of the cause was postponed to await the decision of *Allen* v. *St. Louis, Iron Mountain & Southern Ry. Co.*, 230 U. S. 553, in which the same rates were before the court. That decision was rendered on June 16, 1913, and forthwith after that and the others reported in 230 U. S., there was a conference of railroad managers and officials, engineers and others competent to aid, for the purpose of devising formulas for the division of expenses, etc., between local and interstate business in accord with the views of this court, as a step toward determining the constitutionality of this and other rates sought to be imposed by the States. The Railroad Company then made

a laborious attempt to apply the formulas thus reached, and as a result the injunction was made perpetual subject to a change of circumstances, after a careful discussion by the District Court. 222 Fed. Rep. 539.

The value of the railroad property for the years 1910–1913 was admitted. The question in dispute is the usual one of the division of expense and income between state and interstate business. The decision below explains in greater detail than it is necessary to repeat the method of investigation adopted by the Railroad. For the months of November and December, 1913, it caused the most minute and specific reports to be made of all the facts that, by the formulas prepared, would throw light upon the problem to be solved. Such an investigation is too expensive to be kept up for more than a limited time, but evidence was offered to show that the figures for the two months reflected the previous years as to the material proportions, so far as was possible to judge from the returns previously required by the State.

In establishing local rates a State must be assumed to intend to confine its action within the limits set by the Constitution and not to seek an unjust advantage from the difficulties of dividing income and expense to which we have referred, but in this case the appellants have contented themselves with a purely negative attitude. There is made even a preliminary objection that the evidence is hearsay. We have not observed that the objection was taken when the evidence was introduced and if not it would be too late. *Diaz* v. *United States*, 223 U. S. 442, 450. But it is enough to say that the Railroad adopted the only practicable mode of presenting its results, that it exhibited its work-sheets and data to the appellants, that the returns were made by the employees in the course of their business and that if the appellants had desired to question any of the data they could have called for further verification. It seems to us that technical rules are sat-

isfied and that justice plainly requires this objection to be set aside.

We hardly can avoid approaching the discussion of the merits in the light of a few facts indicating that the probabilities are on the Railroad's side. Weight naturally attaches to the opinion of the judge who heard the case. Apart from that, it is not to be forgotten that this same Commission, with others, recognizing the incongruity between the local passenger rates and those in force between different States, applied to the Interstate Commerce Commission to have the latter changed; that the Commission found that the three-cent rate was not shown to be unreasonable and that it dismissed their petition, reminding them that the adjustment properly should come not from the United States but from themselves. *Corporation Commission of Oklahoma* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 31 I. C. C. 532. The average haul in Arkansas is shorter than the average of the road, the density of traffic is less and the maintenance of the road is more expensive. We are aware that there is some contradiction upon this last point but we have no doubt of the fact that the cost is greater in Arkansas than the average cost of the line.

We do not propose to follow the arguments that have been addressed to us into the elaborate tables of figures. We are satisfied in the main with the discussion that they received below and shall refer only to one or two details that seem to need mention, without discussing the merits or demerits of the formulas. We are of opinion that the Railroad has shown successfully the state rates to be confiscatory and that even if some errors are detected they are not enough to change the result. We agree with the District Judge that the two months of investigation afforded a basis for argument as to constant conditions. We agree that it is proved that the local expenses are proportionally very much greater than the interstate.

In fixing the exact rates it may be that mistakes were made. Perhaps the most important doubt is raised by the fact that the Railroad apportioned the cost of maintaining tracks and track structures, so far as not definitely assignable, between freight and passenger service on the basis of engine ton miles (the weight of the engine in working order multiplied by the distance it moves in the one service or the other). This criterion, although upheld by the court below, is not regarded as certainly the best by the Interstate Commerce Commission. *Western Passenger Fares*, 37 I. C. C. 1, 13. It gave for the test period 51.19 per cent. to freight and 49.31 to passenger, whereas the Commission's figures gave a larger percentage to freight. The result of a difference of eleven per cent. would be to convert the deficit alleged by the Railroad and found by the court below in intrastate returns into a profit of less than 1 per cent. upon the agreed valuation. But the extent of the error, if any, is doubtful, and neither that nor any other possible errors would turn the scale.

The Railroad, after getting the actual returns at the three-cent and two-and-a-half-cent passenger rate and the freight rates allowed by the court, deducted the sums necessary to bring the revenue down to what it would have been had the state rates been followed. It is objected that this does not allow for the increase of travel that would follow the reduction. The Railroad replies and the court below found that the increase is mainly at the expense of interstate revenue when the combined local rates are less than the interstate one. Whether this exhausts the matter or not we are of opinion that upon this record the supposed increase is too conjectural properly to affect our conclusion. The direct effect of the reduction is plain—the remote one is at best a guess.

Light is thrown upon the position of the State by the decision of the Interstate Commerce Commission in *Memphis* v. *Chicago, Rock Island & Pacific Ry. Co.*, 39

I. C. C. 256, 265: "The present unduly low rates within Arkansas are due at least in part to the attempt by the Railroad Commission of Arkansas to protect Arkansas shippers and build up Arkansas jobbing centres." In that case it was intimated that the carriers would be required to remove discriminations resulting from the unduly low rates, as was done in the *Shreveport Case*. *Houston, East & West Texas Ry. Co.* v. *United States*, 234 U. S. 342. Upon the whole matter we are of opinion that the decree below was right and it is affirmed.

Decree affirmed.

UNITED STATES *v.* WILDCAT, A MINOR, ET AL.

ON CERTIFICATE FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 741. Argued April 11, 12, 13, 1917.—Decided May 21, 1917.

Acting under the enrollment provisions of the Curtis Act of June 28, 1898, and the Creek Agreement of March 1, 1901, the Dawes Commission was a *quasi* judicial tribunal, and enrollments made by it and approved by the Secretary of the Interior are presumptively correct; and, unless impeached by very clear evidence of fraud, mistake or arbitrary action, they are conclusive.

Whether or not a person alleged to be a member of the Creek Nation was living on April 1, 1899, is one of the questions going to the right of such person or his heirs to have his name enrolled under § 28 of Agreement of March 1, 1901, which the Dawes Commission was competent to decide; it is not a jurisdictional question, and an incorrect determination of it does not necessarily render the enrollment void. *Scott* v. *McNeal*, 154 U. S. 34, distinguished.

In enrolling members of the Creek Tribe in 1901, the Dawes Commission was authorized to presume that a person enrolled as a member of the tribe on the tribal rolls of 1895 was living on April 1, 1899, in the absence of proof of his death before that day or of circumstances indicating that he had died before the commission acted.

The evidence in the case examined and found wanting in proof of such arbitrary action on the part of the Dawes Commission as would establish a mistake of law or fact warranting the impeachment of its action in enrolling the Indian in whose name the allotment in question was made and patented.

An attempt of the Secretary of the Interior to set aside the enrollment and allotment of a deceased Creek Indian by striking his name from the rolls without notice to his heirs is *ultra vires* and void.

When a Creek citizen dies after April 1, 1899, and an allotment is afterwards made, and deeds issued, in his name, the title is vested in his heirs by § 28 of the Agreement of March 1, 1901. *Skelton* v. *Dill*, 235 U. S. 206–208.

Under the Creek Agreement of March 1, 1901, § 3, it was permissible for the Dawes Commission to enroll tribal citizens and make them allotments when they failed to make selections for themselves.

Affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful, with whom *The Solicitor General* and *Mr. S. W. Williams* were on the brief, for the United States.

Mr. Joseph C. Stone, *Mr. John J. Shea* and *Mr. C. B. Stuart* for Wildcat *et al.* The following counsel were on the brief: *Mr. A. C. Cruce*, *Mr. Geo. S. Ramsey*, *Mr. Malcolm E. Rosser*, *Mr. Edgar A. de Meules*, *Mr. Villard Martin*, *Mr. John Devereux*, *Mr. J. E. Wyand*, *Mr. K. B. Turner*, *Mr. M. E. Turner*, *Mr. J. B. Furry*, *Mr. E. C. Motter*, *Mr. P. J. Carey*, *Mr. W. C. Franklin*, *Mr. Burdette Blue*, *Mr. Thomas F. Shea*, *Mr. William A. Collier*, *Mr. Hazen Green*, *Mr. E. J. Van Court*, *Mr. Chas. A. Moon* and *Mr. Francis Stewart.*

Mr. A. A. Davidson, with whom *Mr. Preston C. West* and *Mr. James A. Veasey* were on the brief, for Bissett *et al.*

Mr. R. C. Allen and *Mr. James C. Davis*, by leave of court, filed a brief on behalf of the Creek Nation as *amici curiæ.*

Mr. Grant Foreman and *Mr. James D. Simms*, by leave of court, filed a brief as *amici curiæ*.

Mr. Justice Day delivered the opinion of the court.

This action was begun by the United States, in behalf of the Creek Tribe of Indians, in the District Court of the United States for the Eastern District of Oklahoma, against Bessie Wildcat, and others, heirs of Barney Thlocco, a full-blood Creek Indian, to obtain cancellation of the allotment certificate and deeds for his allotment of 160 acres. The bill of complaint alleges that Thlocco was a Creek Indian by blood; that he died at about the beginning of the year 1899 and prior to April 1, 1899, and that he was not entitled to be enrolled as a citizen of the Creek Nation or to receive an allotment of any part of its lands under the acts of Congress; that on or about May 24, 1901, the Commission to the Five Civilized Tribes caused his name to be placed on the roll of Creek citizens by blood which that Commission was then preparing; that thereafter, on June 30, 1902, the Commission issued a certificate of allotment in Thlocco's name, and homestead and allotment patents purporting to convey the land allotted were executed by the Principal Chief of the Creek Nation on March 11, 1903, and approved by the Secretary of the Interior on April 3, 1903; that thereafter, on December 13, 1906, the Secretary of the Interior, by executive order, caused Thlocco's name to be stricken from the roll of citizens by blood of the Creek Nation, and he is not an enrolled citizen by blood or otherwise of the Creek Nation, and is not now and has never been entitled to an allotment of land therein because he has never been a lawfully enrolled citizen thereof, and because he died prior to April 1, 1899; and that the patents have never been delivered to Thlocco or to any other person, but are in the possession of complainant through its officers and agents. The bill

alleges that these instruments and proceedings constitute a cloud upon the Creek Nation's title to the land and that the existence of this cloud hinders and delays complainant in the performance of the duty imposed on it by law to allot and otherwise dispose of the lands and to wind up the affairs of the Creek Nation, and prays that the allotment certificate and patents be declared void and of no effect as instruments of conveyance; that the defendants be decreed to have no right, title, interest or estate in and to the land; that the title to the land be quieted in complainant and the Creek Nation; that whatever cloud is cast upon the title to the land by reason of the matters aforesaid be decreed to be dissolved and the land decreed to be a part of the public and unallotted tribal land of the Creek Nation, subject to disposition by complainant in accordance with law; that the enrollment of Barney Thlocco be cancelled, and that he, or any person claiming by, through, or under him, including the defendants, be decreed not to be entitled to participate in the disposition of the lands, moneys, or other property of the Creek Nation, and that the defendants be forever enjoined from asserting any claim of title to, or interest in the tract of land hereinbefore described, adverse to the complainant and the Creek Nation. It is alleged that no hearing was held or investigation made by the Commission and no evidence of any kind was obtained or had by it on the question of Thlocco's right to be enrolled; that no notice was given to the Creek Nation that his name was about to be enrolled; that there was no controversy, contest or adverse proceeding of any kind before the Commission in this respect; and that the Commission, in causing Thlocco's name to be placed on the roll of Creek citizens by blood, acted arbitrarily and summarily, and without knowledge, information or belief that he was living or dead on April 1, 1899, and acted on a mere arbitrary and erroneous assumption wholly unsupported by evidence or

information that he was living on that date and entitled to be enrolled.

The answer avers that Thlocco was living April 1, 1899, and denies that the Commission acted arbitrarily and without evidence in placing his name on the roll and allotting the lands to him, and alleges that the Commission, in causing both these acts to be done, was not guilty of any gross mistake of fact or of law, but acted upon evidence satisfactory to it, and sufficient in law and in fact. It further alleges that the Dawes Commission was vested with jurisdiction to determine what persons were entitled to enrollment as citizens of the nation, and entitled to allotment out of the tribal lands, and that its decision in that regard having been approved by the Secretary of the Interior, "said enrollment, allotment and patent cannot be cancelled, nor can the issue of fact upon which the Commission placed the name of said Barney Thlocco upon the approved Creek roll be tried again, and these defendants say that this court is without authority of law or jurisdiction to reopen or retry the question of fact sought to be put in issue by the United States."

Other defendants claimed an interest in part of the same property under a subsequent allotment and intervened for the same relief as was asked by the United States.

Upon the trial of the case the Government offered to show by witnesses and circumstances that Thlocco in fact died in January, 1899. Upon objection to this evidence by the defendants, the trial court ruled that the question whether Thlocco was living on April 1, 1899, was one of the questions which the law submitted to the Dawes Commission, and that its decision, placing Thlocco's name on the tribal roll, could only be attacked upon the ground of fraud, error of law, or gross mistake of fact, or upon the ground that the Commission acted arbitrarily and wholly without evidence; that it was not open to the Govern-

ment, for the purpose of attacking the allotment certificate and deeds to Thlocco, to retry the question of fact as to whether he was living April 1, 1899.

At the conclusion of the trial the Government renewed its offer of proof, to which objections were sustained on the ground just stated. A decree was then entered dismissing the bill for the reason that the Government had failed to show that the Commission in enrolling Thlocco acted arbitrarily and without evidence. Appeal was then taken to the Circuit Court of Appeals for the Eighth Circuit, which court certified certain questions of law to this court. Subsequently a writ of certiorari was issued, bringing the whole case here. (Judicial Code, § 239.)

The Government in the brief filed in its behalf reduces the questions necessary to decide the merits of this appeal to two: First, Should the evidence offered by the Government to show that Thlocco died prior to April 1, 1899, have been admitted? Second, Should the judgment of the District Court be reversed because the enrollment of Thlocco and the allotment to him were made arbitrarily and without evidence as to whether he was living or dead on April 1, 1899?

As to the first question, an understanding of certain legislation is necessary to its answer. By the Act of Congress of June 10, 1896, 29 Stat. 339, the Commission to the Five Civilized Tribes, more commonly known as the Dawes Commission, was authorized to hear and determine applications for citizenship in any of the Five Civilized Tribes. By that act the rolls of citizenship of those tribes as they then existed were confirmed and the Commission commanded in determining applications for citizenship to "give due force and effect to the rolls, usages, and customs of each of said nations or tribes." It was provided by the Act of June 7, 1897, 30 Stat. 84, that the term "rolls of citizenship" should mean "the last authenticated rolls of each tribe which have been approved by

the council of the nation, and the descendants of those appearing on such rolls," and certain others specified who had been lawfully added to the rolls. By the Curtis Act of June 28, 1898, 30 Stat. 495, 502, the Commission was authorized and directed to make correct rolls of the citizens by blood of the Creek Tribe, eliminating from the tribal rolls such names as might have been placed thereon by fraud or without authority of law, enrolling such only as might have lawful right thereto, and their descendants born since such rolls were made. It was provided that the Commission should make such rolls descriptive of the persons thereon, so that they might be identified thereby, and the Commission was authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls, with the right of access to all rolls and records of the several tribes, and with authority to administer oaths, examine witnesses, and send for persons and papers. The rolls so made, when approved by the Secretary of the Interior, were to be final, and the persons whose names were found thereon, with their descendants thereafter born to them, with such persons as might intermarry according to tribal laws, were alone to constitute the several tribes which they represented. By § 28 of the Creek Agreement of March 1, 1901, 31 Stat. 861, 870, it was provided that all citizens who were living on the first day of April, 1899, entitled to be enrolled under the above provisions of the Curtis Act, should be placed upon the rolls to be made by the Dawes Commission under that act, and provision was made for allotment to the heirs where any such citizen had died since that time. "The rolls so made by said commission," the act continues, "when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no

other persons." This agreement was ratified by the Creek Council May 25, 1901, 32 Stat. 1971.

The legislation which we have outlined indicates the purpose of Congress to make provision for the partition of the lands belonging to the Creek Nation among the members of the tribe, and to that end it authorized the Dawes Commission to make investigation and determine the names of such as were entitled to be on the rolls of citizenship and to participate in the division of the tribal lands. This purpose indicated in the Curtis Act of 1898 was emphasized by the so-called Creek Agreement of 1901, subsequently ratified by the tribe. In that act the Commission was authorized to investigate the subject, and its action when approved by the Secretary of the Interior was declared to be final. There was thus constituted a *quasi*-judicial tribunal whose judgments within the limits of its jurisdiction were only subject to attack for fraud or such mistake of law or fact as would justify the holding that its judgments were voidable. Congress by this legislation evidenced an intention to put an end to controversy by providing a tribunal before which those interested could be heard and the rolls authoritatively made up of those who were entitled to participate in the partition of the tribal lands. It was to the interest of all concerned that the beneficiaries of this division should be ascertained. To this end the Commission was established and endowed with authority to hear and determine the matter.

A correct conclusion was not necessary to the finality and binding character of its decisions. It may be that the Commission in acting upon the many cases before it made mistakes which are now impossible of correction. This might easily be so, for the Commission passed upon the rights of thousands claiming membership in the tribe and ascertained the rights of others who did not appear before it, upon the merits of whose standing the Commis-

sion had to pass with the best information which it could obtain.

When the Commission proceeded in good faith to determine the matter and to act upon information before it, not arbitrarily, but according to its best judgment, we think it was the intention of the act that the matter, upon the approval of the Secretary, should be finally concluded and the rights of the parties forever settled, subject to such attacks as could successfully be made upon judgments of this character for fraud or mistake.

We cannot agree that the case is within the principles decided in *Scott* v. *McNeal*, 154 U. S. 34, and kindred cases, in which it has been held that in the absence of a subject-matter of jurisdiction an adjudication that there was such is not conclusive, and that a judgment based upon action without its proper subject being in existence is void. In *Scott* v. *McNeal* it was held that a probate court had no jurisdiction to appoint an administrator of a living person and to sell property in administration proceedings after finding that he was in fact dead. In that case it was held that a sale of the property of a living person by order of the probate court without notice to him necessarily deprived him of due process of law by selling his property without notice and by order of a court which had no jurisdiction over him in any manner. The notice in such cases to his next of kin, the court held, was not notice to him, and to make an order undertaking to deprive such person of his property would be to take it by a judgment to which the living person was not a party or privy; and it was held that jurisdiction did not arise from the mere finding of the court that the person whose property was thus taken was in fact deceased. In the present case the Government had jurisdiction over these lands. It had the authority to partition them among the members of the tribe. *Shulthis* v. *McDougal*, 170 Fed. Rep. 529, 534; *McDougal* v. *McKay*, 237 U. S. 372, 383.

For this purpose it determined to divide the lands among those living on April 1, 1899, and constituted a tribunal to investigate the question of membership and consequent right to share in the division. We think the decision of such tribunal, when not impeached for fraud or mistake, conclusive of the question of membership in the tribe, when followed, as was the case here, by the action of the Interior Department confirming the allotment and ordering the patents conveying the lands, which were in fact issued. If decisions of this character may be subject to annulment in the manner in which the Government seeks to attack and set aside this one, many titles supposed to be secure would be divested many years after patents issued, upon showing that the decision was a mistaken one. The rule is that such decisions are presumably based upon proper showing, and that they must stand until overcome by full and convincing proof sufficient within the recognized principles of equity jurisdiction in cases of this character to invalidate them. *Maxwell Land-Grant Case*, 121 U. S. 325, 379, 381; *Colorado Coal & Iron Co.* v. *United States*, 123 U. S. 307.

As to the second contention, that the Commission acted arbitrarily and without evidence of the fact that Thlocco was living on April 1, 1899, there is no attack upon the finding of the Commission for fraud, and this record shows an earnest attempt to conform the rolls to the requirements of the law.

Thlocco's name appeared on the Tribal Rolls of 1890 and 1895 and on a census card made by a clerk of the Commission in 1897.

An enrolling clerk with the Dawes Commission testified that he entered the name of Barney Thlocco upon the census card on May 24, 1901; that at that time there were a great many names on the old rolls unaccounted for, and the party went to Okmulgee to get them to come out and get them enrolled; that a great many were brought in;

that Thlocco was one of those who were unaccounted for at that time, and the witness could not say whether his name was taken from the old census roll or whether someone appeared and asked for his enrollment; that after Thlocco's name was listed there was some investigation upon the question as to whether or not he was living or dead on April 1, 1899, but the Commission would have to be satisfied or have information of some kind that he was living on that date; that the Commission knew that Thlocco was dead in 1901 and it apparently was satisfied that he was living on April 1, 1899; that they would ask town kings and town warriors when they came in and anybody else if they knew this or that about the applicants; that because of a discrepancy between the ages of Thlocco on the census cards they must have had some information other than the old census card; that the invariable custom and practice was never to fill out one of the cards until they had some information from some source with reference to the question as to whether the applicant was living or whether he had died prior to April 1, 1899; that the Commission never arbitrarily listed any name; that no name was listed solely because it was on the Roll of 1895, but some particular individual evidence was required outside of that roll; that before the new rolls were sent to Washington the clerks and the chairman of the Commission would get together and go over every one of them.

The clerk who made out the census card in 1897 testified that as Chief Clerk of the Commission he helped in the enrollment; that a notation on the census card "died in 1900" was in his handwriting, but that he did not know who had given him the information or what use was made of the notation, except that it was intended that when the Commission came to pass on that name for final record on the roll an inquiry should be made as to when Thlocco died or whether he was dead and get the proper affidavit

and death proof; that the Commission did not arbitrarily enroll any Creek citizen without evidence, and that in every single case if the applicant did not appear some one who was regarded as reliable appeared for him and gave evidence until the Commissioner was satisfied that he belonged on the roll; that whenever any question was raised by the Creek Nation or its attorney with reference to the right to enrollment, or for any reason as to whether the applicant was living or dead, there was generally testimony taken in those cases; that with reference to those people whose names up to March, 1901, had not been accounted for, there were lists of these made and sent to the various town kings and various inquiries were made that way and report came back; that sometimes the party addressed came in and gave verbal testimony, and if it seemed clear to the Commission it was probably not reduced to writing; that if there was any question with reference to the matter it probably was reduced to writing; that the Commission had to be satisfied from the records; that the Commission never passed upon a card until it was completed; that the information may have been picked up piecemeal over a year or two, but the Commission was satisfied that the party was entitled to enrollment, and the records were made up for the purpose of the information of the Commission and to show such information as was necessary to enable the Commission to reach a decision.

One of the enrolling clerks at Okmulgee testified that if information was present that a name was entitled to go on the rolls, the roll was completed at Okmulgee; that if the Commission did not have this information they did not complete it; that the fact that Barney Thlocco's card was completed at Okmulgee indicated that the party who wrote the card was satisfied that Thlocco was living on April 1, 1899, and satisfied from evidence; that there was in all cases some evidence as to whether the citizen

was living or dead on April 1, 1899, before the rolls were recommended to the Secretary of the Interior.

The Acting Chairman of the Dawes Commission testified that they did not to his knowledge ever enroll any man without taking some evidence, information, or eliciting knowledge from some source other than the tribal rolls that he was entitled to be enrolled, and it was never permitted to be done; that the purpose was to find out whether a man was entitled to enrollment and one of the factors in that determination was whether he died prior or subsequent to April 1, 1899; that he always ascertained that fact before he enrolled the applicant and always satisfied his mind on that subject by evidence outside of the roll; that every name sent into the Department of the Interior as a name to be enrolled and which had been enrolled as a member of the Creek Tribe had been investigated by some member of the Commission at some place and by evidence outside of the rolls and a determination had been reached that that person was entitled to enrollment; that he undoubtedly satisfied himself from an examination of Thlocco's card whether Thlocco was living on April 1, 1899; that in securing information the Commission had the assistance of the best men in the tribes as well as its own field parties; that when he would take the card he would have the card and the clerk would have the schedule, and he went over it several times with clerks and would find out from the clerk all the information the clerk had with reference to that card several times.

It is true, as set forth in the certificate upon which this case was originally sent here, in view of § 28 of the original Creek Agreement, providing that no person except as therein provided should be added to the rolls of citizenship of the tribe after the date of the agreement, and no person whomsoever should be added to the rolls after the ratification of the agreement, which was ratified on May 25, 1901, that the tribe assembled at Okmulgee,

its capital, some days before that date, for the purpose of considering and acting upon the agreement, and that there was great activity some time before the ratification upon the part of the Dawes Commission and its officers and clerks to complete the enrollment of the tribe; and it is shown that Thlocco's enrollment card was made out at Okmulgee on the twenty-fourth day of May, 1901,—the last day before the ratification of the agreement. It is also true that in the testimony as adduced in this record, there was, as naturally would be the case, a lack of recollection as to the details which attended the enrollment of Thlocco. But there is evidence to which we have already alluded, showing the practice of the Commission to make inquiries and investigations and to ascertain the facts as to the persons enrolled, and that no person was enrolled without information that was deemed satisfactory at that time. The Commission had before it the tribal rolls of 1890 and 1895. The latter roll was made out some six years before the action of the Commission, and in the absence of proof of Thlocco's death or some circumstances to give rise to the conclusion that he was not still living, the Commission might well indulge the presumption that he was still alive. *Fidelity Mutual Life Assn.* v. *Mettler*, 185 U. S. 308, 316.

It is true that the methods followed by the Commission may not have been the most satisfactory possible of determining who were entitled to enrollment as living persons on April 1, 1899, but it must be remembered that there were many persons whose right to enrollment was being considered, and the Commission in good faith made an honest endeavor to keep the names of persons off the rolls who were not entitled to appear as members of the tribe upon the date fixed by Congress. We think the testimony very far from showing such arbitrary action on the part of the Commission in placing Thlocco's name on the rolls as would establish that mistake of law or fact

which is essential to the impeachment of the action of the Commission. This action was brought fourteen years after the enrollment of Thlocco and the allotment to him based on such enrollment should not be disturbed except for good and sufficient reasons.

It is not contended by the Government that the subsequent action of the Secretary in striking Thlocco's name from the rolls had the legal effect to accomplish that purpose. Such is the contention of the intervenors. The testimony shows that Thlocco was enrolled by the Commission on May 24, 1901, that the allotment was made and the certificate therefor issued on June 30, 1902, and that patents were recorded in the office of the Commission on April 11, 1903, the allotment certificate issued in the name of Thlocco. On August 25, 1904, the Commission transmitted to the Secretary of the Interior a communication from the Creek attorney in the nature of a motion to re-open the matter. On September 16, 1904, the Secretary of the Interior ordered further investigation, and directed that notice be given to the heirs of Thlocco of the hearing. The heirs of Thlocco were not found, and no notice was given them of the proposed hearing. On October 10, 1906, the Commission reported that the testimony showed that Thlocco died before April 1, 1899, and recommended that his name be stricken from the roll. On December 13, 1906, the Secretary directed that Thlocco's name be stricken from the roll, and requested the Attorney General to take action to set aside the allotment deeds. We think this action entirely ineffectual to annul the previous action of the Government in placing Thlocco's name upon the roll and issuing in his name the certificate and patents as we have stated. Such action could not be legally taken without notice to the heirs, and was void and of no effect. *Garfield* v. *United States ex rel. Goldsby*, 211 U. S. 249; *Knapp* v. *Alexander-Edgar Lumber Co.*, 237 U. S. 162, 169. In *Lowe* v. *Fisher*, 223

U. S. 95, the Secretary of the Interior in striking names from the roll of Cherokee citizens acted after notice and opportunity to be heard.

The fact that Thlocco was dead at the time deeds were issued in his name would not prevent the title from vesting in his heirs. Section 28 of the Act of March 1, 1901, 31 Stat. 861, 870, provides that "if any such citizen has died since that time [April 1, 1899,] or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly." The effect of this provision is to vest title in the heirs by operation of law. *Skelton* v. *Dill*, 235 U. S. 206, 207, 208.

As to the contention that the lands were not selected by Thlocco, and that he was one of those arbitrarily placed upon the rolls, we think it was within the authority of the Commission to enroll members of the tribe who for any reason refused to make selections; for the statute (§ 3, 31 Stat. 861, 862) provides that "all lands of the said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said commission so as to give each an equal share of the whole in value, as nearly as may be, in the manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him." While citizens were thus permitted to make their selections for the purpose of retaining improvements, it seems clear that in case any citizen failed to avail himself of this right it was permissible for the Commission to make the allotment.

We think the District Court rightly ruled that the Government had not offered evidence competent to im-

peach the validity of the Commission's action and thus to invalidate the title subsequently conveyed by the patent to Thlocco with the approval of the Interior Department.

It follows that the decree of the District Court, dismissing the bill, should be

Affirmed.

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

YANKAUS *v.* FELTENSTEIN ET AL.

ERROR TO THE CITY COURT OF NEW YORK CITY, STATE OF NEW YORK.

No. 407. Argued April 10, 1917.—Decided May 21, 1917.

The rule that an order of the District Court remanding a cause is conclusive of the right to remove (Jud. Code, § 28) and cannot be reviewed on writ of error to a subsequent judgment of the state court, applies also when the final judgment of the state court is rendered after the attempted removal and before the order of remand, if when the judgment is rendered the District Court has not assumed jurisdiction and assumes none later beyond enjoining further proceedings until the motion to remand may be decided.

Conduct of the plaintiffs in respect of proceedings in the state courts and District Court *held* not to have estopped them from contesting the jurisdiction of the latter after attempted removal, or to have waived their right to the conclusive effect of the order of remand.

Affirmed.

THE case is stated in the opinion.

Mr. Jesse C. Adkins, with whom *Mr. Roger Foster* and *Mr. Frank J. Felbel* were on the briefs, for plaintiff in error.

Mr. Jacob W. Hartman for defendants in error, submitted.

MR. JUSTICE DAY delivered the opinion of the court.

This is a writ of error, bringing into review a judgment of the City Court of the City of New York and an order of that court denying a motion to set aside this judgment, and an order of the Appellate Term of the Supreme Court of the State of New York, which affirmed the order and judgment.

The action was brought in the City Court by Feltenstein and Rosenstein, hereinafter called the plaintiffs, to recover a contingent counsel fee of $500 from Yankaus, hereinafter called the defendant, and for loans of $200 and $100 respectively, in all the sum of $800. Summons and complaint were served on October 11, 1915. On October 16, 1915, the defendant filed in the office of the clerk of the City Court petition and bond for the removal of the cause to the United States District Court for the Southern District of New York. The bond was approved by a judge of the City Court. Notice of the intention to file petition and bond was served on the plaintiffs on October 15, 1915. The ground for removal was diversity of citizenship, and it was averred that the petitioner had a counterclaim exceeding the sum of $3,000, exclusive of interest and costs, and that therefore the matter and amount in dispute in the case exceeded that sum. On October 20, 1915, a certified copy of the record was filed in the office of the clerk of the United States District Court for the Southern District of New York, and an answer was filed setting up the invalidity of the agreements upon which plaintiffs' cause of action was based and asserting a counterclaim.

On October 16, 1915, plaintiffs moved in the City Court for an order setting aside the bond and the removal of the

cause to the United States District Court and directing that the City Court retain jurisdiction. This motion came on to be heard before a judge of the City Court on October 20, 1915, and resulted in an order setting aside the removal and determining that the action was not entitled to be removed. This decision was made upon the basis that the counterclaim could not be considered in determining the amount in dispute, in so far as to give the federal court jurisdiction. Judgment was entered on October 26, 1915, for plaintiffs. From this order and judgment appeal was taken to the Supreme Court, Appellate Term. Thereupon, the defendant moved in the United States District Court for the Southern District of New York for an order restraining the plaintiffs from proceeding to the enforcement of the judgment. The matter was heard before Judge Lacombe, sitting as District Judge, and on November 4, 1915, he issued an order restraining the plaintiffs until further order made on proper notice and motion to remand from in any way proceeding with or prosecuting their cause of action in the City Court or from collecting anything under any judgment entered therein. Subsequently plaintiffs moved in the United States District Court for the Southern District of New York for an order remanding the case to the state court. This motion came on for hearing before Judge Hough, who granted the motion to remand and an order remanding the cause to the City Court was made on the fifteenth day of November, 1915. The defendant afterward moved in the City Court to set aside the judgment rendered while it was alleged the suit was pending in the United States court, which motion was denied.

Appeal was thereupon taken to the Supreme Court, Appellate Term, and the judgment and the order setting aside the removal and declaring that the case was still in the City Court were both affirmed. Motion was made by the plaintiffs to dismiss the appeal upon the ground

that the order denying the defendant's motion to vacate the judgment had become academic by the affirmance of the order setting aside the removal. The appeal was dismissed by the Appellate Term. Defendant thereupon applied to the Appellate Term for leave to appeal to the Appellate Division from the order affirming the order of the City Court, setting aside the removal of the action, and from the judgment entered by the plaintiffs while the action was in the federal court, and also from the dismissal of the appeal from the order refusing to vacate this judgment. Both motions were denied. Defendant then applied to a Justice of the Appellate Division, First Department, for an order permitting him to take appeals, and these applications were denied. In these applications the defendant set forth that he had been denied rights asserted by him under the Constitution and statutes of the United States. Afterwards a writ of error was allowed from this court.

As we view this case, we think the judgment of the court below must be affirmed, as this proceeding is practically an attempt to review an order remanding a cause attempted to be removed to the District Court of the United States. Section 28 of the Judicial Code provides that "whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed." After the filing of the transcript in the United States District Court the matter came on for hearing before Judge Lacombe, and it was ordered that until the further order of the court the plaintiff should be enjoined and restrained from proceeding in the City Court, or from collecting in any manner any

judgment entered therein. Accompanying this order Judge Lacombe wrote the following memorandum:

"Jurisdiction is too doubtful to warrant this court in retaining the cause. *Crane Co.* v. *Guanica Centrale,* 132 Fed. Rep. 713. Plaintiff's proper course would have been to make a motion to remand. This he may now do. When such motion is made and granted the cause may proceed there; it is now here. Plaintiffs in the meanwhile may be enjoined (until remand is made) from proceeding further in the State Court."

We think the effect of this order, read in the light of the opinion, simply manifested the purpose of the court to prevent proceedings while the question of the jurisdiction of the United States court was pending, and did not amount to a decision that that court had jurisdiction. It is true that an order of injunction was granted; but it is apparent from a reading of Judge Lacombe's memorandum that his purpose was merely to enable the District Court to hold the case until it decided the question of its jurisdiction. Afterwards the motion came up in the United States District Court, in which an opinion was delivered by Judge Hough, wherein he said:

"When this matter was argued the record on removal was not in court. If it had been the motion would not have been held until now. The opinion of Judge Lacombe in *Crane Co.* v. *Guanica Centrale,* 132 Fed. Rep. 713, merely states what for many previous years had been the practice of this Court,—i. e. doubtful cases were always remanded.

"Rulings of this nature are admittedly unsatisfactory. Counsel and parties are entitled to a clear-cut statement of the law if it is possible to make one;—and it would seem as if the removal acts were sufficiently old by this time to enable a court to select what appeared to be the best of conflicting rules.

"Since no case (irrespective of amount involved) can

be removed over which the United States Court might not have had original jurisdiction, it has always seemed to me illogical to consider a counterclaim in ascertaining the propriety of removal or remand.

"In the State of New York there is no compulsion on a defendant to set up a counterclaim. It is always optional with the party possessing it to reserve his affirmative demand for an independent suit.

"Imagine this action brought originally in this Court; the defendant would only have been obliged to appear and move on the pleadings to dismiss the complaint without prejudice. Such a motion would have been granted as of course.

"Thus it appears that an action of the most trifling nature may (under defendant's contention) be removed to this Court at the option of defendant if he can assert a counterclaim of sufficient size. That this was never the intent of the statute I am clear. Considering, however, the confusion of decisions and (so far as I know) the failure of late years to observe the difference between the Act of 1875 and that of 1888, I should have felt impelled to consider and classify decisions were it not for the consideration next to be stated. If it be true that by a preponderance of rulings the affirmative claims set up in an answer are to be considered in determining jurisdiction, it is at least necessary that somewhere and in some shape the defendant who sets up counterclaims shall plead them in a manner which enables his opponent to criticise them, modify them or expunge them as may be proper under the rules of good pleading.

"In this case,—and in any similar case under the Act of 1888 there is no answer. The only knowledge that to this moment plaintiff has regarding defendant's counterclaim is contained in the petition for removal,—the language of which petition sets forth no reason whatever for the recovery by the defendant from the plaintiff of any

sum of money at all. The petition says in substance that the defendant has a counterclaim, without stating what it is. Whatever may be the preferred rule, when in a proper and formal manner the amount in controversy between the parties is made to appear and shown to exceed $3,000 exclusive of interest and costs;—I feel justified in holding, and do hold, that it is impossible to show that such controversial amount exists in any such manner as this defendant has attempted."

For the reasons stated, the case was remanded to the City Court. We think these orders, with the accompanying memoranda and opinion, taken together, show that the District Court denied its jurisdiction, and remanded the cause to the City Court. In this attitude of the case, the judgment of the state court must stand, as the effect of the orders of the District Court was to hold the attempted removal unauthorized. This court has more than once held that such an order is not subject to review, directly or indirectly, but is final and conclusive. *Missouri Pacific Ry. Co.* v. *Fitzgerald*, 160 U. S. 556, 580–583; *McLaughlin Brothers* v. *Hallowell*, 228 U. S. 278, 286; *Pacific Live Stock Co.* v. *Oregon Water Board*, 241 U. S. 440, 447.

Nor are we able to find anything in the conduct of the plaintiffs estopping them from contesting the jurisdiction of the federal court, or amounting to a waiver of their right to the benefit of the judgment remanding the case from the District Court.

It follows that the judgment of the City Court of the City of New York must be

Affirmed.

Mr. Justice Pitney concurs in the result.

LEWIS, EXECUTRIX OF LEWIS, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 197. Submitted April 23, 1917.—Decided May 21, 1917.

The clause in the Sundry Civil Appropriation Act of March 4, 1909, c. 299, 35 Stat. 945, 987, appropriating money to enable the Secretary of the Interior to complete unfinished work pertaining to surveys in Louisiana and other States "caused by the discontinuance of the offices of surveyors-general in those States," abolished the office of surveyor general in Louisiana, repealing by necessary implication § 2207 of the Revised Statutes creating that office.

In determining the effect of the later enactment it must be assumed that Congress was familiar with action whereby the Interior Department had already undertaken to terminate the office, which the act recognizes as discontinued.

In view of § 1765, Rev. Stats., which fixes the compensation of federal officers at the salaries established by law with only such additional compensation as is by law authorized and explicitly appropriated, the surveyor general of Louisiana was not entitled to the fees for furnishing copies of plats and transcripts of records which the Act of March 3, 1831, § 5, c. 116, 4 Stat. 492, required him to collect but did not undertake to dispose of.

50 Ct. Cls. 226, affirmed.

THIS suit was instituted by James Lewis, and revived upon his death by Josephine B. Lewis, as executrix, to recover the sum of $2,000 salary claimed to be due him from the United States as surveyor general of Louisiana for the fiscal year beginning July 1, 1909, and ending June 30, 1910, and to recover the further sum of $2,287.80 claimed to belong to him as perquisites of this office and paid over his protest into the Treasury of the United States between May 1, 1907, and June 30, 1909, at the direction of his superior officer, the Commissioner of the General Land Office, a total of $4,287.80, for which he prayed judg-

ment. The Court of Claims found for the United States on both items and dismissed claimant's petition (50 Ct. Cls. 226), and it is from this judgment that the appeal has been taken to this court.

From the findings of fact made by the Court of Claims, the following appears: On or about January 18, 1905, James Lewis, who had previously held the office, was reappointed and recommissioned surveyor general of Louisiana, and under this commission he administered the duties of the office continuously until July 15, 1909, on which date he was deprived of the possession and custody of the records and other property of the office by John H. Batchelor, a clerk detailed from the General Land Office of the United States and acting under directions from the Commissioner of the General Land Office, as will hereafter more fully appear.

On December 7, 1908, Lewis received a letter from the Commissioner of the General Land Office dated December 5, 1908, in which the Commissioner informed him that it was proposed to discontinue the office of surveyor general for the district of Louisiana on June 30, 1909, and on or about May 13, 1909, he received a letter from the Commissioner, dated May 11, 1909, reading in part as follows:

"As the office of the surveyor general of Louisiana will be permanently closed and discontinued on July 1, 1909, the records thereof, excepting such as may be required for use in this office, will be turned over to the State of Louisiana when proper provision has been made by the legislature for their safe-keeping and providing for free access to them by the authorities of the United States, as provided by §§ 2218, 2220, and 2221, Revised Statutes.

"As no provision has been made by the legislature for the reception of the records under the conditions above stated, it will become necessary to appoint a custodian of them on July 1, at a salary of $1,000 per annum, who will

retain them in his custody until the required law has been provided. . . ."

On or about June 19, 1909, Lewis received from the Commissioner a letter, as follows:

"As you have been verbally informed that Congress omitted to include an appropriation for the maintenance of your office, you are aware that it will be necessary to discontinue it after June 30 next.

"You are now advised that Mr. John H. Batchelor, of this office, has been detailed to visit your office and supervise the transfer of its records to the State building at Baton Rouge, La.; also to select such of the records and Government property as it is thought best should be moved to this city for use in this office. You are directed to furnish him all facilities for carrying out this purpose and give him such assistance as he may need.

"It is assumed that you have already prepared an inventory of the records and property, which will be verified by Mr. Batchelor.

"The State authorities having failed to provide by legislation for the custody and care of the records which by law are to be turned over to them, it will be necessary, pending the enactment of suitable provision for a place for the records, to give the same in charge of a custodian. Mr. Arthur Gascon, of your office, has been selected for this office, and he will receipt to Mr. Batchelor for the records by schedule.

"Property which is not a part of the records, such as furniture not belonging to the Treasury Department, and stationery, including surveying instruments, drafting instruments, etc., will be examined by Mr. Batchelor, and that which is serviceable and can be transported profitably to this city will be boxed up for transmission. The remainder will be stored and advertised for sale at auction, either under Mr. Gascon or other officer, or turned over to the local land office.

"Mr. Gascon will be instructed separately."

Pursuant to the plan outlined in this letter, on June 19, 1909, Batchelor, a clerk detailed from the General Land Office, acting under instructions from the Commissioner, dated June 17, 1909, arrived at the surveyor general's office in New Orleans, La., and assumed supervision of the closing of that office and the disposition of the records and other property therein, caused inventories of said records and other property to be made, and, on July 15, 1909, the same having been completed, took said records and property out of the possession and custody of Lewis and gave to him a formal receipt therefor. Thereafter, on the same day, Batchelor, acting under his instructions, turned over the records and other property of the office to Arthur Gascon, formerly chief clerk in the office of the surveyor general, as custodian thereof, Gascon having been appointed custodian thereof by the Secretary of the Interior on June 16, 1909, to take effect July 1, 1909, the appointment being in the following language:

"Arthur Gascon, of Louisiana, is hereby appointed custodian of the documents and records pertaining to the office of the surveyor general of Louisiana upon the discontinuance of that office, at a salary of $1,000 per annum, to take effect upon July 1, 1909.

"Salary payable from the appropriation for completing field notes, etc., of surveys in Minnesota, North Dakota, and Louisiana.

"By transfer from chief clerk, office of surveyor general of Louisiana."

On January 9, 1915, the President issued the following order:

"The Secretary of the Interior.

"Sir: The action of the Interior Department in discontinuing the office of the United States surveyor general for the district of Louisiana from and after June 30, 1909, as shown by the letters of the Commissioner of the Gen-

eral Land Office to James Lewis, surveyor general of Louisiana, dated December 5, 1908, and May 11, 1909, and the appointment by the Secretary of the Interior, under date of June 16, 1909, of Arthur Gascon as custodian of the records of the office of the surveyor general of Louisiana, to take effect July 1, 1909, copies of which letters and appointment are hereto attached, is hereby ratified and confirmed.

"WOODROW WILSON, President."

The records of the surveying district of Louisiana were not completed on June 30, 1909, or on July 15, 1909, and the State of Louisiana did not provide by law for the reception and safe-keeping as public records of the field notes, maps, records, and other papers appertaining to land titles in said State, which belonged to the office of United States Surveyor General of Louisiana, and for the free access to the same of the authorities of the United States, until June 10, 1910, on which day the Governor of the State approved an act of the general assembly known as Act No. 6 of the Session Acts of the General Assembly of the State of Louisiana for the year 1910, and passed for that purpose. Acting under authority which was vested in him for that purpose by this act of the General Assembly, Fred J. Grace, register of the state land office of Louisiana, on June 30, 1910, formally receipted to Gascon, custodian as aforesaid for the records of the United States Surveyor General's office of Louisiana, for the plats, field notes, books, papers, etc., constituting the records of said office, and on that day Gascon, for and in behalf of the United States, formally delivered the said records to the State of Louisiana in the person of its duly authorized representative, Fred J. Grace.

For the period beginning July 1, 1909, and ending June 30, 1910, both inclusive, Lewis received no salary or compensation from the United States as surveyor general of Louisiana.

During Lewis' period of service as surveyor general of Louisiana he furnished copies of plats of surveys and transcripts from the records of his office to various individuals requiring them, and asked and received therefor from such individuals fees, as compensation for the service rendered in furnishing such copies and transcripts, in amounts equal to or less than those authorized in said § 5 of the Act of Congress approved March 3, 1831, 4 Stat. 492, entitled "An act to create the office of surveyor of the public lands for the state of Louisiana." Some of such copies and transcripts were certified by him under the seal of his office, and for such certifications he received from the individuals requiring the same fees at the rate of $1 for each certificate and seal. From the time Lewis assumed the authority, powers and duties of his office up to and including April 30, 1907, he retained as his personal property the fees received by him, construing said § 5 of the Act of March 3, 1831, as conferring upon him this right, in addition to and separate from his salary as surveyor general.

From the time the office of surveyor general for Louisiana was established up to the time Lewis last entered upon its duties, the incumbents of the office rendered similar services to individuals and received and retained fees for such services as their personal property, and in this construction of the Act of March 3, 1831, up to and including April 30, 1907, the Commissioner of the General Land Office and the Secretary of the Interior acquiesced.

Upon April 15, 1907, the Commissioner of the General Land Office issued a circular order to Lewis, requiring him to desist from retaining these fees as his personal property, and requiring him, when application should be made by individuals for exemplified copies of plats or other records in his office, to first furnish the applicant with a memorandum of the exact cost thereof at the rates

established by law for registers and receivers for like services, and to require said applicant to deposit the amount indicated in a United States depository to the credit of the Treasurer of the United States, and directing Lewis, after that should have been done, to furnish the copies and transcripts ordered.

Lewis protested against this order in a letter to the Commissioner dated May 3, 1907, in which he informed the Commissioner that his office had hitherto based its charges for copies from its records upon § 5 of the Act of March 3, 1831; that the rates established by law for registers and receivers for furnishing such copies were not applicable to his office; and that the fees for furnishing such copies had been construed by the surveyor general of Louisiana as perquisites allowed to him, as appeared from the correspondence of his office with the General Land Office as far back as 1860. To this letter the Commissioner replied, on May 9, 1907, that the Act of March 3, 1831, being unrepealed, Lewis should continue to charge the fees established under the act, to the extent of which direction the circular order of April 15, 1907, stood modified as far as Lewis' office was concerned, but that all fees of whatever nature received from parties desiring copies of the records must be covered into the Treasury, and the practice of receiving them as personal property be discontinued.

Upon receipt of this letter, Lewis addressed a second letter of protest to the Commissioner. The Commissioner replied, on May 31, 1907, that his order of April 15, 1907, was considered to be in the interest of good administration and must be strictly observed.

Under this order of April 15, 1907, there was deposited in the United States subtreasury at New Orleans, by individuals in payment for copies furnished by the surveyor general's office from May 1, 1907, to June 30, 1909, inclusive, the sum of $635.65.

On October 19, 1907, the Commissioner issued to Lewis

a further circular order relative to these fees, modifying the circular order of April 15, 1907, and requiring him thereafter, when application should be made to him by individuals for exemplified copies of plats or other records in his office, to first furnish the applicant with a memorandum of the exact cost thereof, to require the applicant to pay such cost to him, as surveyor general, and upon receipt of the amount to prepare the copies desired, and to deposit the aggregate amount thus received each week to the credit of the Treasurer of the United States on account of "Receipts for furnishing copies of records," and to forward the duplicate certificates of deposit to the office of said Commissioner in Washington.

Upon receipt of this circular order, Lewis wrote another letter of protest to the Commissioner.

Under the circular order of October 19, 1907, Lewis deposited in the United States subtreasury at New Orleans, to the credit of the Treasurer of the United States, between May 1, 1907, and June 30, 1909, inclusive, the sum of $1,652.15, received by him as fees from individuals.

The sums deposited by individuals or by Lewis, from May 1, 1907, to June 30, 1909, inclusive, aggregate the sum of $2,287.80, no part of which has ever been received by Lewis from the United States.

Mr. L. Russell Alden and *Mr. Edward F. Colladay* for appellant.

Mr. Assistant Attorney General Thompson for the United States.

MR. JUSTICE DAY, after making the foregoing statement, delivered the opinion of the court.

Section 2207 of the Revised Statutes provided for the appointment of a surveyor general for the surveying dis-

trict of Louisiana; § 2208 fixed his salary at the sum of $2,000 a year; § 2217 fixed the term of office at four years from the date of the commission unless the incumbent should resign, die or be removed from office within that period.

The claimant insists that Lewis was entitled to the salary of the office for the year ending June 10, 1910, notwithstanding the facts found by the Court of Claims as to the discontinuance of the office, as it was not until that date that the State of Louisiana duly provided for the reception and safe-keeping of the papers and records of the office, which were delivered by the custodian to the State on June 30, 1910.

Sections 2218, 2219, 2221 and 2222 of the Revised Statutes provide as follows:

"2218. The Secretary of the Interior shall take all the necessary measures for the completion of the surveys in the several surveying-districts for which surveyors-general have been, or may be, appointed, at the earliest periods compatible with the purposes contemplated by law; and whenever the surveys and records of any such district are completed, the surveyor-general thereof shall be required to deliver over to the secretary of state of the respective States, including such surveys, or to such other officer as may be authorized to receive them, all the field-notes, maps, records, and other papers appertaining to land titles within the same; and the office of surveyor-general in every such district shall thereafter cease and be discontinued."

"2219. In all cases where, as provided in the preceding section, the field-notes, maps, records, and other papers appertaining to land titles in any State are turned over to the authorities of such State, the same authority, powers, and duties in relation to the survey, resurvey, or subdivision of the lands therein, and all matters and things connected therewith, as previously exercised by the surveyor-general, whose district included such State, shall

be vested in, and devolved upon, the Commissioner of the General Land-Office."

"2221. The field-notes, maps, records, and other papers mentioned in section twenty-two hundred and nineteen, shall in no case be turned over to the authorities of any State, until such State has provided by law for the reception and safe-keeping of the same as public records, and for the allowance of free access to the same by the authorities of the United States."

"2222. Every surveyor-general, register, and receiver, except where the President sees cause otherwise to determine, is authorized to continue in the uninterrupted discharge of his regular official duties, after the day of expiration of his commission, and until a new commission is issued to him for the same office, or until the day when a successor enters upon the duties of such office; and the existing official bond of any officer so acting shall be deemed good and sufficient, and in force, until the date of the approval of a new bond to be given by him, if recommissioned, or otherwise, for the additional time he may so continue officially to act, pursuant to the authority of this section."

It is the contention of the Government that the action of the Secretary of the Interior with the approval of the President had the effect to discontinue the office as of July 1, 1909, and that in fact the office of surveyor general was discontinued after June 30, 1909. In the Sundry Civil Appropriation Act of March 4, 1909, 35 Stat. 945, 987, it was provided:

"To enable the Secretary of the Interior to complete the unfinished drafting and field-note writing pertaining to surveys in the States of Minnesota, North Dakota, and Louisiana, caused by the discontinuance of the offices of surveyors-general in those States, six thousand and five hundred dollars."

And in the appropriation bill for that year Congress

made no provision, such as had been customary in former years, for salaries of these officials.

The Court of Claims held that this act was effectual to abolish the office of surveyor general for Louisiana. We deem that a correct conclusion. It is true that repeals by implication are not favored. The repugnancy between the later act upon the same subject and the former legislation must be such that the first act cannot stand and be capable of execution consistently with the terms of the later enactment. As we view it, such conflict does appear in this instance.

It must be assumed that Congress was familiar with the action of the executive department undertaking to terminate the office, and when Congress acted upon the assumption that the office was abolished and provided for the unfinished work pertaining to the surveys, "caused by the discontinuance" of the office, such action was tantamount to a direct repeal of the act creating the office and had the effect to abolish it.

As to the part of Lewis' claim which is for fees, it is alleged in his petition, and found to be a fact by the Court of Claims, that during the entire period of his service as surveyor general he furnished copies of plats of surveys and transcripts from the records of his office to various individuals requiring them, receiving therefor compensation as authorized by § 5 of the Act of Congress of March 3, 1831, 4 Stat. 492, which is as follows:

"The surveyor general . . . shall be allowed an annual salary of two thousand dollars . . . and that the fees heretofore authorized by law for examining and recording surveys be, and the same are hereby, abolished; . . . and for every copy of a plat of survey, there shall be paid twenty-five cents, and for any transcript from the records of said office, there shall be paid at the rate of twenty-five cents for every hundred words by the individuals requiring the same."

It had been the custom of Lewis and his predecessors in office to retain these fees as their personal property, but by virtue of an order from the Commissioner of the General Land Office, the amounts realized from these fees between May 1, 1907, and June 30, 1909, being $2,287.80, were paid into the Treasury of the United States. It is appellant's contention that this amount is now due and owing Lewis' estate, under the terms of § 5 of the Act of March 3, 1831, above quoted, interpreted in the light of established custom.

Section 1765 of the Revised Statutes provides:

"No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation." Claimant contends that this section shows no intention to interfere with the enjoyment of any emoluments already fixed by law, as the additional compensation, the receipt of which it prohibits, is compensation additional to "salary, pay, or emoluments . . . fixed by law or regulations." To establish that these fees were emoluments fixed by law, the claimant points to the Act of April 21, 1806, 2 Stat. 391, by § 9 of which it is provided: "The surveyor of the public lands, south of Tennessee, be, and he is hereby directed to appoint a principal deputy for each of the two land districts of the territory of Orleans . . . And each of the said principal deputies shall receive an annual compensation of five hundred dollars, and in addition thereto, the following fees, that is to say: for examining and recording the surveys executed by any of the deputies, at the rate of twenty-five cents for every mile of the boundary line of

such survey; and for a certified copy of any plot of a survey in the office, twenty-five cents."

This read in connection with the Act of March 3, 1831, is the foundation of this claim. The Act of 1831 provides that the surveyor general of the State of Louisiana shall have the same authority, and perform the same duties, as are vested in and required of the surveyor of the lands of the United States, south of the State of Tennessee, or of the principal deputy surveyors in the said State.

We are of opinion that § 1765 of the Revised Statutes, above quoted, prevents the allowance of the claim for fees. This section is general in its application, and fixes the compensation of officers of the United States at the salary established by law, unless the additional compensation is authorized and explicitly appropriated for. No such law or appropriation is shown in this case. The Act of March 3, 1831, made no disposition of the fees. After May, 1907, the Department required them to be paid into the Treasury. The Court of Claims correctly ruled that § 1765 controlled this part of the claim of appellant.

Judgment affirmed.

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

NEW YORK CENTRAL RAILROAD COMPANY *v.* WINFIELD.

ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

No. 321. Argued February 29, March 1, 1916; restored to docket for reargument November 13, 1916; reargued February 1, 1917.—Decided May 21, 1917.

The liabilities and obligations of interstate railroad carriers to make compensation for personal injuries suffered by their employees while engaged in interstate commerce are regulated both inclusively and exclusively by the Federal Employers' Liability Act; and, Congress having thus fully covered the subject, no room exists for state regulation, even in respect of injuries occurring without fault, as to which the federal act provides no remedy.

Therefore, an award made under the New York Workmen's Compensation Act for injuries not attributable to negligence, which were received by an employee of an interstate railroad carrier while both were engaged in interstate commerce, cannot be upheld.

168 App. Div. 351; 216 N. Y. 284, reversed.

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 brief, 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 VAN DEVANTER delivered the opinion of the court.

While in the service of a railroad company in the State of New York, James Winfield sustained a personal injury

whereby he lost the use of an eye. At that time the railroad company was engaging in interstate commerce as a common carrier and Winfield was employed by it in such commerce. The injury was not due to any fault or negligence of the carrier, or of any of its officers, agents or employees, but arose out of one of the ordinary risks of the work in which Winfield was engaged. He was a section laborer assisting in the repair of the carrier's main track and while tamping cross-ties struck a pebble which chanced to rebound and hit his eye. Following the injury he sought compensation therefor from the carrier under the Workmen's Compensation Law of the State [1] and an award was made to him by the state commission, one member dissenting. The carrier appealed and the award was affirmed by the Appellate Division of the Supreme Court, two judges dissenting, 168 App. Div. 351, and also by the Court of Appeals, 216 N. Y. 284. Before the commission and in the state courts the carrier insisted that its liability or obligation and the employee's right were governed exclusively by the Employers' Liability Act of Congress, c. 149, 35 Stat. 65; c. 143, 36 Stat. 291, and therefore that no award could be made under the law of the State. That insistence is renewed here.

It is settled that under the commerce clause of the Constitution Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it also is settled that when Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority.[2] Congress acted

[1] See *New York Central R. R. Co.* v. *White*, 243 U. S. 188.

[2] *Second Employers' Liability Cases*, 223 U. S. 1, 53–55; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hesterly*, 228 U. S. 702; *St. Louis, San Francisco & Texas Ry. Co.* v. *Seale*, 229 U. S. 156; *Taylor* v. *Taylor*, 232 U. S. 363; *Chicago, Rock Island & Pacific Ry. Co.* v. *Devine*, 239

upon the subject in passing the Employers' Liability Act, and the extent to which that act covers the field is the point in controversy. By one side it is said that the act, although regulating the liability or obligation of the carrier and the right of the employee where the injury results in whole or in part from negligence attributable to the carrier, does not cover injuries occurring without such negligence, and therefore leaves that class of injuries to be dealt with by state laws; and by the other side it is said that the act covers both classes of injuries and is exclusive as to both. The state decisions upon the point are conflicting. The New York court in the present case and the New Jersey court in *Winfield* v. *Erie R. R. Co.*, 88 N. J. L. 619, hold that the act relates only to injuries resulting from negligence, while the California court in *Smith* v. *Industrial Accident Commission*, 26 Cal. App. 560, and the Illinois court in *Staley* v. *Illinois Central R. R. Co.*, 268 Illinois, 356, hold that it has a broader scope and makes negligence a test,—not of the applicability of the act, but of the carrier's duty or obligation to respond pecuniarily for the injury.

In our opinion the latter view is right and the other wrong. Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the Nation as a whole is interested and there are weighty considerations why the controlling law should be uniform and not change at every state line. *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368, 378–379. It was largely in recognition of this that the Employers' Liability Act was enacted by Congress. *Second Employers' Liability Cases*, 223 U. S. 1, 51. It was drafted and passed shortly follow-

U. S. 52; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 41; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370; *Erie R. R. Co.* v. *New York*, 233 U. S. 671; *Southern Ry. Co.* v. *Railroad Commission*, 236 U. S. 439.

ing a message from the President advocating an adequate national law covering all such injuries and leaving to the action of the several States only the injuries occurring in intrastate employment. Cong. Rec., 60th Cong., 1st sess., 1347. And the reports of the congressional committees having the bill in charge disclose, without any uncertainty, that it was intended to be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws and to apply to them a national law having a uniform operation throughout all the States. House Report No. 1386 and Senate Report No. 460, 60th Cong., 1st sess. Thus, in the House Report it is said: "It [the bill] is intended in its scope to cover all commerce to which the regulative power of Congress extends . . . by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees. . . . A Federal statute of this character will supplant the numerous State statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the States."

True, the act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence, but this is because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where, the injury results from negligence imputable to it. Every part of the act conforms to this principle, and no part points to any purpose to leave the States free to require compensation where the act withholds it. By declaring in § 1 that the carrier shall be liable in damages for an injury to the employee "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier,

or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track," etc.,[1] the act plainly shows, as was expressly held in *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 501, that it was the intention of Congress to make negligence the basis of the employee's right to damages, and to exclude responsibility of the carrier to the employee for an injury not resulting from its negligence or that of its officers, agents or other employees. The same principle is seen also in § 3, which requires that where the carrier and the employee are both negligent the recovery shall be diminished in proportion to the employee's contribution to the total negligence, and in § 4, which regards injuries arising from risks assumed by the employee as among those for which the carrier should not be made to respond. The committee reports upon the bill show that this principle was adopted deliberately, notwithstanding there were those within and without the committees who looked with greater favor upon a different principle which puts negligence out of view and regards the employee as entitled to compensation wherever the injury is an incident of the service in which he is employed. A few years after the passage of the act a legislative commission drafted and the Committees on the Judiciary in the two houses of Congress favorably reported a bill substituting the latter principle for the other, Senate Report No. 553, 62d Cong., 2d sess., House Report No. 1441, 62d Cong., 3d sess., but that bill did not become a law.

That the act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court. Thus, in *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570, 576, and other cases, it is pointed out that the subject which the act covers is "the responsibility of

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[1] The act is printed in full in *Second Employers' Liability Cases*, 223 U. S. 1, 6–10.

interstate carriers by railroad to their employés injured in such commerce"; in *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, 66, 67, it is said that "we may not piece out this act of Congress by resorting to the local statutes of the State of procedure or that of the injury," that by it "Congress has undertaken to cover the subject of the liability of railroad companies to their employés injured while engaged in interstate commerce," and that it is "paramount and exclusive"; in *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 256, it is held that where it appears that the injury occurred while the carrier was engaged and the employee employed in interstate commerce the federal act governs to the exclusion of the state law; in *Seaboard Air Line Ry.* v. *Horton*, *supra*, pp. 501, 503, it is said not only that Congress intended "to exclude responsibility of the carrier to its employés" in the absence of negligence, but that it is not conceivable that Congress "intended to permit the legislatures of the several States to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employés, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer;" and in *Wabash R. R. Co.* v. *Hayes*, 234 U. S. 86, 89, it is said: "Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling and a recovery could not have been had under the common or statute law of the State; in other words, the Federal act would have been exclusive in its operation, not merely cumulative [citing cases]. On the other hand, if the injury occurred outside of interstate commerce, the Federal act was without application and the law of the State was controlling."

The act is entitled, "An Act Relating to the liability of common carriers by railroad to their employees in certain cases," and the suggestion is made that the words "in

certain cases" require that the act be restrictively construed. But we think these words are intended to do no more than to bring the title into reasonable accord with the body of the act, which discloses in exact terms that it is not to embrace all cases of injury to the employees of such carriers, but only such as occur while the carrier is engaging and the employee is employed in "commerce between any of the several States," etc. See *Employers' Liability Cases*, 207 U. S. 463.

Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several States require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no State is at liberty thus to interfere with the operation of a law of Congress. As before indicated, it is a mistake to suppose that injuries occurring without negligence are not reached or affected by the act, for, as is said in *Prigg* v. *Pennsylvania*, 16 Pet. 539, 617, "if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it." Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a regulation of the carriers' duty or obligation as to both. And the reasons which operate to prevent the

States from dispensing with compensation where the act requires it equally prevent them from requiring compensation where the act withholds or excludes it.

It follows that in the present case the award under the state law cannot be sustained.

Judgment reversed.

MR. JUSTICE BRANDEIS, dissenting.

I dissent from the opinion of the court; and the importance of the question involved induces me to state the reasons.

By the Employers' Liability Act of April 22, 1908, Congress provided, in substance, that railroads engaged in interstate commerce shall be liable in damages for their negligence resulting in injury or death of employees while so engaged. The majority of the court now holds that by so doing Congress manifested its will to cover the whole field of compensation or relief for injuries suffered by railroad employees engaged in interstate commerce; or, at least, the whole field of obligation of carriers relating thereto; and that it thereby withdrew the subject wholly from the domain of state action. In other words the majority of the court declares, that Congress by passing the Employers' Liability Act prohibited States from including within the protection of their general Workmen's Compensation Laws employees who *without fault on the railroad's part* are injured or killed while engaged in interstate commerce; although Congress itself offered them no protection. That Congress *could* have done this is clear. The question presented is: Has Congress done so? Has Congress so willed?

The Workmen's Compensation Law of New York here in question has been declared by this court to be among those which "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." *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 207. And this court has definitely formulated the rules which should govern in determining when a federal statute regulating commerce will be held to supersede state legislation in the exercise of the police power. These rules are:

1. "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Sherlock* v. *Alling*, 93 U. S. 99, 103.

2. "If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to regulation of Congress within the sphere of its delegated power. . . .

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." *Savage* v. *Jones*, 225 U. S. 501, 533.

3. "The question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 623.

Guided by these rules and the cases in which they have

been applied [1] we endeavor to determine whether Congress in enacting the Employers' Liability Act intended

[1] The following cases show that Congress, in legislating upon a particular subject of interstate commerce, will not be held to have inhibited by implication the exercise by the States of their reserved police power, unless such state action would actually frustrate or impair the intended operation of the federal legislation.

1. In *Sligh* v. *Kirkwood*, 237 U. S. 52, 62, it was held that the Federal Food and Drugs Act, dealing, among other things with shipment in interstate commerce of fruit in filthy, decomposed, or putrid condition, did not prevent a State from penalizing the shipment of citrus fruits "which are immature or otherwise unfit for consumption."

2. In *Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280, 293, it was held that Congress did not, by the passage of the Federal Safety Appliance Acts, dealing with the equipment of locomotives, as well as of cars, and the Act to Regulate Commerce, preclude the States from legislating concerning locomotive headlights, as to which Congress had not specifically acted.

3. In *Missouri, Kansas & Texas Ry. Co.* v. *Harris*, 234 U. S. 412, 420, it was held that the Carmack Amendment (34 Stat. 584, 595), regulating the carrier's liability for loss of interstate shipments, did not prevent a State from providing for the allowance of a moderate attorney's fee in a statute applicable both in the case of interstate and intrastate shipments.

4. In *Savage* v. *Jones*, 225 U. S. 501, 529, it was held that the passage by Congress of the Food and Drugs Act of 1906, which, among other things, prohibited misbranding, did not prevent the States from regulating the sale and requiring to be affixed a statement of ingredients and minimum percentage of fat and proteins.

5. In *Missouri Pacific Ry. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, 623, it was held that Congress, by granting, in the Act to Regulate Commerce, power to the Interstate Commerce Commission to compel equal switching service on cars destined to interstate commerce, did not, in the absence of the exercise by the Commission of its power, prohibit States from legislating on the subject.

6. In *Asbell* v. *Kansas*, 209 U. S. 251, 257, it was held that Congress, in providing that a certificate of inspection issued by the National Bureau of Animal Industry should entitle cattle to be shipped into any State without further inspection, did not prevent a State from penalizing the importation of cattle which had not been inspected either by the federal bureau or by designated state officials.

to prevent States from entering the specific field of compensation for injuries to employees arising *without fault*

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7. In *Crossman* v. *Lurman*, 192 U. S. 189, 199, it was held that the Act of Congress of August 30, 1890, 26 Stat. 414, prohibiting importation into the United States of adulterated and unwholesome food, did not prevent the States from legislating for the prevention of the sale of articles of food so adulterated, as come within valid prohibitions of their statutes.

8. In *Reid* v. *Colorado*, 187 U. S. 137, 149, it was held that Congress, by making it an offence under the Animal Industry Act for anyone to send from State to State cattle known to be affected with communicable disease, did not prevent the States from penalizing the importation of cattle without inspection by designated state officials.

9. In *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 623, it was held that the Federal Animal Industry Act, making it a misdemeanor for any person or corporation to transport cattle known to be affected with contagious disease, did not prevent a State from imposing a civil liability for damages sustained by owners of domestic cattle by reason of the importation of such diseased cattle.

10. In *Smith* v. *Alabama*, 124 U. S. 465, 482, it was held that Congress did not, by the passage of the Act to Regulate Commerce, prohibit the States from enacting laws requiring persons to undergo examination before being permitted to act as locomotive engineers.

11. In *Sherlock* v. *Alling*, 93 U. S. 99, it was held that Congress did not, by the passage of many laws regulating navigation, with a view to safety, and providing for liability in certain cases, prohibit the application to an accident in navigable waters of a State of a statute providing for liability for wrongful death.

The following cases, holding that the Federal Employers' Liability Act supersedes the common or statutory laws of the States relating to the liability of railroads for negligent injuries to their employees while engaged in interstate commerce, are, of course, wholly consistent with the cases above referred to, the "field" of both federal and state laws there under consideration being identical: *Second Employers' Liability Cases*, 223 U. S. 1, 55; *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570, 576; *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, 66; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hesterly*, 228 U. S. 702, 704; *St. Louis, San Francisco & Texas Ry. Co.* v. *Seale*, 229 U. S. 156; *Taylor* v. *Taylor*, 232 U. S. 363, 368; *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 501; *Wabash R. R. Co.* v. *Hayes*, 234 U. S. 86, 89; *Toledo, St. Louis & Western R. R. Co.* v. *Slavin*, 236 U. S. 454, 458; *St.*

on the railroad's part, for which Congress made no provision.

To ascertain the intent we must look, of course, first at what Congress has said; then at the action it has taken, or omitted to take. We look at the words of the statute to see whether Congress has used any, which in terms express that will. We enquire whether, without the use of explicit words, that will is expressed in specific action taken. For Congress must be presumed to have intended the necessary consequences of its action. And if we find that its will is not expressed, or is not clearly expressed, either in words or by specific action, we should look at the circumstances under which the Employers' Liability Act was passed; look, on the one hand, at its origin, scope and purpose; and, on the other, at the nature, methods and means of state Workmen's Compensation Laws. If the will is not clearly expressed in words we must consider all these in order to determine what Congress intended.

First—As to words used: The act contains no words expressing a will by Congress to cover the whole field of compensation or relief for injuries received by or for death of such employees while engaged in interstate commerce; or the whole field of carriers' obligations in relation thereto. The language of the act, so far as it indicates anything in this respect, points to just the contrary. For its title is: "An Act Relating to the liability of common carriers by railroad to their employees in certain cases." [1]

Louis, Iron Mountain & Southern Ry. Co. v. *Craft*, 237 U. S. 648; *Chicago, Rock Island & Pacific Ry. Co.* v. *Devine*, 239 U. S. 52, 54; *Chicago, Rock Island & Pacific Ry. Co.* v. *Wright*, 239 U. S. 548, 551; *Seaboard Air Line Ry.* v. *Kenney*, 240 U. S. 489, 493; *Osborne* v. *Gray*, 241 U. S. 16, 19.

[1] The title of this act may be profitably compared with that of the bill (not enacted) prepared by the Employers' Liability and Workmen's Compensation Commission pursuant to Joint Resolution No. 41, approved June 25, 1910, 36 Stat. 884, proposing a Federal Workmen's Compensation Law, which reads: "A bill to provide an exclusive remedy

Second—As to specific action taken: The power exercised by Congress is not such that, when exercised, it *necessarily* excludes the state action here under consideration. It would obviously have been possible for Congress to provide in terms, that wherever such injuries or death result from the railroad's negligence, the remedy should be sought by action for damages; and wherever injury or death results from causes other than the railroad's negligence, compensation may be sought under the Workmen's Compensation Laws of the States. Between the federal and the state law there would be no conflict whatsoever. They would, on the contrary, be complementary.

Third—As to origin, purpose and scope of the Employers' Liability Act and the nature, methods and means of state Workmen's Compensation Laws: The facts are of common knowledge. Do they manifest that, by entering upon one section of the field of indemnity or relief for injuries or death suffered by employees engaged in interstate commerce, Congress purposed to occupy the whole field?

(A) *The origin of the Federal Employers' Liability Act:*

By the common law as administered in the several States, the employee, like every other member of the community, was expected to bear the risks necessarily attendant upon life and work; subject only to the right to be indemnified for any loss inflicted by wrongdoers. The employer, like every other member of the community, was in theory liable to all others for loss resulting from his wrongs; the scope of his liability for wrongs being amplified by the doctrine of *respondeat superior*. This legal liability, which in theory applied between employer and employee as well as between others, came, in course of

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and compensation for accidental injuries resulting in disability or death, to employees of common carriers by railroad engaged in interstate or foreign commerce, or in the District of Columbia, and for other purposes." Sen. Doc. 338, p. 107, 62d Cong. 2d sess.

time, to be seriously impaired in practice. The protection it provided employees seemed to wane as the need for it grew. Three defenses—the doctrines of fellow servant's negligence, of assumption of risk and of contributory negligence—rose and flourished. When applied to huge organizations and hazardous occupations, as in railroading, they practically abolished the liability of employers to employees; and in so doing they worked great hardship and apparent injustice. The wrongs suffered were flagrant; the demand for redress insistent; and the efforts to secure remedial legislation widespread. But the opponents were alert, potent and securely entrenched. The evils of the fellow-servant rule as applied to railroads were recognized as early as 1856, when Georgia passed the first law abolishing the defense. Between the passage of that act and the passage of the first Federal Employers' Liability Act (Act of June 11, 1906, 34 Stat. 232), fifty years elapsed. In those fifty years only four more States had wholly abolished the defense of fellow servant's negligence. Furthermore, in only one State had a statute been passed making recovery possible, where the employee had been guilty of contributory negligence.[1] Meanwhile, the num-

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[1] At the time the first Federal Employers' Liability Act was passed the so-called common law defenses remained in force, in large part, in most of the States, as to railroad employees.

A. *The Fellow Servant Rule.* (See Compilation of Statutes in "Liability of Employers," Senate Hearings, 1906, pp. 183–288; and in Senate Document No. 207, 60th Congress, 1st sess.)

(1) It had been completely abolished as to railroad employees in only 5 States: Georgia (1856), Kansas (1874), North Carolina (1897), Colorado (1901), North Dakota (1903).

(2) It remained in full force, or substantially so, in 25 States or Territories: Arizona, California, Connecticut, Delaware, Idaho, Illinois, Kentucky, Louisiana, Michigan, Maine, Maryland, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wyoming.

ber of accidents to railroad employees had become appalling. In the year 1905–6 the number killed while on duty was 3,807, and the number injured 55,524.[1] The promoters of remedial action, unable to overcome the efficient opposition presented in the legislatures of the several States, sought and secured the powerful support of the President.[2] Congress was appealed to and used its power

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(3) In 16 other States it had been modified; abolished either as to certain more dangerous kinds of work, or as to certain classes of employees: Alabama, Arkansas, Florida, Indiana, Iowa, Massachusetts, Minnesota, Mississippi, Missouri, New York, Oregon, South Carolina, Texas, Utah, Virginia, Wisconsin.

(4) The passage of the first federal act immediately stimulated further state legislation. In 1907 the fellow-servant rule was abolished as to railroads in Arkansas, Nevada, Oklahoma, South Dakota; and largely in California, Nebraska, Pennsylvania and Wisconsin.

B. *Contributory Negligence.* (See compilations cited, *supra.*)

(1) In all but 1 State there had been no statutory change of the rule that contributory negligence constituted a complete defense. Georgia (1895) had substituted the comparative negligence doctrine. In Kansas and Illinois early cases at common law seeming to apply this doctrine had been repudiated. The common law of Tennessee also contained some traces of the doctrine.

(2) During the year following the passage of the first federal act, which adopted the rule of comparative negligence, with mitigation of damages proportionate to the degree of plaintiff's negligence, several States introduced this modification: Nebraska, Nevada, North Dakota, South Dakota, Wisconsin.

C. *Assumption of Risk.* (See the compilations cited, *supra.*)

The harshness of this rule had been mitigated by statute or other statutory action taken in only 14 States: Alabama, California, Colorado, Georgia, Massachusetts, Mississippi, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Virginia. In 1907 Iowa abolished the rule as to employees giving notice of a known defect.

[1] See Report of Interstate Commerce Commission for the year 1906. Summary of Casualties, Table A, p. 161.

[2] President's Messages, December 2, 1902; December 6, 1904; December 5, 1905; January 31, 1908.

over interstate commerce to afford relief. The promotion of safety was of course referred to in the Committee's report as justifying congressional action; but the moving cause for the Federal Employers' Liability Act was not the desire to promote safety or to secure uniformity, as in standardizing equipment by the Safety Appliance Acts.[1] There was, in the nature of things, no more reason for providing a federal remedy for negligent injury to employees than there would have been for providing such a remedy for negligent injury to passengers or to other members of the public. The Federal Employers' Liability Act was, in a sense, emergency legislation. The circumstances

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[1] The following facts are significant as showing that employers' liability was not deemed a factor in safety to employees or the public, or a matter in which uniformity was desirable, or as otherwise presenting a railroad problem:

(1) The Annual Reports of the Interstate Commerce Commission to Congress for the eleven years ending December, 1908, deal each year at large with accidents, casualties to employees, and the promotion of safety. These reports contain numerous recommendations for legislation concerning safety appliances, hours of labor, block signals, train control, inspection and accident reporting; but no recommendation or even mention of employers' liability.

(2) The National Convention of Railroad Commissioners, an association comprising the commissioners of the several States, is formed for the purpose of discussing and aiding in the solution of American railroad problems. Likewise, in its reports for eleven years ending October, 1908, no reference has been found, either in the annual President's address, or in the report of the Committee on Legislation, or in the discussions, to the subject of employers' liability; or any mention of the passage by Congress of the two Employers' Liability Acts, or of the decision of this court on the first act.

The absence of such reference is particularly noteworthy in the legislative report for the year 1908, pp. 218–233, which is devoted to a consideration of harmonious or uniform legislation. It contains a résumé of the legislation in Congress recommended and supported by the National Convention of Railroad Commissioners during a period of 19 years and attendances at congressional hearings on safety appliances, block signal, and hours of labor legislation.

attending its passage were such as to preclude the belief that thereby Congress intended to deny to the States the power to provide for compensation or relief for injuries not covered by it.

(B) *The scope of the Federal Employers' Liability Act:*

(1.) The act leaves uncovered a large part of the injuries which result from the railroads' negligence. The decision of this court in the first *Employers' Liability Cases*, 207 U. S. 463, had declared that Congress lacked power to legislate in respect to any injuries occurring otherwise than to employees *engaged* in interstate commerce. Later decisions disclose how large a part of the injuries resulting from the railroads' negligence are thus excluded from the operation of the federal law. For the act was held to apply only to those *directly* engaged in interstate commerce. This excludes not only those engaged in intrastate commerce, but also the many who—while engaged on work *for* interstate commerce, as in repairing engines or cars—are not directly engaged *in* it. Likewise it excludes employees who, though habitually engaged directly in interstate commerce, *happen* to be injured or killed through the railroads' negligence, while performing some work in intrastate commerce.[1]

(2.) The act leaves uncovered all of the injuries which result *otherwise* than from the railroad's negligence, though occurring when the employee is engaged directly in interstate commerce.

The scope of the act is so narrow as to preclude the belief that thereby Congress intended to deny to the States

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[1] Compare *Illinois Central R. R. Co.* v. *Behrens*, 233 U. S. 473; *New York Central & Hudson River R. R. Co.* v. *Carr*, 238 U. S. 260; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439; *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556; *Chicago, Burlington & Quincy R. R. Co.* v. *Harrington*, 241 U. S. 177; *Erie R. R. Co.* v. *Welsh*, 242 U. S. 303; *Raymond* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 243 U. S. 43.

the power to provide compensation or relief for injuries not covered by it.

(C) *The purpose of the Employers' Liability Act:*

The facts showing the origin and scope of the act discussed above indicate also its purpose. It was to end the denial of the right to damages for injuries due to the railroads' negligence—a right denied under judicial decisions through the interposition of the defenses of fellow-servant, assumption of risk and contributory negligence. It was not the purpose of the act to deny to the States the power to grant *the wholly new right* to protection or relief in the case of injuries suffered otherwise than through fault of the railroads.

The Federal Employers' Liability Act was, in no respect, a departure from the individualistic basis of right and of liability. It was, on the contrary, an attempt to enforce truly and impartially the old conception of justice as between individuals. The common-law liability for fault was to be restored by removing the abuses which prevented its full and just operation. The liability of the employer, under the federal act as at common law, is merely a penalty for wrong doing. The remedy assured to the employee is merely a more efficient means of making the wrongdoer indemnify him whom he has wronged. This limited purpose of the Employers' Liability Act precludes the belief that Congress intended thereby to deny to the States the power to provide compensation or relief for injuries not covered by the act.

(D) *The nature of Workmen's Compensation Acts:*

In the effort to remove abuses, a study had been made of facts; and of the world's experience in dealing with industrial accidents. That study uncovered as fiction many an assumption upon which American judges and lawyers had rested comfortably. The conviction became widespread, that our individualistic conception of rights and liability no longer furnished an adequate basis for dealing

with accidents in industry. It was seen that no system of indemnity dependent upon fault on the employers' part could meet the situation; even if the law were perfected and its administration made exemplary. For in probably a majority of cases of injury there was no assignable fault; and in many more it must be impossible of proof. It was urged: Attention should be directed, not to the employer's fault, but to the employee's misfortune. Compensation should be general, not sporadic; certain, not conjectural; speedy, not delayed; definite as to amount and time of payment; and so distributed over long periods as to insure actual protection against lost or lessened earning capacity. To a system making such provision, and not to wasteful litigation, dependent for success upon the coincidence of fault and the ability to prove it, society, as well as the individual employee and his dependents, must look for adequate protection. Society needs such a protection as much as the individual; because ultimately society must bear the burden, financial and otherwise, of the heavy losses which accidents entail. And since accidents are a natural, and in part an inevitable, concomitant of industry as now practiced, society, which is served thereby, should in some way provide the protection. To attain this end, coöperative methods must be pursued; some form of insurance—that is, some form of taxation. Such was the contention which has generally prevailed. Thus out of the attempt to enforce individual justice, grew the attempt to do social justice. But when Congress passed the Employers' Liability Act of April 22, 1908, these truths had gained little recognition in the United States. Not one of the thirty-seven States or Territories which now have Workmen's Compensation Laws had introduced the system. Yet the conception and value of compensation laws was not unknown to Congress. It then had under consideration the first Compensation Law for Federal Employees which was enacted

in the following month (Act of May 30, 1908, 35 Stat. 556). The need of its speedy passage had been called to the attention of Congress by the President in the same special message which urged the passage of this Employers' Liability Act.

Can it be contended that Congress by simply passing the Employers' Liability Act prohibited the States from providing in *any* way for the maintenance of such employees (and their dependents) for whose injuries a railroad, innocent of all fault, could not be called upon to make indemnity under that act? It is the State which is both primarily and ultimately concerned with the care of the injured and of those dependent upon him; even though the accident may occur while the employee is engaged directly in interstate commerce. Upon the State falls the financial burden of dependency, if provision be not otherwise made. Upon the State falls directly the far heavier burden of the demoralization of its citizenry, and of the social unrest, which attend destitution and the denial of opportunity. Upon the State also rests under our dual system of government the duty owed to the individual to avert misery and promote happiness so far as possible. Surely we may not impute to Congress the will to deny to the States the power to perform either this duty to humanity or their fundamental duty of self-preservation. And if the States are left free to provide compensation, what is there in the Employers' Liability Act to show an intent on the part of Congress to deny to them the power to make the provision by raising the necessary contributions, in the first instance, through employers?

(E) *Methods and means of Workmen's Compensation Laws:*

The principle underlying Workmen's Compensation Laws is the same in all the States. The methods and means by which that principle is carried out vary materially. The principle is that of insurance, the premiums

to which are contributed by employers generally. How the insurance fund shall be raised and administered; what the scale of compensation or relief shall be; how the contributing groups of employers shall be formed; whether or not a state fund shall be created; whether the individual employer shall be permitted to become a self-insurer; whether he shall be permitted to deal directly with the employee in making settlement of the compensation to be awarded; on all these questions the laws of the several States do and properly may differ radically.

What methods and means the State shall adopt in order to provide compensation for injuries to citizens or residents where Congress has left it free to legislate, rests (subject to constitutional limitations) wholly within the judgment of the State. It might conclude, in view of the hazard involved, that no one should engage in the occupation of railroading without providing against the financial consequences of accidents through contributing an adequate amount to an accident insurance fund. It might conclude that it was wise to make itself the necessary contributions to such a fund, out of monies raised from general taxation. Or it might conclude, as the State of Washington did, that the fairest and wisest form of taxation for the purpose was to impose upon the employer directly the duty of making the required contributions—relying upon the laws of trade to effect, through the medium of transportation charges, an equitable distribution of the burden. The method last suggested is pursued in substance also by the State of New York. In its essence the laws of the States are the same in this respect, as is shown in *Mountain Timber Co.* v. *Washington*, 243 U. S. 219. It is misleading to speak of the new obligation of the employer to contribute to compensation for injuries to workmen as an increase of the "employer's liability." It is not a liability for a violation of a duty. It is a direct—a primary—obligation in the nature of a tax. And the right

of the employee is as free from any suggestion of wrong done to him as the new right granted by Mothers' Pension Laws.

(F) *Federal and State legislation are not in conflict.*

The practical difficulty of determining in a particular case, according to presence or absence of railroad fault, whether indemnity is to be sought under the Federal Employers' Liability Act or under a state compensation law—affords, of course, no reason for imputing to Congress the will to deny to the States power to afford relief through such a system. The difficulty and uncertainty is, at worst, no greater than that which now exists in so many cases where it is necessary to determine whether the employee was, at the time of the accident, engaged in interstate or intrastate commerce.[1] Expedients for minimizing inherent difficulties will doubtless be found by experience. All the difficulties may conceivably be overcome in practice. Or they may prove so great as to lead Congress to repeal the Federal Employers' Liability Act and leave to the States (which alone can deal comprehensively with it) the whole subject of indemnity and compensation for injuries to employees whether engaged in interstate or intrastate commerce, and whether such injuries arise from negligence or without fault of the employer.

We are admonished also by another weighty consideration not to impute to Congress the will to deny to the States this power. The subject of compensation for

[1] The number of cases on the October 1915 term of this court was 1069. Of these 93 involved one or more questions arising under the Federal Employers' Liability Act of April 22, 1908. Of these 93 cases, 37 presented the question whether or not the employee was engaged in *inter*state commerce or *intra*state commerce. In 52 of the cases the question was presented whether there was evidence of negligence on the part of defendant. In 24 of the cases the question was also presented whether or not the employee had assumed the risk.

accidents in industry is one peculiarly appropriate for state legislation. There must, necessarily, be great diversity in the conditions of living and in the needs of the injured and of his dependents, according to whether they reside in one or the other of our States and Territories, so widely extended. In a large majority of instances they reside in the State in which the accident occurs. Though the principle that compensation should be made, or relief given, is of universal application, the great diversity of conditions in the different sections of the United States may, in a wise application of the principle, call for differences between States, in the amount and method of compensation, the periods in which payment shall be made, and the methods and means by which the funds shall be raised and distributed. The field of compensation for injuries appears to be one in which uniformity is *not* desirable, or at least not essential to the public welfare.

The contention that Congress has, by legislating on one branch of a subject relative to interstate commerce, preëmpted the whole field—has been made often in this court; and, as the cases above cited show, has been repeatedly rejected in cases where the will of Congress to leave the balance of the field open to state action was far less clear than under the circumstances here considered. Tested by those decisions and by the rules which this court has framed for its guidance, I am of opinion, as was said in *Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280, 294, that: "The intent to supersede the exercise of the State's police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken." The field covered by Congress was a limited field of the carrier's liability for negligence, not the whole field of the carrier's obligation arising from accidents. I find no justification for imputing to Congress the will to deny to a large class of persons engaged in a necessarily

hazardous occupation [1] and otherwise unprovided for the protection afforded by beneficent statutes enacted in the long-deferred performance of an insistent duty and in a field peculiarly appropriate for state action.

MR. JUSTICE CLARKE concurs in this dissent.

ERIE RAILROAD COMPANY *v.* WINFIELD.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

No. 353. Argued March 1, 1916; restored to docket for reargument November 13, 1916; reargued February 1, 2, 1917.—Decided May 21, 1917.

The duty of interstate railroad carriers to make compensation for injury or death of their employees in interstate commerce is regulated uniformly and exclusively by the Federal Employers' Liability Act and is thereby confined to cases of causal negligence. *New York Central R. R. Co.* v. *Winfield, ante*, 147.

It is beyond the power of any State to interfere with the operation of the federal act, either by putting carriers and their employees to an election between its provisions and those of a state statute or by imputing such an election to them through a statutory presumption. So *held* in the case of a New Jersey law containing provisions for compensation without regard to negligence, to be applicable when employer and employee elect to accept them, and presuming acceptance in the absence of a declaration to the contrary.

In leaving the yard after his day's work in switching inter- and intrastate commerce, the employee is "engaged in interstate commerce."

88 N. J. L. 619, reversed.

THE case is stated in the opinion.

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[1] The experience of the organization [Brotherhood of Locomotive Firemen and Enginemen] shows that more than 60 per cent. of all deaths and disabilities are caused by railroad accidents. W. S. Carter, Sen. Doc. 549, p. 137, 64th Cong. 1st sess.

Mr. George S. Hobart and *Mr. Gilbert Collins* for plaintiff in error.

Mr. Harry Lane for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a proceeding under a New Jersey statute, c. 95, Laws 1911, against a common carrier by railroad, engaged in both interstate and intrastate commerce, to obtain compensation for the death of one of its employees. The employee was in charge of a switch engine in the carrier's extensive yard at Croxton, New Jersey, and was switching freight cars about in the yard, especially to and from a transfer station. The cars usually contained package freight and many were moved in the course of a day's work. In some the freight was interstate, in others intrastate and in still others it was of both classes. This was true of the cars moved on the day in question. In concluding his work for that day the employee took his engine to the place where it was to remain for the night and started to leave the yard. His route lay across some of the tracks and while passing over one he was struck by an engine and received injuries from which he soon died. No causal negligence was alleged or proved and both parties assumed there was none. In these circumstances the trial judge, while not doubting that the fatal injury occurred in the course of the deceased's employment, held that he was not then employed in interstate commerce and that compensation should be made under the state statute to the widow. A judgment in her favor was entered, but was reversed by the Supreme Court of the State, which concluded that the deceased's employment at the time of the injury was in interstate commerce and that the case was controlled by the Employers' Liability Act

of Congress, which makes negligence the test of the carrier's liability or obligation. That judgment was in turn reversed by the Court of Errors and Appeals, which, although assuming "that the conclusion of the Supreme Court as to the character" of the deceased's employment at the time of the injury "was justified by the facts proved," regarded the federal act as without bearing, because affording no remedy and imposing no liability in the absence of causal negligence. 88 N. J. L. 619.

The questions presented for decision are these: First, whether the federal act is regulative of the carrier's liability or obligation in every instance of the injury or death of one of its employees in interstate commerce, or only in those instances where there is causal negligence for which the carrier is responsible. Second, whether the facts proved sustain the conclusion that the deceased was employed in interstate commerce at the time of the injury. Third, whether by reason of the state statute the carrier became bound contractually to make compensation in this instance, even though it came within the federal act.

The first question is fully considered in *New York Central R. R. Co.* v. *Winfield*, the opinion in which has been just announced, *ante*, 147, and it suffices here to say that, for the reasons there given, we are of opinion that the federal act proceeds upon the principle which regards negligence as the basis of the duty to make compensation and excludes the existence of such a duty in the absence of negligence, and that Congress intended the act to be as comprehensive of those instances in which it excludes liability as of those in which liability is imposed. It establishes a rule or regulation which is intended to operate uniformly in all the States, as respects interstate commerce, and in that field it is both paramount and exclusive.

The second question must be given an affirmative an-

swer. In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. See *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 260. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for present purposes of no importance.

The third question requires some notice of the New Jersey statute. It consists of two parts. One conforms to the principle which regards negligence as the basis of liability and excludes liability in the absence of negligence. In its details, however, that part differs materially from the federal act. The other conforms to a different principle which rejects negligence as a basis of liability and requires compensation to be made by the employer wherever the injury or death of the employee is an incident of the service in which he is employed. This part is described as "elective" and is not to be applied unless the employer and the employee shall have agreed, expressly or impliedly, to be bound thereby and to surrender "their rights to any other method, form or amount of compensation or determination thereof." Respecting the mode of manifesting such an agreement or the contrary, it is provided that every contract of hiring "shall be presumed to have been made" with reference to this part of the statute and, unless the contract or a notice from one party to the other contain "an express statement in writing" to the contrary, it "shall be presumed" that the parties "have agreed to be bound" by this part of the statute. There was no express agreement in this instance and there is no

basis for regarding the carrier as in any way bound by this part of the statute, save as it provides that an agreement to be bound by it shall be presumed in the absence of a declaration to the contrary. But such a presumption cannot be indulged here, and this for the reason that by the federal act the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of state laws. It is beyond the power of any State to interfere with the operation of that act, either by putting the carriers and their employees to an election between its provisions and those of a state statute or by imputing such an election to them by means of a statutory presumption. The third question therefore must be answered in the negative.

It follows that the Court of Errors and Appeals erred in failing to give controlling effect to the federal act.

Judgment reversed.

MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE dissent.

LANE, SECRETARY OF THE INTERIOR, *v.* HOGLUND.

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

No. 365. Argued April 11, 1917.—Decided May 21, 1917.

Section 7 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099, lays upon the Secretary of the Interior a plain duty to cause a patent to be issued upon a homestead entry when no contest or protest proceeding has been initiated and no order has been made, in his Department, for the purpose of challenging the validity of the entry, within two years from the issuance of the final receiver's receipt.

An adverse report by a deputy supervisor of a National Forest, challenging a homestead entry within the forest for insufficiency of residence and cultivation, but merely filed in the General Land Office and not acted on until after the two year limitation period had expired, *Held* not a "pending contest or protest" within the meaning of § 7 of the Act of March 3, 1891, *supra*.

Notwithstanding its reluctance to award or sustain a writ of mandamus against an executive officer, the court is constrained to do so where the duty sought to be enforced is plain and nondiscretionary and the situation exigent.

44 App. D. C. 310, affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful, with whom *Mr. S. W. Williams* was on the brief, for plaintiff in error.

Mr. F. W. Clements, with whom *Mr. B. E. Hinton* was on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a petition for a writ of mandamus against the Secretary of the Interior. In the court of first instance the writ was refused, but the Court of Appeals directed that it be granted, 44 App. D. C. 310, and our jurisdiction arises out of the fact that the construction of a statute of the United States and the duty of the Secretary of the Interior thereunder are drawn in question. The statute is the following provision in § 7 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099:

"That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preëmption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled

to a patent conveying the land by him entered, and the same shall be issued to him."

What is meant by a "pending contest or protest" is the question under the statute. The facts are not in dispute and are these:

In 1902 Svan Hoglund settled upon and made preliminary entry under the homestead law of a tract of public land in the Eureka land district in California. In 1905 the land was included within a national forest reserve by a proclamation of the President, 34 Stat. 3001, which contained the following excepting clause:

"Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; *Provided*, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing or settlement was made."

In due time thereafter, and after due notice by publication of his purpose so to do, Hoglund submitted final proof of compliance with the homestead law and of his right to obtain the title. The proof was accepted as satisfactory by the local officers and on August 6, 1907, a receiver's receipt and a register's certificate upon final entry were regularly issued to him.

May 29, 1909, a report from a deputy forest supervisor recommending the cancellation of the entry "on account of non-residence and lack of cultivation" was received at the General Land Office. The report indicated that the entryman was a single man, and had a three-room house, a small barn and some fencing on the land; that he had three acres plowed and under cultivation; that the land

had much valuable timber thereon, but none had been cut except for improvements, and that the entryman had established actual residence on the tract in June, 1902, but had really lived thereon only at unnamed periods, "going away to work for wages four or five months at a time." No action upon this report was taken until April 19, 1910. On that day, almost three years after the date of the receiver's receipt, the Commissioner of the General Land Office ordered a proceeding in the local land office to determine whether the entryman had established and maintained a residence upon the land. Notice of this was given to him—apparently it was his first information that his entry was called in question—and a hearing was had. The local officers and the Commissioner of the General Land Office in turn found the facts in his favor, but the Secretary of the Interior found them the other way and ruled that the entry was not confirmed or protected by the provision in § 7 of the Act of March 3, 1891, *supra*. 42 L. D. 405; 43 L. D. 538 and 540.

The Secretary directed that the entry be cancelled and the present petition was then filed. It prayed for a writ of mandamus commanding the Secretary to recall the order for the cancellation of the entry, to reinstate the entry upon the records and to cause a patent to be issued to the entryman.

For present purposes no importance attaches to the creation of the forest reserve after the primary and before the final entry. The entryman was free under the terms of the President's proclamation to proceed with the steps essential to obtain a final entry and ultimately the full title, and to such a final entry the statute—the provision in § 7—has the same application as if the land were without instead of within the reserve.

The statute makes it very plain that if at the expiration of two years from the date of the receiver's final receipt there is no "pending contest or protest" against the entry

its validity no longer may be called in question—in the words of the act, "the entryman shall be entitled to a patent . . . and the same shall be issued to him." The purpose to fix his right and to command its recognition is obvious. What, then, is the "pending contest or protest" which is to exclude a subsisting entry from this statute of limitation and repose? Is it some proceeding which is begun, ordered or set in motion in the interest of another claimant or of the public to test or determine the validity of the entry? Or may it be a mere report, letter or other communication, confidential or otherwise, which has not been and may never be acted upon, which may be neither known nor accessible to the entryman, or which may be so general, vague or intemperate in its statements as not in itself to merit attention? Independently of the occasion for the enactment and of the practice of the Land Department, there hardly could be any difference of opinion about the answer. And when these are understood we think there is no room whatever for a difference; in short, the reference is to a proceeding against the entry and not to some communication which at most is only suggestive of the propriety of such a proceeding and may never become the basis of one.

As applied to public land affairs the term "contest" has been long employed to designate a proceeding by an adverse or intending claimant conducted in his own interest against the entry of another, and the term "protest" has been commonly used to designate any complaint or objection, whether by a public agent or a private citizen, which is intended to be and is made the basis of some action or proceeding in the public right against an existing entry. This explains the use in the statute of both terms in the disjunctive, and accords with the instructions of May 8, 1891, 12 L. D. 450, wherein each term is spoken of as meaning a "proceeding" under the Rules of Practice to cancel or defeat an entry, and wherein it is said that

"when there are no proceedings initiated within that time [the two years] by the government or individuals the entryman shall be entitled to patent." The same view is shown in the supplemental instructions of July 1, 1891, 13 L. D. 1, wherein the Secretary said to the Commissioner: "You will, therefore, approve for patent all entries against which no proceedings were begun within the period of two years from the date of the final certificate, but where proceedings have been, or shall be, begun within the specified period, the entry will be held to have been taken out of the operation of this statute, and such cases will proceed to final judgment as heretofore."

Subject to some exceptions and qualifications which need not be specially noticed, this continued to be the view and practice of the Land Department for many years and in conformity therewith many thousands of entries were carried to patent or otherwise as their particular facts caused them to fall upon one side of the line or the other. But in the case of *Mertie C. Traganza*, 40 L. D. 300, decided November 17, 1911, a sharp departure was taken from the earlier view and it was held that the statute has "no reference to proceedings by the United States, or its officers or agents" against such entries and does "not affect the conduct or action of the Land Department in taking up and disposing of final proof of entrymen after the lapse of the two years mentioned in the act." That view, however, did not long have the approval of the Department. In the case of *Jacob A. Harris*, 42 L. D. 611, decided December 13, 1913, the subject was reconsidered, attention being given to the occasion for the enactment and to its prior administration, and the conclusion was reached that the earlier view, long maintained, was right and that the practice thereunder should be restored. In that case, as in this, a forest officer reported that the claimant had not established or maintained a residence upon the land, and no action was

taken on the report until after the expiration of the two-year period. But in that case the entry was held to be confirmed under the statute while here the ruling was the other way. Of the situation which prompted the enactment of the statute it was said in the decision in that case:

"The records of this Department disclose that, during several years preceding 1891, a very large number of entries were suspended by the General Land Office on vague and indefinite suggestions of fraud or noncompliance with law, to await investigation by special agents of that bureau. These suspensions were so numerous and the force available for investigation was so insufficient as to create a practical blockade in the issuance of patents to the serious prejudice of *bona fide* claimants under the public land laws. In many instances, the charge or suggestion upon which the suspension was ordered had no foundation of fact other than the proximity of the land to other tracts embraced in entries alleged to be fraudulent or otherwise illegal. The reports of this Department to the public land committees of the Senate and House of Representatives, concerning this legislation, and the debates of those bodies thereon, leave no doubt of the purpose of Congress that said proviso should correct the hardship of this situation and provide against a repetition thereof."

And it was also said:

"Passed, primarily, to rectify a past and to prevent future abuses of the departmental power to suspend entries, the proviso is robbed of its essential purpose and practically repealed by the decision in the Traganza case. . . .

"Upon mature consideration, the Department is convinced that a contest or protest, to defeat the confirmatory effect of the proviso, must be a proceeding sufficient, in itself, to place the entryman on his defense or to require of him a showing of material fact, when served with notice thereof."

That decision was followed in *George Judicak*, 43 L. D. 246; *Joseph Crowther*, *ibid.* 262; Instructions, *ibid.* 294 and 322.

Looking, then, at the statute in the light of all that bears upon its purpose and meaning, we think it certainly and unmistakably lays upon the Secretary of the Interior, as the head of the Land Department, a plain duty to cause a patent to be issued to a homestead entryman whenever it appears, as concededly it did in this instance, that two years have elapsed since the issue of the receiver's receipt upon the final entry and that during that period no proceeding has been initiated or order made which calls in question the validity of the entry. In the exercise of its discretion Congress has said, in substance, by this statute that for two years after the entryman submits final proof and obtains the receiver's receipt the entry may be held open for the initiation of proceedings to test its validity, but that if none such be begun within that time it shall be passed to patent as a matter of course. Thus in a case like this, where according to the conceded facts no proceeding was begun within the prescribed period, there is no room for the exercise of discretion or judgment, but on the contrary a plain duty to see that the entryman receives a patent.

True this court always is reluctant to award or sustain a writ of mandamus against an executive officer, and yet cases sometimes arise when it is constrained by settled principles of law and the exigency of the particular situation to do so. *Kendall* v. *United States*, 12 Pet. 524; *United States* v. *Schurz*, 102 U. S. 378; *Roberts* v. *United States*, 176 U. S. 221; *Garfield* v. *Goldsby*, 211 U. S. 249; *Ballinger* v. *Frost*, 216 U. S. 240. And see *Noble* v. *Union River Logging Railroad Co.*, 147 U. S. 165; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94. This, we think, is such a case. As quite apposite we excerpt the following from the unanimous opinion in *Roberts* v. *United States*, *supra*, p. 231:

"Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

We therefore conclude that the Court of Appeals rightly directed that the writ be granted.

Judgment affirmed.

LEHIGH VALLEY RAILROAD COMPANY *v.* BARLOW.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 194. Argued April 20, 1917.—Decided May 21, 1917.

An employee is not engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act, when his work at the time of injury consists in placing cars owned by the carrier, containing its supply coal, upon an unloading trestle within its yards, and when the interstate movement of the cars carrying the coal occurred as long as seventeen days previously and the cars, with the coal, in the meantime, have remained upon sidings and switches in the yards. *Chicago, Burlington & Quincy R. R. Co.* v. *Harrington*, 241 U. S. 177. 214 N. Y. 116, reversed.

THE case is stated in the opinion.

Mr. Peter F. McAllister, with whom *Mr. F. O. McCleary* was on the briefs, for plaintiff in error.

Mr. Clayton R. Lusk for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Basing his claim upon the Federal Employers' Liability Act, defendant in error sought damages for personal injuries. The New York Court of Appeals affirmed a judgment in his favor, 214 N. Y. 116, and the question now presented is whether there is evidence tending to show that he was injured while engaging in interstate commerce. The accident occurred July 27, 1912, when, as member of a switching crew, he was assisting in placing three cars containing supply coal for plaintiff in error on an unloading trestle within its yards at Cortland, New York. These

cars belonged to it and with their contents had passed over its line from Sayre, Pennsylvania. After being received in the Cortland yards—one July 3 and two July 10—they remained there upon sidings and switches until removed to the trestle on the twenty-seventh.

We think their interstate movement terminated before the cars left the sidings, and that while removing them the switching crew was not employed in interstate commerce. The essential facts in *Chicago, Burlington & Quincy R. R. Co.* v. *Harrington*, 241 U. S. 177, did not materially differ from those now presented. There we sustained a recovery by an employee, holding he was not engaged in interstate commerce; and that decision is in conflict with the conclusion of the Court of Appeals. The judgment under review must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

SMITH ET AL. *v.* THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW MEXICO.

No. 214. Argued April 24, 25, 1917.—Decided May 21, 1917.

Where lands, allotted as part of a Mexican community grant and for many years occupied, improved and claimed in good faith under color of such allotments and mesne conveyances, were excluded from the grant by a decree of the Court of Private Land Claims determining its boundaries, *Held*, that a continuance of such occupancy under the same and later mesne conveyances, with knowledge of the decree, was not a trespass of the character forbidden by the act to prevent unlawful occupancy of public lands (February 25, 1885, c.

149, 23 Stat. 321), but came within the exceptions of that act as an occupancy under claim and color of title made or acquired in good faith.

20 N. Mex. 264, affirmed.

THE case is stated in the opinion.

Mr. F. G. Morris, with whom *Mr. W. B. Grant* was on the briefs, for plaintiffs in error.

Mr. W. H. Winter, with whom *Mr. A. Seymour Thurmond*, *Mr. J. H. Paxton* and *Mr. R. L. Young* were on the brief, for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Defendants in error brought suit in the District Court, Dona Ana County, New Mexico, seeking judgment against plaintiff in error Smith upon his three notes for forty-five hundred dollars ($4,500) each and also foreclosure of the mortgage upon lands in that county given to secure them. Recovery was resisted upon the ground that although Smith was in actual possession of the lands under deed from Reinhart they belonged to the United States and were unlawfully in the vendor's possession when so conveyed without *bona fide* claim or color of title, contrary to the Act of Congress approved February 25, 1885, 23 Stat. 321; and that the notes were given in part payment therefor. The state Supreme Court affirmed a judgment in the bank's favor. Quotations from its statement will suffice to indicate the essential facts (20 N. Mex. 264):

"In 1851 the government of Mexico granted certain lands now embraced within the limits of Dona Ana County, this state, to the Colony of Refugio. The grant was similar to many others found in this state. Settlements were made upon it by many people, and individual

allotments were made from time to time by the commissioners.

"The territorial legislature, by the Act of March 7th, 1884, constituted the owners of lands within the limits of the grant a body corporate and politic under the name and style of the Grant of the Colony of Refugio, under which they were authorized by said act to sue and be sued and have perpetual succession.

"Many years ago the lands involved in this litigation, embracing some 400 acres were allotted to ten individuals, who subsequently, by separate deeds of conveyance, transferred the same to Leon Alvarez, probably some time in the 80's, but the date is wholly immaterial. From that time to 1909 various deeds were executed to divers parties, all of whom had possession and cultivated and improved the lands. Something like six or seven thousand dollars, possibly more, have been expended in improvements on the land in constructing irrigation ditches. In 1909 W. H. Reinhart claimed to be the owner of the lands, under deeds of conveyance, and was in possession of the same. In that year he conveyed the same to D. B. Smith, the appellant here, receiving perhaps one-half of the purchase money in cash, and to secure the balance took Smith's promissory notes, secured by a mortgage on the real estate. The notes aggregated $13,500.00. It is not disputed that Reinhart was the owner of said lands if the original allottees were invested with the legal title to the same.

"Some time prior to 1893, the grant was surveyed by Elkins & Marmon, and the lands in question here were within the limits of that survey. In 1893, the commissioners of the grant, acting under the power and authority conferred by the Act of March 7, 1884, instituted proceedings in the United States Court of Private Land Claims to have the title of said grant confirmed and settled. Leon Alvarez was one of the commissioners of the grant

at that time and acting as such. The title of the grant was confirmed and a survey was ordered to determine what lands were embraced within the limits of the same. This survey was made by the Surveyor General of New Mexico and reported to the court, and the title to the lands so embraced within the limits of such survey was confirmed in the Colony of Refugio. This survey, so made as aforesaid, embraced a smaller tract than did the Elkins & Marmon survey, and the lands in question here, together with other lands, were without the limits of the survey, made under the direction and by authority of the Court of Private Land Claims. The judgment of the Court of Private Land Claims establishing the boundaries and confirming the title to the lands within the limits of such survey, so made by the Surveyor General of New Mexico, was entered in the year 1903, and from which no appeal was taken.

"The parties owning land without the limits of the grant as confirmed, but within the Elkins & Marmon survey, continued in possession thereof and resided thereon with their families, and dealt with said lands as though they had been invested with the legal title to the same. No action was ever taken by the United States, so far as the record discloses, to dispossess them, although the legal title to said lands was in the United States. In 1909, when the deed to Smith was executed by Reinhart, a bill was pending before Congress to validate the titles of the *bona fide* claimants to said lands so found to be without the limits of the confirmed survey."

"Said lands were for many years, before and after the Mexican cession to the United States, in good faith considered to be a part of the Refugio Colony Grant, a Mexican Community Grant, and were so held in good faith by the owners of the said grant; and that the commissioners of the said grant, in good faith, allotted and conveyed the said lands to certain members of said commu-

nity who settled on the said grant; and that the titles and claims of the allottees thereto were passed and deraigned by a chain of sufficient mesne conveyance to the said W. H. Reinhart; and that said W. H. Reinhart and his predecessors in title and claim held, occupied and possessed the said lands for more than fifteen years, under and by virtue of the conveyances from the commissioners of the Refugio Colony Grant and the said mesne conveyances; and that the said defendant D. B. Smith and his assigns now hold and possess and are cultivating the said lands under and by virtue of the said conveyances from the commissioners of the Refugio Colony Grant, and the said mesne conveyances, and the said conveyance from the said W. H. Reinhart to defendant D. B. Smith, and subsequent conveyances from D. B. Smith to his said assigns."

"The plaintiffs have such deed of conveyance from the Refugio Colony Grant owners and mesne chain of conveyances down to W. H. Reinhart and D. B. Smith and wife as they plead in their reply and such as defendants plead that they hold under.

"During the examination of a witness for plaintiffs, Dionicio Alvarez, counsel for defendants made the following 'admission':

"'It is admitted by the defendants, for the purpose of shortening the testimony, that the parties mentioned in the chain of transfers from the Refugio Colony down to the date of the rendition of the decree of the Court of Private Land Claims in evidence were holders under the chain of title mentioned, in good faith, under color of title and in good faith.'"

Section 1, Act of Congress February 25, 1885, follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all inclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party,

association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land-office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosures, is likewise declared unlawful, and hereby prohibited."

Section 4 of the same act makes violation of any provision thereof a misdemeanor punishable by fine and imprisonment.

The Supreme Court declared: "Upon this appeal, the only question which requires consideration is whether the evidence shows that Reinhart had 'no claim or color of title made or acquired in good faith' to the land in question at the time he conveyed the same. If he did not, the judgment must be reversed; on the other hand, if he had color of title to the land, made or acquired in good faith, the judgment entered was proper and must be affirmed. . . . The deed from Potter to Reinhart constituted color of title, so that the only question of any practical importance for determination is whether Reinhart's title was acquired and held in good faith, within the meaning of the act of Congress." And relying upon *Cameron* v. *United States*, 148 U. S. 301, 305 and *Searl* v. *School District*, 133 U. S. 553, it held that although Reinhart was fully cognizant of all the facts he, nevertheless, had a claim or color of title to the lands made or acquired

in good faith within the true intendment of the Act of 1885. With this conclusion we agree.

In *Cameron* v. *United States, supra,* we said: "The Act of Congress [approved Feb. 25, 1885] which forms the basis of this proceeding was passed in view of a practice which had become common in the Western Territories of enclosing large areas of lands of the United States by associations of cattle raisers, who were mere trespassers, without shadow of title to such lands, and surrounding them by barbed wire fences, by which persons desiring to become settlers upon such lands were driven or frightened away, in some cases by threats or violence. The law was, however, never intended to operate upon persons who had taken possession under a *bona fide* claim or color of title; nor was it intended that, in a proceeding to abate a fence erected in good faith, the legal validity of the defendant's title to the land should be put in issue. It is a sufficient defence to such a proceeding to show that the lands enclosed were not public lands of the United States, or that defendant had claim or color of title, made or acquired in good faith, or an asserted right thereto, by or under claim made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States. As the question whether the lands enclosed by the defendant in this case were public lands of the United States depends upon the question whether he had claim or color of title to them, the two questions may be properly considered together."

Without doubt Reinhart and his predecessors were upon the lands for more than fifteen years; and it is admitted that prior to entry of the decree of the Court of Private Land Claims in 1903 their occupancy was under color of title and in good faith. We cannot conclude that further occupancy by those then in possession under *bona fide* claims or their vendees was rendered unlawful—criminal indeed—by the Act of 1885. They were not mere

naked trespassers dishonestly seeking to appropriate public property, and they did not belong to that class of offenders intended to be hit by the act. Their claim deserved consideration as plainly appears from the circumstances above narrated. This is further shown by "An Act to Quiet Title to Certain Land in Dona Ana County, New Mexico," approved February 3, 1911, 36 Stat. 896, through which Congress granted them the right to make entries of and receive patents to lands in their possession and empowered the General Land Office to assist them at public expense in making proofs necessary to that end.

Affirmed.

MISSOURI PACIFIC RAILWAY COMPANY *v.* McGREW COAL COMPANY.[1]

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 222. Argued April 26, 1917.—Decided May 21, 1917.

The court is not called upon to consider state statutes passed for the enforcement of a provision in the state constitution, when the latter as construed and applied in the case by the state supreme court is self-executing and covers the judgment in question.

As applied to a company engaged in both interstate and intrastate traffic, a state regulation, in respect of the latter only, which forbids any railroad company in general terms from charging more for a shorter haul than for a longer haul for the same class of freight over

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[1] No. 223. *Missouri Pacific Railway Company* v. *McGrew et al., Executors of McGrew.* Error to the Supreme Court of the State of Missouri. May 21, 1917. McReynolds, J. A stipulation of counsel for the respective parties that this cause abide the decision in case No. 222 having been filed, the judgment in this case is

Affirmed.

any portion of its lines within the State without regard to direction, circumstances or condition, and which allows the shipper an absolute right to recover any overcharges collected from him in violation of the prohibition, is consistent with the Fourteenth Amendment, the Commerce Clause, and the Interstate Commerce Acts, in the absence of special facts and circumstances warranting a different conclusion in the particular case. *Louisville & Nashville R. R. Co.* v. *Kentucky*, 183 U. S. 503.

To claim exemption from such regulations under the Contract Clause, the existence of a special protecting contract must be shown by the record.

178 S. W. Rep. 1179, affirmed.

THE case is stated in the opinion.

Mr. James F. Green, with whom *Mr. Edward J. White* was on the briefs, for plaintiff in error.

Mr. Edwin A. Krauthoff, with whom *Mr. Alexander Graves*, *Mr. William S. McClintock*, *Mr. Arthur L. Quant* and *Mr. Maurice McNeill* were on the briefs, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Defendant in error filed a petition containing forty-seven counts in the Lafayette Circuit Court seeking to recover what it paid in excess of alleged lawful freight rates upon as many shipments of coal from Myrick, Missouri, to other points in that State. The first count follows. It is identical in substance with all others except as to dates, amount of coal shipped, charges paid, destination and comparative rates.

"Plaintiff avers that on April, 1908, it was and still is a coal mining company incorporated under the law of the State of Missouri.

"Plaintiff for 1st cause of action avers that on October,

1879, the defendant was and has been ever since a railroad corporation duly organized under the law of said state and a common carrier for hire of freight and passengers between its stations hereinafter named in said state.

"That within five years last past and on the dates hereinafter named plaintiff produced and sold bituminous coal from its own mines near Myrick, one of defendant's stations in said county, and that on the various dates named in exhibit No. 1 and in the cars therein described by number and initial, it shipped by defendant's road from said Myrick in the aggregate 867,000 pounds of its said coal in car load lots to the consignee named in said exhibit at Strasburg, Mo., another station on defendant's road.

"Plaintiff avers that for the said carriage of said coal defendant fixed, charged and demanded and received of the plaintiff 80 cents per ton, an illegal freight rate, being 30 cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all said times and dates herein named defendant had fixed, charged, demanded and received for the carriage for the same class of coal over its said line and over another part of said road from its station of Liberal, Mo., and to another of its said stations, viz., Granby in said State, a distance of 77.14 miles, 50 cents per ton by the car load while the distance from said Myrick to said Strasburg was only 61.95 miles for which said rate of 80 cents per ton for said carriage fixed, charged, demanded and received of plaintiff as aforesaid; and the same was illegal and exceeded the amount the defendant was entitled to fix, charge, demand and receive for said shipments by the sum of $130.05.

"And the plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge in the sum of $130.05; wherefore it prays judgment for the same and for damages not exceeding $1000.00 and for all other and general relief, according to the statutes in such case made and provided."

The answer to count one—identical in effect with answers to all others—formal and some presently unimportant parts being omitted, follows:

"Comes now the defendant and for its answer to the 1st count of plaintiff's petition, states that the same is founded upon the Session Laws of Missouri, 1872, page 69, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, and section 12 of Article 12 of the Constitution of Missouri, 1875, and that said sections are null and void and of no legal force and effect for the following reasons:

"(a). Because said sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, when enacted by the Legislature were passed in violation of Section 32 of Article 4 of the Constitution of Missouri, 1865, in this: . . .

"(b). Because said Sections 3173 and 3211 are repugnant to and in violation of Section 14 of Article 12 of the Constitution of Missouri, 1875, in this: . . .

"(c). Because said Sections 3173 and 3211 Revised Statutes of Missouri, 1909, when re-enacted by the Legislature in 1879, were not legally re-enacted but were enacted in violation of Section 28 of Article 4 of the Constitution of Missouri, 1875, in this: . . .

"(d). Because said Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, were repealed by an Act of the Legislature passed in 1887 entitled, 'An Act to Regulate Railroad Corporations,' passed at the extra session of 1887, same being found in the Session Laws of 1887 at page 15, now Sections 3185 and 3193 of the Revised Statutes, 1909.

"For further answer to said count, the defendant says that Section 12 of Article 12 of the Constitution of Missouri, 1875, and Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, are in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States in this: That said

sections of the Constitution of Missouri and of the Revised Statutes of Missouri, deprive defendant of its property without due process of law and deny to it the equal protection of the laws.

" . . . Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, are repugnant to and in violation of Article 5 of the Amendments to the Constitution of the United States in this: That said sections deprive the defendant of its property without due process of law.

" . . . Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: That the said defendant is engaged in interstate commerce and owns and operates various lines of railroad as a part of its system which run into other states than Missouri and into the States of Kansas, Colorado, Nebraska, Oklahoma, Illinois, Arkansas and Louisiana, and that the train in which the plaintiff's property described in said count was being transported was at the time engaged in interstate commerce and contained car load lots and shipments of merchandise consigned and being carried from points without the State of Missouri to points within this state, and from points within this state to points without the same and from points without this state across the State of Missouri and to points in other states, and that by reason of the premises this state is without jurisdiction to adopt and pass the sections herein named and to enforce the provisions of the same against this defendant while so engaged in interstate commerce.

" . . . Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article 1 of the Con-

stitution of the United States and the various laws passed by Congress thereunder in this: That the defendant's railroad is an interstate road and its lines extend over and through the States of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louisiana, and that it is engaged in interstate commerce over its said lines through all of said states and operates trains over the same in transporting freight and passengers through said States; that said section of the Constitution of Missouri and sections of the Revised Statutes seek to compel the defendant arbitrarily to fix its rates in this State and in all of said States and in comparison with rates existing in all such States without regard to the laws passed by Congress regulating interstate commerce.

" . . . Defendant denies each and every allegation therein contained. . . ."

Upon motion, the trial court struck from the answer "all alleged defenses pleaded to each of the counts in the petition except the traverses." No evidence was offered except the stipulation quoted below:

"It is hereby stipulated between the parties that the defendant's stations, the rates charged by the defendant, including those paid by the plaintiff, the amount of coal transported and the distance set out in the several counts of the petition are correctly stated therein. It is further stipulated that such coal was delivered by the plaintiff to the defendant for shipment in the usual and ordinary way without any direction or request by plaintiff as to what particular trains the same was to be transported in and that the defendant received and transported the same in the usual and ordinary course of business, on the usual trains passing over its road. It is further agreed that the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this state to points without the same, from points without the same to points within this state and from

points without this state through this state and to points in other states."

A jury being waived, the court rendered judgment upon each count for alleged overcharge, without penalty,—on the first count $130.05, total upon all $16,504.19; and this action the state Supreme Court affirmed. 178 S. W. Rep. 1179.

The insistence here is that, as construed and applied § 12, Article XII Missouri constitution (1875), and, also, §§ 3173 and 3211, Revised Statutes (1909), deprive plaintiff in error of property without due process of law and deny it equal protection, contrary to the Fourteenth Amendment, and, also, conflict with § 8, Article 1, Federal Constitution.

Sections 3173 and 3211 originated in the Act of 1872. The first provides that no railroad corporation organized or doing business within the State shall "charge or collect, for the transportation of goods, merchandise or property over any portion of its road, a greater amount as toll or compensation than shall be charged or collected by it for the transportation of similar quantities of the same class of goods, merchandise or property over any other portion of its road of equal distance." And the second prescribes a penalty for violating the first, not exceeding one thousand dollars with costs, etc., to be recovered by aggrieved party.

The Supreme Court declared "each count of the petition is in legal effect identical with the counts of the petition in *McGrew* v. *Railroad*, 258 Mo. 23, and with those in the cases between the same parties cited in the opinion in that case, . . . differing only in amounts, dates and destination of shipments and in distances used for purposes of comparison. . . . The assignments of error in this case, in legal effect, and the points and authorities, verbatim, are identical with those in that case. The authorities cited are exactly the same." And upon the

opinion in the cause referred to, it affirmed the trial court.

In *McGrew* v. *Missouri Pacific Ry. Co.*, 258 Missouri, 23, the court followed *James C. McGrew* v. *Missouri Pacific Ry. Co.*, 230 Missouri, 496, where (the issues being the same as those here presented), after considering the whole subject, it was held that plaintiff's judgment could be sustained under § 12, Article XII, constitution of Missouri (1875) without reliance upon any statute. The court said (230 Missouri, 546): "The petition was framed upon the Act of 1872, but in view of the fact that the trial court denied the penalties asked, and allowed only the difference between the higher rates charged plaintiff and the lower rates charged by defendant for the longer distances, the judgment could be sustained upon section 12 of article 12 of the Constitution, without the aid of the Act of 1872, provided that said section of the Constitution is self-enforcing. Because if said section is self-enforcing, that is to say, if it, without the aid of any statutory enactment, makes it unlawful for a railroad company to charge more for a shorter haul than a longer one of the same class of property in any direction, the same or not, and under any or all circumstances and conditions, then clearly the measure of damages for doing the unlawful thing, in the absence of any statute upon the subject, is the amount of the excess charged for the shorter distance over that charged for the longer distance."

(561.) "Section 12 of article 12 of our Constitution clearly establishes an unconditional short-haul rule, without regard to direction or to circumstances and conditions. Said section declares that it *shall be unlawful* for any railroad company to charge for the transportation of freight or passengers a greater amount for a less distance than 'the amount charged for any greater distance.' That declaration establishes a rule, and creates a right in every passenger and shipper to a compliance with, and an

obedience to its terms. . . . Said section has the same force and effect as if it read: 'It shall not be lawful in this State for any railroad company to *charge, under penalties which the General Assembly shall prescribe,* for freight or passengers a greater amount for the transportation of the same, for a less distance than the amount charged for any greater distance.' Had said section read that way, its effect as an operative law would have been too clear for controversy. To my mind it is equally clear under the present reading."

In view of this ruling, it is unnecessary for us to consider either terms, validity, or possible application of sections of Revised Statutes mentioned in the answer.

Section 12, Article XII, constitution of Missouri provides: "It shall not be lawful in this State for any railway company to charge for freight or passengers a greater amount, for the transportation of the same, for a less distance than the amount charged for any greater distance; and suitable laws shall be passed by the General Assembly to enforce this provision; but excursion and commutation tickets may be issued at special rates." As construed and applied in the present cause, this section prohibits the carrier from charging in respect of intrastate commerce more for a shorter haul than for a longer one over any portion of its line within the State without regard to direction, circumstance or condition; and if this inhibition is disobeyed the shipper acquires an absolute right to recover any overcharge paid by him.

The record does not disclose when plaintiff in error was incorporated, or what provisions its charter contains. There is no suggestion of anything therein amounting to a contract exempting it from legislation commonly within the police power. No claim is made that the cost of moving freight over its lines in Missouri is without substantial relation to distance; and no facts are alleged which indicate material differences between conditions and cir-

cumstances under which the hauls from mines at Myrick were made and those surrounding the longer shipments for less charges over other portions of the road.

Arguments identical in principle with those now presented to show invalidity of the inhibition under consideration, because of conflict with the Fourteenth Amendment and interference with interstate commerce, were considered and rejected in *Louisville & Nashville R. R. Co.* v. *Kentucky*, 183 U. S. 503, approved in *Intermountain Rate Cases*, 234 U. S. 476, 489. And we think it must be accepted as settled that unless some controlling circumstance of a character not here disclosed is established, or a special protecting contract exists, there is nothing in the provisions of the Federal Constitution or laws presently relied on which necessarily restricts the power of a State by general rule to prohibit railway companies from receiving higher charges for shorter hauls than for longer ones when both are wholly within its borders. Such a prohibition is not necessarily an arbitrary, unreasonable or grossly oppressive measure for preventing discriminations and insuring equal and just treatment to all shippers.

We find no error in the judgment below, and it is

Affirmed.

MISSOURI PACIFIC RAILWAY COMPANY *v.* TABER, GUARDIAN OF SMALL ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 760. Submitted April 10, 1917.—Decided May 21, 1917.

The claim that the Federal Employers' Liability Act should have governed the action will not afford jurisdiction under Judicial Code, § 237, where the action was originally based upon a state statute and the federal act was not set up or relied upon in the answer or

otherwise called to the trial court's attention and where the state supreme court, following the state statutes and established practice, declined to pass upon the claim because not presented to the trial court.

Writ of error to review 186 S. W. Rep. 688, dismissed.

THE case is stated in the opinion.

Mr. Edward J. White, Mr. Thomas Hackney and *Mr. Martin Lyons* for plaintiff in error.

Mr. John T. Wayland, Mr. R. J. Ingraham, Mr. L. E. Durham and *Mr. Hale Houts* for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Charles H. Small was killed at Kansas City while employed by plaintiff in error as a switchman. Relying upon a state statute, the guardian of his minor children sued for damages in the Jackson County Circuit Court and recovered a judgment which the Supreme Court of Missouri affirmed, May 15, 1916. We are asked to reverse that action because the Federal Employers' Liability Act was not applied, but rights and liabilities were determined according to state laws.

Unless some right, privilege, or immunity under the federal act was duly and especially claimed we have no jurisdiction. Judicial Code, § 237. Speaking for the court in *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148, 154, Mr. Justice Harlan announced the applicable rule. "Now, where a party—drawing in question in this court a state enactment as invalid under the Constitution of the United States, or asserting that the final judgment of the highest court of a State denied to him a right or immunity under the Constitution of the United States—did not raise such question or especially set up or claim such right or immu-

nity in the trial court, this court cannot review such final judgment and hold that the state enactment was unconstitutional or that the right or immunity so claimed had been *denied* by the highest court of the State, if that court did nothing more than decline to pass upon the Federal question because not raised in the trial court as required by the state practice. *Spies* v. *Illinois*, 123 U. S. 131, 181; *Miller* v. *Texas*, 153 U. S. 535, 538; *Morrison* v. *Watson*, 154 U. S. 111, 115."

The original action was based upon a state statute; the answer did not set up or rely upon the federal act; the trial court's attention was not called thereto; and although urged to hold liability depended upon it, the Supreme Court declined to pass upon that point because not presented to the trial court. This ruling seems in entire accord with both state statutes and established practice. Rev. Stats. Mo. 1909, § 2081; *St. Louis* v. *Flanagan*, 129 Missouri, 178; *Freeland* v. *Williamson*, 220 Missouri, 217.

The writ must be dismissed.

Dismissed.

VALLEY STEAMSHIP COMPANY *v.* WATTAWA.

VALLEY STEAMSHIP COMPANY *v.* MRAZ.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

Nos. 469, 470. Argued January 10, 11, 1917.—Decided May 21, 1917.

It being settled that in the absence of congressional legislation the commerce clause does not forbid a State to legislate concerning the relative rights and duties of employers and employees within her borders although engaged in interstate commerce, a contention to the con-

trary will not afford jurisdiction to this court to review a state judgment.

So *held* where an Ohio elective Workmen's Compensation Law, in withdrawing the defenses of contributory negligence, negligence of fellow servant and assumption of risk from employers not accepting provisions of the act, was claimed to contravene the commerce clause, as applied to a company engaged in interstate transportation by steamship.

The objection that the Ohio Compensation Act, as applied to a steamship company engaged in interstate commerce, would be an unconstitutional invasion of the federal maritime jurisdiction cannot be considered in this case, since the jurisdiction of the court below is confined to review of the trial court's judgment for errors appearing on the record, and this objection was neither made in the trial court, nor, clearly, in the petition in error before the court below, nor definitely mentioned in the latter court's opinion. *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291.

Dismissed.

THE cases are stated in the opinion.

Mr. Tracy H. Duncan, with whom *Mr. Frank S. Masten* was on the brief, for plaintiff in error.

Mr. George H. Eichelberger for defendants in error.

Memorandum opinion by MR. JUSTICE MCREYNOLDS.

NUMBER 469.

Seeking damages under the laws of Ohio, defendant in error Wattawa brought this action in the Common Pleas Court of Cuyahoga County. He alleged that by reason of the Steamship Company's negligence he suffered personal injuries in September, 1913 while employed by it as a deck hand on the Edwin N. Ohl then lying at Sandusky, Ohio; and that although an employer of more than five men the company was not a subscriber or contributor to the State Insurance Fund provided for by the Act of May 31, 1911—the first Ohio Workmen's Compensation Act.[1] In defence

[1] General Code, §§ 1465–37 to 1465–70.

the company claimed that although employing more than five men it was engaged in interstate commerce and therefore was not required to subscribe to the State Insurance Fund; denied negligence; and alleged that the accident resulted wholly from the employee's want of care and moreover that he had assumed the risk. Upon motion the allegation as to assumption of risk was stricken out.

The court charged that as the company had not accepted the Compensation Act it could not rely upon common-law defences based on the fellow-servant rule, assumption of risk or contributory negligence. Judgment upon a verdict for $5,200.00 was affirmed by the Court of Appeals, and petitions in error and for certiorari were denied by the Supreme Court.

We are asked to reverse the action of the Court of Appeals upon two grounds. First, because the company was engaged in interstate commerce and therefore could not be subjected to the Compensation Act without burdening such commerce contrary to the Commerce Clause of the Federal Constitution. Second, because Article III, § 2 of the Constitution extended judicial power to all cases of admiralty and maritime jurisdiction and thereby rendered the general maritime law part of the federal laws not subject to alteration by state statutes.

The first point relied upon is entirely without merit and inadequate to support our jurisdiction. In the absence of congressional legislation the settled general rule is that without violating the Commerce Clause the States may legislate concerning relative rights and duties of employers and employees while within their borders although engaged in interstate commerce. *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*, 173 U. S. 285, 297; *The Minnesota Rate Cases*, 230 U. S. 352, 408.

The second reason for reversal now set up was not presented to the trial court in any form. It was not pointed out clearly, if at all, by the petition in error before

the Court of Appeals and was not definitely mentioned in the opinion of that court whose powers only extend to a review of the trial court's judgment for errors appearing on the record. Section 12,247, Ohio General Code, as amended by Ohio Laws 103, pp. 405, 431. The question therefore is not properly before us. *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291, 308, 309.

The writ of error must be dismissed for want of jurisdiction.

NUMBER 470.

Counsel for the Steamship Company have admitted of record here that this cause involves the same state of facts and questions of law as those presented in Number 469. They were heard together and the same judgment will be entered in each of them.

Dismissed.

SOUTHERN PACIFIC COMPANY *v.* JENSEN.

ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

No. 280. Argued February 28, 1916; restored to docket for reargument November 13, 1916; reargued January 31, February 1, 1917.—Decided May 21, 1917.

The Federal Employers' Liability Act applies only where the injury occurs in railroad operations or their adjuncts, and cannot be extended to interstate maritime transportation merely because the vessel in the case is owned and operated by an interstate carrier by railroad.

The word "boats" in the statute refers to vessels which may be prop-

erly regarded as but part of a railroad's extension or equipment as understood and applied in common practice.

Under Art. III, § 2, of the Constitution, extending the judicial power of the United States "to all cases of admiralty and maritime jurisdiction," and Art. I, § 8, conferring on Congress power to make all laws which may be necessary and proper for executing the powers vested in the general government or in any of its departments or officers, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.

In the absence of controlling statutes, the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction.

The power of the States to change, modify or affect the general maritime law, while existing to some extent under the Constitution and the Judiciary Act of 1789, § 9, Judicial Code, §§ 24, 256, may not contravene the essential purposes of an act of Congress, work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations.

Work performed by a stevedore on board a ship in unloading her at wharf in navigable waters is maritime; his employment for such work and injuries suffered in it are likewise maritime, and the rights and liabilities arising from such work, employment and injuries are clearly within the admiralty jurisdiction. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52.

A stevedore engaged on an interstate ship in unloading her at wharf in navigable waters in New York was accidentally injured and killed, and an award of compensation was made against the shipowner by the New York Workmen's Compensation Commission under the New York Workmen's Compensation Act (*New York Central R. R. Co.* v. *White*, 243 U. S. 188), and affirmed by the courts of that State. *Held*, that the act as applied to such a case was in conflict with the Constitution and to that extent invalid.

The remedy of the New York Workmen's Compensation Act (it provides compensation upon a prescribed scale for injuries and deaths of employees, without regard to fault, to be administered and awarded primarily through a state administrative commission), is a remedy unknown to the common law and incapable of enforcement by the ordinary processes of any court, and hence is not among the common-law remedies which are saved to suitors from the exclusive admiralty jurisdiction by Judiciary Act of 1789, § 9; Judicial Code, §§ 24, 256.

The remedy of the New York Workmen's Compensation Act is inconsistent with the policy of Congress to encourage investments in ships, manifested by the Acts of 1851 and 1884 (Rev. Stats., §§ 4283–4285; c. 121, 23 Stat. 57), which declare a limitation upon the liability of their owners.

215 N. Y. 514, reversed.

THE case is stated in the opinion.

Mr. Norman B. Beecher, with whom *Mr. Ray Rood Allen* was 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 briefs, for defendant in error.

Mr. Christopher M. Bradley, by leave of court, filed a brief on behalf of the Industrial Accident Commission of the State of California, as *amicus curiæ*.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Upon a claim regularly presented, the Workmen's Compensation Commission of New York made the following findings of fact, rulings and award, October 9, 1914:

"1. Christen Jensen, the deceased workman, was, on August 15, 1914, an employee of the Southern Pacific Company, a corporation of the State of Kentucky, where it has its principal office. It also has an office at Pier 49, North River, New York City. The Southern Pacific Company at said time was, and still is, a common carrier by railroad. It also owned and operated a steamship El Oriente, plying between the ports of New York and Galveston, Texas.

"2. On August 15, 1914, said steamship was berthed

for discharging and loading at Pier 49, North River, lying in navigable waters of the United States.

"3. On said date Christen Jensen was operating a small electric freight truck. His work consisted in driving the truck into the steamship El Oriente where it was loaded with cargo, then driving the truck out of the vessel upon a gangway connecting the vessel with Pier 49, North River, and thence upon the pier, where the lumber was unloaded from the truck. The ship was about 10 feet distant from the pier. At about 10:15 A. M., after Jensen had been doing such work for about three hours that morning, he started out of the ship with his truck loaded with lumber, a part of the cargo of the steamship El Oriente, which was being transported from Galveston, Texas, to New York City. Jensen stood on the rear of the truck, the lumber coming about to his shoulder. In driving out of the port in the side of the vessel and upon the gangway, the truck became jammed against the guide pieces on the gangway. Jensen then reversed the direction of the truck and proceeded at third or full speed backward into the hatchway. He failed to lower his head and his head struck the ship at the top line, throwing his head forward and causing his chin to hit the lumber in front of him. His neck was broken and in this manner he met his death.

"4. The business of the Southern Pacific Company in this State consisted at the time of the accident and now consists solely in carrying passengers and merchandise between New York and other States. Jensen's work consisted solely in moving cargo destined to and from other States.

"5. Jensen left him surviving Marie Jensen, his widow, 29 years of age, and Howard Jensen, his son, seven years of age, and Evelyn Jensen, his daughter, three years of age.

"6. Jensen's average weekly wage was $19.60 per week.

"7. The injury was an accidental injury and arose out of

and in the course of Jensen's employment by the Southern Pacific Company and his death was due to such injury. The injury did not result solely from the intoxication of the injured employee while on duty, and was not occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another."

"This claim comes within the meaning of Chapter 67 of the Consolidated Laws as re-enacted and amended by Chapter 41 of the Laws of 1914, and as amended by Chapter 316 of the Laws of 1914."

"Award of compensation is hereby made to Marie Jensen, widow of the deceased, at the rate of $5.87 weekly during her widowhood with two years' compensation in one sum in case of her remarriage; to Harold Jensen, son of the deceased, at the rate of $1.96 per week and to Evelyn Jensen, daughter of the deceased, at the rate of $1.96 per week until the said Harold Jensen and Evelyn Jensen respectively shall arrive at the age of eighteen years, and there is further allowed the sum of One Hundred ($100) Dollars for funeral expenses."

In due time the Southern Pacific Company objected to the award "upon the grounds that the Act does not apply because the workman was engaged in interstate commerce on board a vessel of a foreign corporation of the State of Kentucky which was engaged solely in interstate commerce; that the injury was one with respect to which Congress may establish, and has established, a rule of liability, and under the language of Section 114,[1] [copied

[1] *Section 114.* "The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the

in the margin] the Act has no application; on the ground that the Act includes only those engaged in the operation of vessels other than those of other states and countries in foreign and interstate commerce, while the work upon which the deceased workman was engaged at the time of his death was part of the operation of a vessel of another state engaged in interstate commerce, and hence does not come within the provisions of the Act; further, that the Act is unconstitutional, as it constitutes a regulation of and burden upon commerce among the several States in violation of Article I, Section 8, of the Constitution of the United States; in that it takes property without due process of law in violation of the 14th Amendment of the Constitution; in that it denies the Southern Pacific Company the equal protection of the laws in violation of the 14th Amendment of the Constitution because the Act does not afford an exclusive remedy, but leaves the employer and its vessels subject to suit in admiralty; also that the Act is unconstitutional in that it violates Article III, Section 2, of the Constitution conferring admiralty jurisdiction upon the courts of the United States."

Without opinion, the Appellate Division approved the award and the Court of Appeals affirmed this action (215 N. Y. 514, 519), holding that the Workmen's Compensation Act applied to the employment in question and was not obnoxious to the Federal Constitution. It said: "The scheme of the statute is essentially and fundamentally one by the creation of a state fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments. The state fund is created from premiums

manner provided by the commission and so far as not forbidden by any act of Congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

paid by employers based on the payroll, the number of employees and the hazards of the employment. The employer has the option of insuring with any stock corporation or mutual association authorized to transact such business, or of furnishing satisfactory proof to the commission of his own financial ability to pay. If he does neither he is liable to a penalty equal to the *pro rata* premium payable to the state fund during the period of his non-compliance and is subject to a suit for damages by the injured employee, or his legal representative in case of death, in which he is deprived of the defenses of contributory negligence, assumed risk and negligence of a fellow-servant. By insuring in the state fund, or by himself or his insurance carrier paying the prescribed compensation, the employer is relieved from further liability for personal injuries or death sustained by employees. Compensation is to be made without regard to fault as a cause of the injury, except where it is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another or results solely from his intoxication while on duty. Compensation is not based on the rule of damages applied in negligence suits but in addition to providing for medical, surgical or other attendance or treatment and funeral expenses it is based solely on loss of earning power. Thus the risk of accidental injuries occurring with or without fault on the part either of employee or employer is shared by both and the burden of making compensation is distributed over all the enumerated hazardous employments in proportion to the risk involved." See also *Walker* v. *Clyde Steamship Co.*, 215 N. Y. 529.

In *New York Central R. R. Co.* v. *White*, 243 U. S. 188, we held the statute valid in certain respects; and, considering what was there said, only two of the grounds relied on for reversal now demand special consideration. First. Plaintiff in error being an interstate common

carrier by railroad is responsible for injuries received by employees while engaged therein under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, and no state statute can impose any other or different liability. Second. As here applied, the Workmen's Compensation Act conflicts with the general maritime law, which constitutes an integral part of the federal law under Art. III, § 2, of the Constitution, and to that extent is invalid.

The Southern Pacific Company, a Kentucky Corporation, owns and operates a railroad as a common carrier; also the steamship El Oriente plying between New York and Galveston, Texas. The claim is that therefore rights and liabilities of the parties here must be determined in accordance with the Federal Employers' Liability Act. But we think that act is not applicable in the circumstances.

The first Federal Employers' Liability Act (June 11, 1906, c. 3073, 34 Stat. 232) extended in terms to all common carriers engaged in interstate or foreign commerce, and because it embraced subjects not within the constitutional authority of Congress was declared invalid. *The Employers' Liability Cases*, 207 U. S. 463, January 6, 1908. The later act is carefully limited and provides that "every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States and Territories, or between the District of Columbia or any of the States and Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's

parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto. It is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters merely because the ocean-going ship concerned happened to be owned and operated by a company also a common carrier by railroad. The word "boats" in the statute refers to vessels which may be properly regarded as in substance but part of a railroad's extension or equipment as understood and applied in common practice.

The fundamental purpose of the Compensation Law as declared by the Court of Appeals is "the creation of a state fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments," among them being "longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage." Its general provisions are specified in our opinion in *New York Central R. R. Co.* v. *White*, *supra*, and need not be repeated. Under the construction adopted by the state courts no ship may load or discharge her

cargo at a dock therein without incurring a penalty, unless her owners comply with the act which, in order to secure payment of compensation for accidents, generally without regard to fault and based upon annual wages, provides (§ 50) that—"An employer shall 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. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state. If insurance be so effected in such a corporation or mutual association the employer shall forthwith file with the commission, in form prescribed by it, a notice specifying the name of such insurance corporation or mutual association together with a copy of the contract or policy of insurance.—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 liability to pay the compensation provided in this chapter."

"If an employer fail to comply with this section, he shall be liable to a penalty during which such failure continues of an amount equal to the pro rata premium which would have been payable for insurance in the state fund for such period of noncompliance to be recovered in an action brought by the commission."

Article III, § 2, of the Constitution, extends the judicial power of the United States "To all cases of admiralty and maritime jurisdiction;" and Article I, § 8, confers upon the Congress power "To make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Con-

stitution in the government of the United States or in any department or officer thereof." Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527; *In re Garnett*, 141 U. S. 1, 14. And further, that in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction. *The Lottawanna*, 21 Wall. 558; *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527, 557; *Workman* v. *New York City*, 179 U. S. 552.

In *The Lottawanna*, Mr. Justice Bradley speaking for the court said: "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been intended to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

By § 9, Judiciary Act of 1789, 1 Stat. 76, 77, the District Courts of the United States were given "exclusive original cognizance of all civil causes of admiralty and

maritime jurisdiction; . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." And this grant has been continued. Judicial Code, §§ 24 and 256.

In view of these constitutional provisions and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute, *The Lottawanna*, 21 Wall. 558, 579, 580; *The J. E. Rumbell*, 148 U. S. 1; pilotage fees fixed, *Cooley* v. *Board of Wardens*, 12 How. 299; *Ex parte McNiel*, 13 Wall. 236, 242; and the right given to recover in death cases, *The Hamilton*, 207 U. S. 398; *La Bourgogne*, 210 U. S. 95, 138. See *The City of Norwalk*, 55 Fed. Rep. 98, 106. Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings *in rem* according to the course in admiralty, *The Moses Taylor*, 4 Wall. 411; *Steamboat Co.* v. *Chase*, 16 Wall. 522, 534; *The Glide*, 167 U. S. 606; nor create liens for materials used in repairing a foreign ship, *The Roanoke*, 189 U. S. 185. See *Workman* v. *New York City*, 179 U. S. 552. And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lottawanna*.

A similar rule in respect to interstate commerce deduced

from the grant to Congress of power to regulate it is now firmly established. "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 507, 508; *Vance* v. *Vandercook Co.*, 170 U. S. 438, 444; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311. And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the States to interpose where maritime matters are involved.

The work of a stevedore in which the deceased was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 59, 60.

If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien condemned in *The Roanoke*. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed.

So applied, it conflicts with the Constitution and to that extent is invalid.

Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District Courts, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction. *The Hine* v. *Trevor*, 4 Wall. 555, 571, 572; *The Belfast*, 7 Wall. 624, 644; *Steamboat Co.* v. *Chase*, 16 Wall. 522, 531, 533; *The Glide*, 167 U. S. 606, 623. And finally this remedy is not consistent with the policy of Congress to encourage investments in ships manifested in the Acts of 1851 and 1884 (Rev. Stats., §§ 4283–4285; § 18, Act of June 26, 1884, c. 121, 23 Stat. 57) which declare a limitation upon the liability of their owners. *Richardson* v. *Harmon*, 222 U. S. 96, 104.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE HOLMES, dissenting.

The Southern Pacific Company has been held liable under the statutes of New York for an accidental injury happening upon a gang-plank between a pier and the company's vessel and causing the death of one of its employees. The company not having insured as permitted, the statute may be taken as if it simply imposed a limited but absolute liability in such a case. The short question is whether the power of the State to regulate the liability in that place and to enforce it in the State's own courts is taken away by the conferring of exclusive jurisdiction

of all civil causes of admiralty and maritime jurisdiction upon the courts of the United States.

There is no doubt that the saving to suitors of the right of a common-law remedy leaves open the common-law jurisdiction of the state courts, and leaves some power of legislation at least, to the States. For the latter I need do no more than refer to state pilotage statutes, and to liens created by state laws in aid of maritime contracts. Nearer to the point, it is decided that a statutory remedy for causing death may be enforced by the state courts, although the death was due to a collision upon the high seas. *Steamboat Co.* v. *Chase*, 16 Wall. 522. *Sherlock* v. *Alling*, 93 U. S. 99, 104. *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638, 646. *Minnesota Rate Cases*, 230 U. S. 352, 409. The misgivings of Mr. Justice Bradley were adverted to in *The Hamilton*, 207 U. S. 398, and held at least insufficient to prevent the admiralty from recognizing such a state-created right in a proper case, if indeed they went to any such extent. *La Bourgogne*, 210 U. S. 95, 138.

The statute having been upheld in other respects, *New York Central R. R. Co.* v. *White*, 243 U. S. 188, I should have thought these authorities conclusive. The liability created by the New York act ends in a money judgment, and the mode in which the amount is ascertained, or is to be paid, being one that the State constitutionally might adopt, cannot matter to the question before us if any liability can be imposed that was not known to the maritime law. And as such a liability can be imposed where it was unknown not only to the maritime but to the common law, I can see no difference between one otherwise constitutionally created for death caused by accident and one for death due to fault. Neither can the statutes limiting the liability of owners affect the case. Those statutes extend to non-maritime torts, which of course are the creation of state law. *Richardson* v. *Harmon*, 222 U. S.

96, 104. They are paramount to but not inconsistent with the new cause of action. However, as my opinion stands on grounds that equally would support a judgment for a maritime tort not ending in death, with which admiralty courts have begun to deal, I will state the reasons that satisfy my mind.

No doubt there sometimes has been an air of benevolent gratuity in the admiralty's attitude about enforcing state laws. But of course there is no gratuity about it. Courts cannot give or withhold at pleasure. If the claim is enforced or recognized it is because the claim is a right, and if a claim depending upon a state statute is enforced it is because the State had constitutional power to pass the law. Taking it as established that a State has constitutional power to pass laws giving rights and imposing liabilities for acts done upon the high seas when there were no such rights or liabilities before, what is there to hinder its doing so in the case of a maritime tort? Not the existence of an inconsistent law emanating from a superior source, that is, from the United States. There is no such law. The maritime law is not a *corpus juris*—it is a very limited body of customs and ordinances of the sea. The nearest to anything of the sort in question was the rule that a seaman was entitled to recover the expenses necessary for his cure when the master's negligence caused his hurt. The maritime law gave him no more. *The Osceola*, 189 U. S. 158, 175. One may affirm with the sanction of that case that it is an innovation to allow suits in the admiralty by seamen to recover damages for personal injuries caused by the negligence of the master and to apply the common-law principles of tort.

Now, however, common-law principles have been applied to sustain a libel by a stevedore *in personam* against the master for personal injuries suffered while loading a ship, *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52; and *The Osceola* recognizes that in some cases at

least seamen may have similar relief. From what source do these new rights come? The earliest case relies upon "the analogies of the municipal law," *The Edith Godden*, 23 Fed. Rep. 43, 46,—sufficient evidence of the obvious pattern, but inadequate for the specific origin. I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here *en bloc*. Certainly he could not in that way enlarge the exclusive jurisdiction of the District Courts and cut down the power of the States. If admiralty adopts common-law rules without an act of Congress it cannot extend the maritime law as understood by the Constitution. It must take the rights of the parties from a different authority, just as it does when it enforces a lien created by a State. The only authority available is the common law or statutes of a State. For from the often repeated statement that there is no common law of the United States, *Wheaton* v. *Peters*, 8 Pet. 591, 658; *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U. S. 92, 101, and from the principles recognized in *Atlantic Transport Co.* v. *Imbrovek* having been unknown to the maritime law, the natural inference is that in the silence of Congress this court has believed the very limited law of the sea to be supplemented here as in England by the common law, and that here that means, by the common law of the State. *Sherlock* v. *Alling*, 93 U. S. 99, 104. *Taylor* v. *Carryl*, 20 How. 583, 598. So far as I know, the state courts have made this assumption without criticism or attempt at revision from the beginning to this day; e. g. *Wilson* v. *MacKenzie*, 7 Hill (N. Y.), 95. *Gabrielson* v. *Waydell*, 135 N. Y. 1, 11.

Kalleck v. *Deering*, 161 Massachusetts, 469. See *Ogle* v. *Barnes*, 8 T. R. 188. *Nicholson* v. *Mounsey*, 15 East, 384. Even where the admiralty has unquestioned jurisdiction the common law may have concurrent authority and the state courts concurrent power. *Schoonmaker* v. *Gilmore*, 102 U. S. 118. The invalidity of state attempts to create a remedy for maritime contracts or torts, parallel to that in the admiralty, that was established in such cases as *The Moses Taylor*, 4 Wall. 411, and *The Hine* v. *Trevor*, 4 Wall. 555, is immaterial to the present point.

The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact. It always is the law of some State, and if the District Courts adopt the common law of torts, as they have shown a tendency to do, they thereby assume that a law not of maritime origin and deriving its authority in that territory only from some particular State of this Union also governs maritime torts in that territory—and if the common law, the statute law has at least equal force, as the discussion in *The Osceola* assumes. On the other hand the refusal of the District Courts to give remedies coextensive with the common law would prove no more than that they regarded their jurisdiction as limited by the ancient lines—not that they doubted that the common law might and would be enforced in the courts of the States as it always has been. This court has recognized that in some cases different principles of liability would be applied as the suit should happen to be brought in a common-law or admiralty court. Compare *The Max Morris*, 137 U. S. 1, with *Belden* v. *Chase*, 150 U. S. 674, 691. But hitherto it has not been doubted authoritatively, so far as I know, that even when the admiralty had a rule of its own to which it adhered, as in *Workman* v. *New York City*, 179 U. S. 552, the state law, common or statute,

would prevail in the courts of the State. Happily such conflicts are few.

It might be asked why, if the grant of jurisdiction to the courts of the United States imports a power in Congress to legislate, the saving of a common-law remedy, i. e., in the state courts, did not import a like if subordinate power in the States. But leaving that question on one side, such cases as *Steamboat Co.* v. *Chase*, 16 Wall. 522, *The Hamilton*, 207 U. S. 398, and *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, show that it is too late to say that the mere silence of Congress excludes the statute or common law of a State from supplementing the wholly inadequate maritime law of the time of the Constitution, in the regulation of personal rights, and I venture to say that it never has been supposed to do so, or had any such effect.

As to the spectre of a lack of uniformity I content myself with referring to *The Hamilton*, 207 U. S. 398, 406. The difficulty really is not so great as in the case of interstate carriers by land, which "in the absence of Federal statute providing a different rule are answerable according to the law of the State for nonfeasance or misfeasance within its limits." *The Minnesota Rate Cases*, 230 U. S. 352, 408, and cases cited. The conclusion that I reach accords with the considered cases of *Lindstrom* v. *Mutual Steamship Co.*, 132 Minnesota, 328; *Kennerson* v. *Thames Towboat Co.*, 89 Connecticut, 367; and *North Pacific S. S. Co.* v. *Industrial Accident Commission of California*, 163 Pac. Rep. 199, as well as with the New York decision in this case. 215 N. Y. 514.

MR. JUSTICE PITNEY, dissenting.

While concurring substantially in the dissenting opinion of Mr. Justice Holmes, I deem it proper, in view of the momentous consequences of the decision, to present some additional considerations.

This dissent is confined to that part of the prevailing opinion which holds that the Workmen's Compensation Act of New York, as applied by the state court to a fatal injury sustained by a stevedore while engaged in work of a maritime nature upon navigable water within that State, conflicts with the Constitution of the United States and the act of Congress conferring admiralty and maritime jurisdiction in civil cases upon the district courts of the United States, and is to that extent invalid. Except for the statute, an action might have been brought in a court of admiralty. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 62. No question is raised respecting the jurisdiction of the state court over the subject matter. But plaintiff in error contends, and the prevailing opinion holds, that it was a violation of a federal right for the state court to apply the provisions of the local statute to a cause of action of maritime origin, because, by the Constitution of the United States, admiralty jurisdiction was conferred upon the federal courts.

It should be stated, at the outset, that the case involves no question of penalties imposed by the New York act, but affects solely the responsibility of the employer to make compensation to the widow, in accordance with its provisions, which are outlined in *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 192–195.

The argument is that even in the absence of any act of Congress prescribing the responsibility of a shipowner to his stevedore, the general maritime law, as accepted by the federal courts when acting in the exercise of their admiralty jurisdiction, must be adopted as the rule of decision by state courts of common law when passing upon any case that might have been brought in the admiralty; and that just as the absence of an act of Congress regulating interstate commerce in some cases is equivalent to a declaration by Congress that commerce in that respect shall be free, so non-action by Congress amounts to an im-

perative limitation upon the power of the States to interpose where maritime matters are involved.

This view is so entirely unsupported by precedent, and will have such novel and far-reaching consequences, that it ought not to be accepted without the most thorough consideration.

Section 2 of Article III of the Constitution reads as follows: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Acting under the authority of Article I, § 8, which empowers Congress to make all laws necessary and proper for carrying into execution the powers vested in the Government or in any department or officer thereof, the First Congress, in the original Judiciary Act (Act of September 24, 1789, c. 20, § 9, 1 Stat. 73, 77), conferred upon the federal district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." The saving clause has been preserved in all subsequent revisions. Rev. Stats., § 563 (8); Jud. Code, § 24, (3), 36 Stat. 1087, 1091, c. 231.

From the language quoted from the Constitution, read in the light of the general purpose of that instrument and the contemporaneous construction found in the Judiciary Act, with regard also to the mischiefs that called for the

establishment of a national judiciary, and from what I believe to be the unbroken current of decisions in this court from that day until the present, I draw the following conclusions: (1) That the framers of the Constitution intended *to establish jurisdiction*—the power to hear and determine controversies of the various classes specified—and *not to prescribe particular codes or systems of law* for the decision of those controversies; (2) That the civil jurisdiction in admiralty was not intended to be exclusive of the courts of common law, at least not until Congress should deem it proper so to enact; (3) That by the law of England, and by the practice of the colonial governments, the courts of common law, of equity, and of admiralty, were controlled in their decisions by separate and in a sense independent systems of substantive law, and the constitutional grant of judicial power in "all cases in law and equity," and in "all cases of admiralty and maritime jurisdiction," was no more intended (in the absence of legislation by Congress) to make the rules of maritime law binding upon the federal courts of common law when exercising their concurrent jurisdiction, than to make the rules of the common law binding upon the courts of admiralty; (4) That if not binding upon the federal courts, it results, *a fortiori*, that the rules of maritime law were not intended to be made binding upon the courts of the States; (5) That it is not necessary, in order to give full effect to the grant of admiralty and maritime jurisdiction, to imply that the rules of decision prevailing in admiralty must be binding upon common-law courts exercising concurrent jurisdiction in civil causes of maritime origin, and to give such a construction to the Constitution is to render unconstitutional the saving clause in § 9 of the Judiciary Act, and also to trench upon the proper powers of the States by interfering with their control over their water-borne internal commerce; and (6) That, in the absence of legislation by Congress abrogating the saving

clause, the States are at liberty to administer their own laws in their own courts when exercising a jurisdiction concurrent with that of admiralty, and at liberty to change those laws by statute.

That the language of § 2 of Art. III of the Constitution speaks only of establishing jurisdiction, and does not prescribe the mode in which or the substantive law by which the exercise of that jurisdiction is to be governed, seems to me entirely plain; and upon this point I need only refer to the language itself, which I have quoted.

That this view is in harmony with the general purpose of the Constitution seems to me equally plain. At this late date it ought not to be necessary to repeat that the object of the framers of that instrument was to lay the foundations of a government, to set up its frame-work, and to establish merely the general principles by which it was to be animated; avoiding, as far as possible, any but the most fundamental regulations for controlling its operations, and these usually in the form of restrictions. *Vanhorne* v. *Dorrance*, 2 Dall. 304, 308; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 326.

The object was to enumerate, rather than to define, the powers granted. *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 194; *Passenger Cases*, 7 How. 283, 549; *Lottery Case*, 188 U. S. 321, 346. To delineate only the great outlines of the judicial power, leaving the details to Congress, while providing for the organization of the legislative department and the mode in which and the restrictions under which its authority should be exercised. *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 721. The reason for adopting general outlines only was well expressed by Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 407: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could

scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language."

The adoption of any particular system of substantive law was not within the purpose of the Constitutional Convention; and the clause establishing the judicial power was ill-adapted to the purpose had it existed. So far as they intended to prescribe permanent rules of substantive or even procedural law in connection with the establishment of the judicial system, the framers employed express terms for the purpose, as appears from other provisions of Article III, including the definition of treason, the character of proof required, the limitation of the punishment, and the requirement of a jury trial for this and other crimes.

In a somewhat exhaustive examination of various sources of information, including Elliot's Debates, Farrand's Records of the Federal Convention, and The Federalist, Nos. 80–83, I have been unable to find anything even remotely suggesting that the judicial clause was designed to establish the maritime code or any other system of laws for the determination of controversies in the courts by it established, much less any suggestion that the maritime code was to constitute the rule of decision in common-law courts, either federal or state.

Certainly, there is nothing in the mere provision establishing jurisdiction in admiralty and maritime causes to have that effect, unless the jurisdiction so established was in its nature exclusive. But, in civil causes, the jurisdic-

tion was not exclusive by the law of England and of the Colonies, and it was not made an exclusive jurisdiction by the Constitution.

In discussing this point, the distinction between the instance court and the prize court of admiralty must be observed. It was held in England that the question of prize or no prize, and other questions arising out of it, were exclusively cognizable in the admiralty, because that court took jurisdiction owing to the fact of possession of a prize of war, and the controversy turned upon belligerent rights and was determinable by the law of nations, and not the particular municipal law of any country. *Le Caux* v. *Eden* (1781), Doug. 594; 99 E. R. 375, 379–385; *Lindo* v. *Rodney*, reported in a note to *Le Caux* v. *Eden*, Doug. 613; 99 E. R. 385; *Smart* v. *Wolff* (1789), 3 T. R. 323, 340, *et seq.*; *Lord Camden* v. *Home* (1791), 4 T. R. 382, 393 *et seq.* But of civil actions *in personam* the instance court exercised a jurisdiction concurrent with that of the courts of common law. As Lord Mansfield said in *Lindo* v. *Rodney*, Doug. 614: "A thing being done upon the high sea don't exclude the jurisdiction of the courts of common law. For seizing, stopping, or taking a ship, upon the high sea, *not as prize*, an action will lie; but for taking *as prize*, no action will lie. The nature of the question excludes; not the locality." And again, referring to the effect of certain statutes (p. 614a): "The taking a ship upon the high sea is triable at law to repair the plaintiff in damages; but a taking on the high sea as *prize* is not triable at law to repair the plaintiff in damages. The nature of the ground of the action—*prize or no prize*—not only authorizes the prize court, but excludes the common law. These statutes don't exclude the common law in any case, and they confine the Admiralty by the locality of the thing done, which is the cause of action. It must be done upon the high sea."

So, with respect to actions *ex contractu*, Mr. Justice

Blackstone says, 3 Black. Com. 107: "It is no uncommon thing for a plaintiff to feign that a contract, really made at sea, was made at the royal exchange, or other inland place, in order to draw the cognizance of the suit from the courts of admiralty to those of Westminster Hall." The concurrent jurisdiction of the courts of common law was affirmed by Dr. Browne, the first edition of whose work was published in 1797–1799. 2 Browne's Civ. & Adm. Law (1st Am. ed.), 112, 115.

The declaration of Mr. Justice Nelson, speaking for this court in *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344, 390, that the lodging by the Constitution of the entire admiralty power in the federal judiciary, and the ninth section of the Judiciary Act, with its saving of common-law remedies, left the concurrent power of the courts of common law and of admiralty where it stood at common law, was not a chance remark. It has been so ruled in many other cases, to which I shall refer hereafter. The principles and history of the common law were well known to the framers of the Constitution and the members of the First Congress; it was from that system that their terminology was derived; and the provisions of the Constitution and contemporaneous legislation must be interpreted accordingly.

The statement that there is no common law of the United States (*Wheaton* v. *Peters*, 8 Pet. 591, 658; *Smith* v. *Alabama*, 124 U. S. 465, 478) is true only in the sense that the Constitution neither of its own force imposed, nor authorized Congress to impose, the common law or any other general body of laws upon the several States for the regulation of their internal affairs. As was pointed out in *Smith* v. *Alabama* (p. 478), "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the Eng-

lish common law, and are to be read in the light of its history."

As was well expressed by Shiras, District Judge, in *Murray* v. *Chicago & N. W. Ry. Co.*, 62 Fed. Rep. 24, 31: "From them [citations of the decisions of this court] it appears, beyond question, that the Constitution, the Judiciary Act of 1789, and all subsequent statutes upon the same subject are based upon the general principles of the common law, and that, to a large extent, the legislative and judicial action of the government would be without support and without meaning if they cannot be interpreted in the light of the common law. When the Constitution was adopted, it was not the design of the framers thereof to create any new systems of general law, nor to supplant those already in existence. At that time there were in existence and in force in the Colonies or States, and among the people thereof, the law of nations, the law admiralty and maritime, the common law, including commercial law, and the system of equity. Upon these foundations the Constitution was erected. The problem sought to be solved was not whether the Constitution should create or enact a law of nations, of admiralty, of equity, or the like, but rather how should the executive, legislative, and judicial powers and duties based upon these systems, and necessary for the proper development and enforcement thereof, be apportioned between the national and state governments."

And it is not to be supposed that the framers of the Constitution, familiar with the institutions and the principles of the common law, by which the admiralty jurisdiction was allowed on sufferance, and with a degree of jealousy born of the fact that the courts of admiralty were not courts of record, that they followed the practice of the civil law, allowed no trial by jury, and administered an exotic system of laws (3 Black. Com. 69, 86, 87, 106–108) —it is not to be supposed, I say, that the framers of the

Constitution, in granting judicial power over cases of admiralty and maritime jurisdiction, along with like power over all cases in law and equity arising under the laws of the United States, intended to exclude common-law courts, state or national, from any part of their concurrent jurisdiction in cases of maritime origin, or to deprive them of the judicial power, theretofore existing, to decide such cases according to the rules of the common law.

It is matter of familiar history that one of the chief weaknesses of the Confederation was in the absence of a judicial establishment possessed of general authority. Except that the Continental Congress, as an incident of the war power, was authorized to establish rules respecting captures and the disposition of prizes of war and to appoint courts for the trial of piracies and felonies committed on the high sea, and for determining appeals in cases of capture, and except that the Congress itself, through commissioners, was to exercise jurisdiction in disputes between the States and in controversies respecting conflicting land grants of different States, there was no provision in the Articles of Confederation for establishing a judicial system under the authority of the general government.

The result was that not only private parties, in cases arising out of the laws of the Congress, but the United States themselves, were obliged to resort to the courts of the States for the enforcement of their rights. Many cases of this character are reported, some even antedating the Confederation. *Respublica* v. *Sweers* (1779), 1 Dall. 41; *Respublica* v. *Powell* (1780), 1 Dall. 47; *Respublica* v. *De Longchamps* (1784), 1 Dall. 111. Even treason was punished in state courts and under state laws. See cases of *Molder, Malin, Carlisle* and *Roberts* (1778), 1 Dall. 33–39.

Before the Revolution, courts of admiralty jurisdiction were a part of the judicial systems of the several Colonies.

Waring v. *Clarke*, 5 How. 441, 454–456; Benedict on Admiralty, §§ 118–165. Upon the outbreak of the War questions of prize law became acute, and the colonial Congress, by resolutions of November 25, 1775, passed in the exercise of the war power (3 Dall. 54, 80) made appropriate recommendations for the treatment of prizes of war, but remitted the jurisdiction over such questions to the courts of the several Colonies, reserving to itself only appellate authority. This system continued until the year 1780 (after the submission of the Articles of Confederation, but before their final ratification), when the Congress established a court for the hearing of appeals from the state courts of admiralty in cases of capture. The opinions of this court are reported in 2 Dall. 1–42, and numerous cases decided without opinion, as well as some of those decided by committees of the Congress prior to the establishment of the court, are referred to in the late Bancroft Davis' "Federal Courts Before the Constitution," 131 U. S., Appendix, xix–xlix. The weak point of this system was the want of power in the central government to enforce the judgment of the appellate tribunal when it chanced to reverse the decree of a state court. There were some curious cases of conflicting jurisdiction, illustrated by *Doane* v. *Penhallow* (1787), 1 Dall. 218, 221; *Penhallow* v. *Doane* (1795), 3 Dall. 54, 79, 86; and *United States* v. *Peters* (1809), 5 Cranch, 115, 135, 137.

It was under the influence of numerous experiences of the inefficiency of a general government unendowed with judicial authority that the Constitutional Convention assembled in the year 1787. The fundamental need, to which the Convention addressed itself in framing the judiciary article, was to set up a judicial power covering all subjects of national concern. There was no greater need to establish jurisdiction over admiralty and maritime causes than over controversies arising under the Constitution and laws of the Union. There was no purpose to

establish a system of substantive law in any of the several classes of cases included within the grant of judicial power. The language employed makes it plain that, with the few express exceptions already noted (treason, etc.), the rules of decision were to be sought elsewhere. The entire absence of a purpose to establish a maritime code is manifest not only from the omission of any reference to the laws of Oleron, the laws of Wisbuy, or any other of the maritime codes recognized by the nations of Europe, but further from the fact that the Colonies differed among themselves as to maritime law and admiralty practice, and that their system in general differed from that which was administered in England. The evident purpose, in this as in the other classes of controversy, was that the courts of admiralty should administer justice according to the previous course and practice of such courts in the Colonies, just as the courts of common-law and equity jurisdiction were to proceed according to the several systems of substantive law appropriate to courts of their respective kinds; subject, of course, to the power of Congress to change the rules of law respecting matters lying within its appropriate sphere of action.

Undoubtedly the framers of the Constitution were advised of the ancient controversy in England between the common-law courts and the courts of admiralty respecting the extent of the jurisdiction of the latter. They were aware of the dual function of the admiralty courts as courts of instance and as prize courts, and of the established rule that in civil causes the jurisdiction of the instance court was concurrent with that of the courts of common law. They must have known that, whatever question had existed as to the territorial limits of the jurisdiction of the admiralty, it never had been questioned that in suits for mariners' wages and suits upon policies of marine insurance, and in other actions *ex contractu* having a maritime character, and also in actions of tort

arising upon the sea, the courts of common law exercised, and long had exercised, concurrent jurisdiction. Whatever early doubts may have existed had been based not upon any inherent incapacity of the common-law courts to deal with the subject matters, but upon the ancient theory of the venue, and disappeared with the recognition of the fictitious venue.

The grant of judicial power in cases of admiralty and maritime jurisdiction never has been construed as excluding the jurisdiction of the courts of common law over civil causes that before the Constitution were subject to the concurrent jurisdiction of the courts of admiralty and the common-law courts. The First Congress did not so construe it, as the saving clause in the Judiciary Act conclusively shows. And, assuming that the States, in the absence of legislation by Congress, would be without power over the subject matter, this saving clause, still maintained upon the statute book, is a sufficient grant of power. Jurisdiction in prize cases, as has been shown, springs out of the possession of a prize of war. Civil proceedings *in rem*, to be mentioned hereafter, are based upon the maritime lien, where possession in the claimant is neither necessary nor usual as is the case with common-law liens. With these exceptions, both resting upon grounds peculiar to the forum of the admiralty, concurrent jurisdiction of the courts of common law in civil cases of maritime origin always has been recognized by this court. *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344, 390; *Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, 458; *The Belfast*, 7 Wall. 624, 644–645; *Insurance Co.* v. *Dunham*, 11 Wall. 1, 32; *Leon* v. *Galceran*, 11 Wall. 185, 187–188; *Steamboat Co.* v. *Chase*, 16 Wall. 522, 533; *Schoonmaker* v. *Gilmore*, 102 U. S. 118; *Manchester* v. *Massachusetts*, 139 U. S. 240, 262.

Nor is the reservation of a common-law remedy limited to such causes of action as were known to the common law

at the time of the passage of the Judiciary Act. It includes statutory changes. *Steamboat Co.* v. *Chase*, 16 Wall. 522, 533, 534; *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638, 644. Those remedies which were held not to be common-law remedies, within the saving clause, in *The Moses Taylor*, 4 Wall. 411, 427, 431; *The Hine* v. *Trevor*, 4 Wall. 555, 571, 572; *The Belfast*, 7 Wall. 624, 644; *Steamboat Co.* v. *Chase*, 16 Wall. 522, 533, and *The Glide*, 167 U. S. 606, 623, provided for imposing a lien on the ship by proceedings in the nature of admiralty process *in rem*, and it was for this reason only that they were held to trench upon the exclusive admiralty jurisdiction of the courts of the United States. The distinction was noticed in *Leon* v. *Galceran*, 11 Wall. 185, 189, and again in *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638, 642. In the latter case it was pointed out (p. 644) that the reservation of a common-law remedy where the common law is competent to give it was not confined to common-law actions but included remedies without action, such as a distress for rent or for the trespass of cattle; a bailee's remedy by detaining personal property until paid for work done upon it or for expenses incurred in keeping it; the lien of an innkeeper upon the goods of his guests, and that of a carrier upon things carried; the remedy of a nuisance by abatement, and others. The most recent definition of the rule laid down in *The Hine* v. *Trevor* and other cases of that class is in *Rounds* v. *Cloverport Foundry & Machine Co.*, 237 U. S. 303.

I have endeavored to show, from a consideration of the phraseology of the constitutional grant of jurisdiction and the act of the First Congress passed to give effect to it, from the history in the light of which the language of those instruments is to be interpreted, and from the uniform course of decision in this court from the earliest time until the present, these propositions: First, that the grant of jurisdiction to the admiralty was not intended to be ex-

clusive of the concurrent jurisdiction of the common-law courts theretofore recognized; and, secondly, that neither the Constitution nor the Judiciary Act was intended to prescribe a system of substantive law to govern the several courts in the exercise of their jurisdiction, much less to make the rules of decision, prevalent in any one court, obligatory upon others, exercising a distinct jurisdiction, or binding upon the courts of the States when acting within the bounds of their respective jurisdictions. In fact, while courts of admiralty undoubtedly were expected to administer justice according to the law of nations and the customs of the sea, they were left at liberty to lay hold of common-law principles where these were suitable to their purpose, and even of applicable state statutes, just as courts of common law were at liberty to adopt the rules of maritime law as guides in the proper performance of their duties. This eclectic method had been practiced by the courts of each jurisdiction prior to the Constitution, and there is nothing in that instrument to constrain them to abandon it.

The decisions of this court show that the courts of admiralty in many matters are bound by local law. The doubt expressed by Mr. Justice Bradley in *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527, 558, as to whether a state law could have force to create a liability in a maritime case at all, was laid aside in *The Corsair*, 145 U. S. 335, and definitely set at rest in *The Hamilton*, 207 U. S. 398, 404. The fact is that, long before *Butler* v. *Boston & Savannah Steamship Co.*, it had been recognized that state laws might not merely create a liability in a maritime case, but impose a duty upon the admiralty courts of the United States to enforce such liability. Thus, while it was recognized that by the general maritime law a foreign ship, or a ship in a port of a State to which she did not belong, was subject to a suit *in rem* in the admiralty for repairs or necessaries, the case of a ship in a

port of her home State was governed by the municipal law of the State, and no lien for repairs or necessaries would be implied unless recognized by that law. *The General Smith* (1819), 4 Wheat. 438, 443; *The Lottawanna*, 21 Wall. 558, 571, 578. Conversely, it was held in the case of *The Planter* (*Peyroux* v. *Howard*, 1833), 7 Pet. 324, 341, that a libel *in rem* in the admiralty might be maintained against a vessel for repairs done in her home port where a local statute gave a lien in such a case. To the same effect, *The J. E. Rumbell*, 148 U. S. 1, 12. As elsewhere pointed out herein, where a state statute conferred a lien operative strictly *in rem*, it was uniformly held not enforceable in the state courts, but only because it trenched upon the peculiar jurisdiction of the admiralty, and therefore was not a "common-law remedy" within the saving clause of the Judiciary Act of 1789. *The Moses Taylor*, 4 Wall. 411, 427, 431; *The Hine* v. *Trevor*, 4 Wall. 555, 571, 572; *The Belfast*, 7 Wall. 624, 644; *Steamboat Co.* v. *Chase*, 16 Wall. 522, 533; *The Glide*, 167 U. S. 606, 623.

Under these decisions, and others to the same effect, the substance of the matter is that a State may, by statute, create a right to a lien upon a domestic vessel, in the nature of a maritime lien, which may be enforced in admiralty in the courts of the United States; but a State may not confer upon its own courts jurisdiction to enforce such a lien, because the federal jurisdiction in admiralty is exclusive. *The J. E. Rumbell*, 148 U. S. 1, 12, and cases cited. But a lien imposed not upon the *rem* but upon defendant's interest in the *res* may be made enforceable in the state courts. *Rounds* v. *Cloverport Foundry & Machine Co.*, 237 U. S. 303, 307, and cases cited.

The Roanoke, 189 U. S. 185, 194, 198, while approving *The General Smith*, *The Planter*, *The Lottawanna*, and *The J. E. Rumbell*, *supra*, gave a negative answer to the very different question whether a State could, without encroaching upon the federal jurisdiction, create a lien

against foreign vessels to be enforced in the courts of the United States.

In the present case there is no question of lien, and, I repeat, no question concerning the jurisdiction of the state court; the crucial inquiry is, to what law was it bound to conform in rendering its decision? Or, rather, the question is the narrower one: Do the Constitution and laws of the United States prevent a state court of common law from applying the state statutes in an action *in personam* arising upon navigable water within the State, there being no act of Congress applicable to the controversy? I confess that until this case and kindred cases submitted at the same time were brought here, I never had supposed that it was open to the least doubt that the reservation to suitors of the right of a common-law remedy had the effect of reserving at the same time the right to have their common-law actions determined according to the rules of the common law, or state statutes modifying those rules. This court repeatedly has so declared, at the same time recognizing fully that the point involves the question of state power. In *United States* v. *Bevans*, 3 Wheat. 336, 388, the court, by Mr. Chief Justice Marshall, said: "Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise? This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory, or of general jurisdiction. It is obviously designed for other purposes. . . . In describing the judicial power, the framers of our Constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction. It is not questioned that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the Union. Congress may pass all laws which are necessary and proper for giving

the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of the sovereignty not yet given away." In *Steamboat Co.* v. *Chase*, *supra*, the court, by Mr. Justice Clifford, said (p. 534): "State statutes, if applicable to the case, constitute the rules of decision in common-law actions, in the Circuit Courts as well as in the State courts."

In *Atlee* v. *Packet Co.*, 21 Wall. 389, 395, 396, the court, by Mr. Justice Miller, said: "The plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. . . . An important difference as regards this case is the rule for estimating the damages. In the common-law court the defendant must pay all the damages or none. If there has been on the part of plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. . . . Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially." And see *The Max Morris*, 137 U. S. 1, 10; *Belden* v. *Chase*, 150 U. S. 674, 691; Benedict Adm., § 201.

In the prevailing opinion, great stress is laid upon certain expressions quoted from *The Lottawanna*, 21 Wall. 558, 574, but it seems to me they have been misunderstood, because read without regard to context and subject matter. That was an admiralty appeal, and involved the question whether by the general maritime law, as accepted in the United States, there was an implied lien for necessaries

furnished to a vessel in her home port, where no such lien was recognized by the municipal law of the State. In the course of the discussion, the court, by Mr. Justice Bradley, said: "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' But by what criterion are we to ascertain the precise limits of the law thus adopted? *The Constitution does not define it.* It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. *Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary.* It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law,' *without defining those terms, assuming them to be known and understood.*"

In this language there is the clearest recognition that the Constitution, in establishing and distributing the judicial power, did not intend to define substantive law, or to make the rules of decision in one jurisdiction binding *proprio vigore* in tribunals exercising another jurisdiction. The courts of common law were to administer justice according to the common law, the courts of equity according to the principles of equity, and the courts of admiralty and maritime jurisdiction according to the maritime law.

The expression on page 575 respecting the uniform operation of the maritime law was predicated only of the operation of that law as administered in the courts of admiralty, for it is not to be believed that there was any purpose to overrule *Atlee* v. *Packet Co.*, 21 Wall. 389, 395, decided at the same term and only about two months before *The Lottawanna* by a unanimous court including Mr. Justice Bradley himself, in which it was held that where there was concurrent jurisdiction in the courts of common law and the courts of admiralty each court was at liberty to adopt its own rules of decision. Moreover, the principal question at issue in *The Lottawanna* was whether the case of *The General Smith*, 4 Wheat. 438, should be overruled, in which it had been held that, in the absence of state legislation imposing the lien, a ship was not subject to a libel *in rem* in the admiralty for repairs furnished in her home port. The general expressions referred to relate to that state of the law—the absence of state legislation, as well as of legislation by Congress—and upon this the decision in *The General Smith* was upheld (p. 578). But in proceeding to discuss the subordinate question whether there was a lien under the state statute, it was held (p. 579): "It seems to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the rights of material-men furnishing necessaries to a vessel in her home port may be regulated in each State by State legislation." And again (p. 581): "Whatever may have been the origin of the practice, and whether or not it was based on the soundest principles, it became firmly settled, and it is now too late to question its validity. . . . It would undoubtedly be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted (supposing Congress to have the power) the authority of the States to legislate on the subject seems to be conceded by the uniform course of decisions."

Again, in *Workman* v. *New York City*, 179 U. S. 552, which, like *The Lottawanna*, was a proceeding in admiralty, the court, in quoting the declarations contained in that case respecting the general operation of the maritime law throughout the navigable waters of the United States, was dealing only with its application in the courts of admiralty. This is plain from what was said as a preface to the discussion (p. 557): "In examining the first question, that is, whether the local law of New York must prevail, though in conflict with the maritime law, it must be borne in mind that the issue is not—as was the case in *Detroit* v. *Osborne* (1890), 135 U. S. 492—whether the local law governs as to a controversy arising in the courts of common law or of equity of the United States, but does the local law, if in conflict with the maritime law, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (Art. III, sec. 2) upon the courts of the United States."

In the argument of the present case and companion cases, emphasis was laid upon the importance of uniformity in applying and enforcing the rules of admiralty and maritime law, because of their effect upon interstate and foreign commerce. This, in my judgment, is a matter to be determined by Congress. Concurrent jurisdiction and optional remedies in courts governed by different systems of law were familiar to the framers of the Constitution, as they were to English-speaking peoples generally. The judicial clause itself plainly contemplated a jurisdiction concurrent with that of the state courts in other controversies. In such a case, the option of choosing the jurisdiction is given primarily for the benefit of suitors, not of defendants. For extending it to defendants, removal proceedings are the appropriate means.

Certainly there is no greater need for uniformity of

adjudication in cases such as the present than in cases arising on land and affecting the liability of interstate carriers to their employees. And, although the Constitution contains an express grant to Congress of the power to regulate interstate and foreign commerce, nevertheless, until Congress had acted, the responsibility of interstate carriers to their employees for injuries arising in interstate commerce was controlled by the laws of the States. This was because the subject was within the police power, and the divergent exercise of that power by the States did not regulate, but only incidentally affected, commerce among the States. *Sherlock* v. *Alling*, 93 U. S. 99, 103; *Second Employers' Liability Cases*, 223 U. S. 1, 54. It required an act of Congress (Act of April 22, 1908, c. 149, 35 Stat. 65) to impose a uniform measure of responsibility upon the carriers in such cases. So, it required an act of Congress (the so-called Carmack Amendment to the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, 595) to impose a uniform rule of liability upon rail carriers for losses of merchandise carried in interstate commerce. *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 504. In a great number and variety of cases state laws and policies incidentally affecting interstate carriers in their commercial operations have been sustained by this court, in the absence of conflicting legislation by Congress. Among them are: Laws requiring locomotive engineers to be examined and licensed by the state authorities, *Smith* v. *Alabama*, 124 U. S. 465, 482; requiring such engineers to be examined for defective eyesight, *Nashville, Chattanooga & St. Louis Ry.* v. *Alabama*, 128 U. S. 96, 100; requiring telegraph companies to receive dispatches and transmit and deliver them diligently, *Western Union Telegraph Co.* v. *James*, 162 U. S. 650; forbidding the running of freight trains on Sunday, *Hennington* v. *Georgia*, 163 U. S. 299, 304, 308, etc.; regulating the heating of passenger cars, *New York, New Haven & Hartford R. R. Co.* v. *New York*, 165 U. S.

628; prohibiting a railroad company from obtaining by contract an exemption from the liability which would have existed had no contract been made, *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Solan*, 169 U. S. 133, 136, 137; a like result arising from rules of law enforced in the state courts in the absence of statute, *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477, 488, 491; statutes prohibiting the transportation of diseased cattle in interstate commerce, *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 630, 635; *Reid* v. *Colorado*, 187 U. S. 137, 147, 151; statutes requiring the prompt settlement of claims for loss or damage to freight, applied incidentally to interstate commerce, *Atlantic Coast Line R. R. Co.* v. *Mazursky*, 216 U. S. 122, even since the passage of the Carmack Amendment, *Missouri, Kansas & Texas Ry. Co.* v. *Harris*, 234 U. S. 412, 417, 420; statutes regulating the character of headlights used on locomotives employed in interstate commerce, *Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280; *Vandalia R. R. Co.* v. *Public Service Commission*, 242 U. S. 255. All these cases affected the responsibility of interstate carriers. Until now, Congress has passed no act concerning their responsibility for personal injuries sustained by passengers or strangers, or for deaths resulting from such injuries, so that these matters still remain subject to the regulation of the several States. We have held recently that even the anti-pass provision of the Hepburn Act (34 Stat. 584, 585, c. 3591, § 1) does not deprive a party who accepts gratuitous carriage in interstate commerce with the consent of the carrier, in actual but unintentional violation of the prohibition of the act, of the benefit and protection of the law of the State imposing upon the carrier a duty to care for his safety; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 612.

In the very realm of navigation, the authority of the States to establish regulations effective within their own borders, in the absence of exclusive legislation by Con-

gress, has been recognized from the beginning of our government under the Constitution. As to pilotage regulations, it was recognized by the First Congress (Act of August 7, 1789, c. 9, § 4, 1 Stat. 53, 54; Rev. Stats., § 4235), and this court, in many decisions, has sustained local regulations of that character. *Cooley* v. *Board of Wardens*, 12 How. 299, 320; *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 459; *Ex parte McNiel*, 13 Wall. 236, 241; *Wilson* v. *McNamee*, 102 U. S. 572; *Olsen* v. *Smith*, 195 U. S. 332, 341; *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187, 195.

It is settled that a State, in the absence of conflicting legislation by Congress, may construct dams and bridges across navigable streams within its limits, notwithstanding an interference with accustomed navigation may result. *Willson* v. *Black-Bird Creek Marsh Co.*, 2 Pet. 245, 252; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Pound* v. *Turck*, 95 U. S. 459; *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 683; *Cardwell* v. *American Bridge Co.*, 113 U. S. 205, 208; *Hamilton* v. *Vicksburg, Shreveport & Pacific Railroad*, 119 U. S. 280; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, 8; *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*, 165 U. S. 365; *Manigault* v. *Springs*, 199 U. S. 473, 478.

So, as to harbor improvements, *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; improvements and obstructions to navigation, *Huse* v. *Glover*, 119 U. S. 543, 548; *Leovy* v. *United States*, 177 U. S. 621, 625; *Cummings* v. *Chicago*, 188 U. S. 410, 427; inspection and quarantine laws, *Gibbons* v. *Ogden*, 9 Wheat. 1, 203; wharfage charges, *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559, 563; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 702; *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444, 447; tolls for the use of an improved waterway, *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288, 295.

So, of provisions fixing the tolls for transportation upon an interstate ferry, *Port Richmond &c. Ferry Co.* v. *Hudson County*, 234 U. S. 317, 331; or upon vessels plying be-

tween two ports located within the same State, *Wilmington Transportation Co.* v. *California Railroad Commission*, 236 U. S. 151, 156.

In each of these cases, except the last, which related to intrastate transport, the state regulation had an incidental effect upon the very conduct of navigation in interstate or foreign commerce. If in such cases the States possess the power of regulation in the absence of inconsistent action by Congress, much more clearly do they possess that power where Congress is silent, with respect to a liability which arises but casually, through the accidental injury or death of an employee engaged in a maritime occupation.

Indeed, with respect to injuries that result in death, it already is settled that although the general maritime law, like the common law, afforded no civil remedy for death by wrongful act (*The Harrisburg*, 119 U. S. 199; *The Alaska*, 130 U. S. 201, 209), yet a right of action created by statute is enforceable in a state court although the tort was committed upon navigable water (*Steamboat Co.* v. *Chase*, 16 Wall. 522, 533; *Sherlock* v. *Alling*, 93 U. S. 99, 104), and the liability arising out of a state statute in such a case will be recognized and enforced in the admiralty (*The Hamilton*, 207 U. S. 398), although not by proceeding *in rem* unless the statute expressly creates a lien (*The Corsair*, 145 U. S. 335, 347).

In *Sherlock* v. *Alling*, *supra*, which was an action in a state court and based upon a state statute to recover damages for a death by wrongful act occurring in interstate navigation, it was contended that the statute could not be applied to cases where the injury was caused by a marine tort, without interfering with the exclusive regulation of commerce vested in Congress. The court, after declaring that any regulation by Congress, or the liability for its infringement, would be exclusive of state authority, proceeded to say, by Mr. Justice Field (93 U. S. 104): "But with reference to a great variety of matters touching the

rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit. In our judgment, the statute of Indiana falls under this class. Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies," etc.

I deem *The Hamilton, supra,* to be a controlling authority upon the question now presented. It was there held, not only that the constitutional grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, leaves open the common-law jurisdiction of the state courts over torts committed at sea, but also that it leaves the States at liberty to change the law respecting such torts by legislation, as by a statute creating a liability for death by wrongful act, which was the particular legislation there in question.

To what extent uniformity of decision should result from the grant of jurisdiction to the courts of the United States concurrent with that of the state courts, is a subject that repeatedly has been under consideration in this court, but it never has been held that the jurisdictional grant required state courts to conform their decisions to those of the United States courts. The doctrine clearly

deducible from the cases is that in matters of commercial law and general jurisprudence, not subject to the authority of Congress or where Congress has not exercised its authority, and in the absence of state legislation, the federal courts will exercise an independent judgment and reach a conclusion upon considerations of right and justice generally applicable, the federal jurisdiction having been established for the very purpose of avoiding the influence of local opinion; but that where the State has legislated, its will thus declared is binding, even upon the federal courts, if it be not inconsistent with the expressed will of Congress respecting a matter that is within its constitutional power. The doctrine concedes as much independence to the courts of the States as it reserves for the courts of the Union. *Burgess* v. *Seligman*, 107 U. S. 20, 33, 34; *East Alabama Ry. Co.* v. *Doe*, 114 U. S. 340, 353; *Gibson* v. *Lyon*, 115 U. S. 439, 446; *Anderson* v. *Santa Anna*, 116 U. S. 356, 362; *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368, 372; *Folsom* v. *Ninety-six*, 159 U. S. 611, 625; *Stanly County* v. *Coler*, 190 U. S. 437, 444; *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 357, 360.

In *Baltimore & Ohio R. R. Co.* v. *Baugh*, *supra*, the court had under review the judgment of a circuit court of the United States in an action by a locomotive fireman injured through negligence of the engineer. The cause of action arose in the State of Ohio, and the question presented was whether the engineer and fireman were fellow-servants. Under the decisions of the Ohio courts they were, but this court held that, as there was no state statute, the question should not be treated as a question of local law, to be settled by an examination merely of the decisions of the state court of last resort, but should be determined upon general principles; the courts of the United States being under an obligation to exercise an independent judgment. The court, by Mr. Justice Brewer, said (149 U. S. 378): "There is no question as to

the power of the States to legislate and change the rules of the common law in this respect as in others; but in the absence of such legislation the question is one determinable only by the general principles of that law. Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the States is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our Constitution."

In other words, the general effect of the question upon interstate commerce rendered it one of the class that called for the application of general principles; nevertheless, state legislation would be controlling—in the absence of valid legislation by Congress, of course.

In *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Solan, supra,* the doctrine was concisely stated by Mr. Justice Gray, speaking for the court, as follows (169 U. S. 136): "The question of the right of a railroad corporation to contract for exemption from liability for its own negligence is, indeed, like other questions affecting its liability as a common carrier of goods or passengers, one of those questions not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the State in which the cause of action arises. But the law to be applied is none the less the law of the State; and may be changed by its legislature, except so far as restrained by the constitution of the State or by the Constitution or laws of the United States."

I freely concede the authority of Congress to modify the rules of maritime law so far as they are administered in the federal courts, and to make them binding upon the courts of the States so far as they affect interstate or international relations, or regulate "commerce with foreign

nations, and among the several States, and with the Indian tribes." What I contend is that the Constitution does not, *proprio vigore*, impose the maritime law upon the States except to the extent that the admiralty jurisdiction was exclusive of the courts of common law before the Constitution; that is to say, in the prize jurisdiction, and the peculiar maritime process *in rem;* and that as to civil actions *in personam* having a maritime origin, the courts of the States are left free, except as Congress by legislation passed within its legitimate sphere of action may control them; and that Congress, so far from enacting legislation of this character, has from the beginning left the state courts at liberty to apply their own systems of law in those cases where prior to the Constitution they had concurrent jurisdiction with the admiralty, for the saving clause in the Judiciary Act necessarily has this effect.

Surely it cannot be that the mere grant of judicial power in admiralty cases, with whatever general authority over the subject matter can be raised *by implication,* can, in the absence of legislation, have a greater effect in limiting the legislative powers of the States than that which resulted from the *express* grant to Congress of an authority to regulate interstate commerce,—the limited effect of which, in the absence of legislation by Congress, we already have seen. The prevailing opinion properly holds that, under the circumstances of the case at bar, although plaintiff in error was engaged in interstate commerce, and the deceased met his death while employed in such commerce, the provisions of the Federal Employers' Liability Act (April 22, 1908, c. 149, 35 Stat. 65) do not apply, because they cover only railroad operations and work connected therewith, whereas the deceased was employed upon an ocean-going ship. In effect it holds also that in the absence of applicable legislation by Congress the express grant of authority to regulate such commerce, as contained in the Constitution, does not exclude the operation of the

state law. It seems to me a curious inconsistency to hold, at the same time, that the rules of the maritime law exclude the operation of a state statute without action by Congress, although the Constitution contains no express grant of authority to establish rules of maritime law, and the authority must be implied from the mere constitutional grant of judicial power over the subject matter; and most remarkable that this result is reached in the face of the fact that the judicial power in cases of admiralty jurisdiction has been put into effect by Congress subject to an express reservation of the previous concurrent jurisdiction of the courts of law over actions of this character. This, besides ignoring the reservation, gives a greater potency to an implied power than to a power expressly conferred.

The effect of the present decision cannot logically be confined to cases that arise in interstate or foreign commerce. It seems to be thought that the admiralty jurisdiction of the United States has limits coextensive with the authority of Congress to regulate commerce. But this is not true. The civil jurisdiction in admiralty in cases *ex contractu* is dependent upon the subject matter; in cases *ex delicto* it is dependent upon locality. In cases of the latter class, if the cause of action arise upon navigable waters of the United States, even though it be upon a vessel engaged in commerce wholly intrastate, or upon one not engaged in commerce at all, or (probably) not upon any vessel, the maritime courts have jurisdiction. *Propeller Genessee Chief* v. *Fitzhugh*, 12 How. 443, 452; *The Propeller Commerce*, 1 Black, 574, 578, 579; *The Belfast*, 7 Wall. 624, 636, 638, 640; *Ex parte Boyer*, 109 U. S. 629, 632; *In re Garnett*, 141 U. S. 1, 15, 17. It results that if the constitutional grant of judicial power to the United States in cases of admiralty and maritime jurisdiction is held by inference to make the rules of decision that prevail in the courts of admiralty binding *proprio vigore* upon

state courts exercising a concurrent jurisdiction in cases of maritime origin, the effect will be to deprive the several States of their police power over navigable waters lying wholly within their respective limits, and of their authority to regulate their intrastate commerce so far as it is carried upon navigable waters.

The following additional consideration is entitled to great weight: The same Judiciary Act which in its 9th section conferred upon the district courts of the United States original cognizance of civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, in its 25th section allowed a writ of error from this court to review the final judgment or decree of a state court of last resort resulting from a decision overruling any special claim of right, privilege, or exemption based upon the construction of any clause of the Constitution or statutes of the United States. By later legislation the review was broadened (Act of February 5, 1867, c. 28, § 2, 14 Stat. 385, 386; § 709, Rev. Stats.; § 237, Jud. Code), and by recent legislation the writ of certiorari has been substituted for the writ of error in many cases (Act of September 6, 1916, c. 448, 39 Stat. 726). But, at all times, the right to review in this court the decisions of the state courts upon questions of federal law has existed, so that if by the true construction of Art. III, § 2, of the Constitution, or of § 9 of the Judiciary Act of 1789, it had been the right of parties suing or sued in state courts upon causes of action of a maritime nature to insist that their cases should be determined according to the rules of decision found in the law maritime, this right or immunity might have been asserted as a federal right, and its denial made the ground of a review of the resulting judgment, under a writ of error (or, now, a writ of certiorari), from this court to the state court of last resort. Yet, until the present case, and others submitted

at the same time, the reported decisions of this court show not a trace of any such question raised. I can conceive of no stronger evidence to prove that from the foundation of the government until the present time it has been the opinion of the Bar and of the Judiciary, in the state courts as well as in the courts of the United States, that it was not the right of parties suing or sued in state courts of law or equity upon causes of action arising out of maritime affairs, to have them decided according to the principles that would have controlled the decision had the suits been brought in the admiralty courts.

There is no doubt that, throughout the entire life of the nation under the Constitution, state courts not only have exercised concurrent jurisdiction with the courts of admiralty in actions *ex contractu* arising out of maritime transactions, and in actions *ex delicto* arising upon the navigable waters, but that in exercising such jurisdiction they have, without challenge until now, adopted as rules of decision their local laws and statutes, recognizing no obligation of a federal nature to apply the law maritime. State courts of last resort, in several recent cases, have had occasion to consider the precise contention now made by plaintiff in error, and upon full consideration have rejected it. *Lindstrom* v. *Mutual Steamship Co.*, 132 Minnesota, 328; *North Pacific S. S. Co.* v. *Industrial Accident Commission* [Cal.], 163 Pac. Rep. 199; *Kennerson* v. *Thames Towboat Co.*, 89 Connecticut, 367, 373. See also *Matter of Walker* v. *Clyde Steamship Co.*, 215 N. Y. 529, 531; *Matter of Jensen* v. *Southern Pacific Co.*, 215 N. Y. 514 (this case). I have found no case to the contrary except a decision by the United States District Court for the Northern District of Ohio in *Schuede* v. *Zenith S. S. Co.*, 216 Fed. Rep. 566, now under consideration by this court. The reasoning is unsatisfactory, and it was repudiated in *Keithley* v. *North Pacific S. S. Co.*, 232 Fed. Rep. 255, 259.

I may remark, in closing, that there is no conflict be-

tween the New York Workmen's Compensation Act and the acts of Congress for limiting the liability of shipowners (Rev. Stats., §§ 4283–5; Act of June 26, 1884, c. 121, § 18, 23 Stat. 53, 57). So long as the aggregate liabilities of the owner, including that under the New York law, do not amount to as much as the interest of the owner in the vessel and freight pending, the act of Congress does not come into play. Where it does apply, it reduces all liabilities proportionally, under whatever law arising; the liability under the New York law along with the others. *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527, 552, 558; *The Hamilton*, 207 U. S. 398, 406; *Richardson* v. *Harmon*, 222 U. S. 96, 104, 105.

MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE concur in the dissent, both upon the grounds stated by MR. JUSTICE HOLMES and upon those stated by MR. JUSTICE PITNEY.

CLYDE STEAMSHIP COMPANY *v.* WALKER.

ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

No. 281. Argued February 28, 1916; restored to docket for reargument November 13, 1916; reargued January 31, February 1, 1917.—Decided May 21, 1917.

Upon the authority of *Southern Pacific Co.* v. *Jensen*, *ante*, 205, *Held*, that the New York Workmen's Compensation Act is unconstitutional as applied to the case of a longshoreman employed by a steamship company engaged in interstate transportation by sea, who was injured while on board a vessel unloading her at her wharf in navigable waters in New York.

215 N. Y. 529, reversed.

THE case is stated in the opinion.

Mr. Norman B. Beecher, with whom *Mr. Ray Rood Allen* was 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 MCREYNOLDS delivered the opinion of the court.

Purporting to proceed under the Workmen's Compensation Law of New York (c. 67, Consolidated Laws), the State Commission, on September 3, 1914, made an award to defendant in error, Walker.

It found:

"1. William Alfred Walker, a claimant, is a longshoreman, residing at 151 West 133rd Street, New York City. Prior to July 1, 1914, he was employed in the City of New York by the Clyde Steamship Company for longshore work. He was injured on July 1, 1914, while in the employ of the Clyde Steamship Company as a longshoreman.

"2. The Clyde Steamship Company is a corporation organized and existing under the Laws of Maine, where it has its principal office. It also has an office at Pier 36 North River.

"3. During the discharge of the Cherokee and at the time of the accident, the claimant was on board the steamship Cherokee, owned and operated by the Clyde Steamship Company. During the year prior to the accident, Walker had been employed from time to time by the Clyde Steamship Company and could have been assigned to work upon the pier. The Cherokee was, at the time of the accident, moored to and alongside Pier 37, North

River, New York City, lying in navigable waters of the Hudson River. Said pier is leased by Clyde Steamship Company from the City of New York.

"4. While claimant was hooking the rope of a derrick into a load of lumber in the between decks of said vessel for the purpose of unloading it from that vessel, his hand was jammed against the lumber, resulting in laceration of the second finger of the left hand. Claimant was disabled by reason of the injury from July 1, 1914, to July 22, 1914, returning to work upon the latter date.

"5. The business of the Clyde Steamship Company in this state consists solely of carrying passengers and merchandise to New York from other states and carrying passengers and merchandise from New York to other states. All cargo on board the Cherokee, including the lumber aforesaid, had been taken on board in the State of North Carolina and carried by water to New York and was there unloaded from the steamship Cherokee. The claimant was engaged solely in handling said lumber.

"6. The injury was an accidental injury and arose out of and in the course of the employment of claimant by the Clyde Steamship Company. The injury did not result solely from the intoxication of the injured employee while on duty, and was not occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another.

"7. The average weekly wage of claimant was $17.30."

Without opinion the Appellate Division affirmed the award, and this action was approved by the Court of Appeals. 215 N. Y. 529.

In *Southern Pacific Company* v. *Jensen*, just decided, *ante*, 205, we considered and disposed of the fundamental question here involved. The legislature exceeded its authority in attempting to extend the statute to conditions like those which the record discloses.

The judgment of the court below must be reversed and

the cause remanded for further proceedings not inconsistent with our opinion in the former case.

Reversed.

Dissenting: MR. JUSTICE HOLMES, MR. JUSTICE PITNEY, MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE.

SUTTON *v.* STATE OF NEW JERSEY.

MIHM *v.* STATE OF NEW JERSEY.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

Nos. 189, 190. Argued April 20, 1917.—Decided May 21, 1917.

A state law requiring a street car company to carry city detectives free when in the discharge of duty, *Held* not an arbitrary or unreasonable exercise of police power.

A state law requiring a street car company to carry city detectives free while in the discharge of duty is a valid exercise of a reserved power to amend the company's charter.

87 N. J. L. 192; *id.*, 332, affirmed.

THE case is stated in the opinion.

Mr. Frank Bergen for plaintiffs in error.

Mr. John Bentley for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

These cases were argued together. In each the New Jersey statute (P. L. 1912, p. 235,[1]) requiring street rail-

[1] 1. On and after the passage of this act each street railway company or corporation referred to in the act to which this act is a supple-

way companies to grant free transportation to police officers while engaged in the performance of their public duties, is assailed as invalid under the Fourteenth Amendment. In each a prosecution for assault and battery was brought against an inspector employed by the Public Service Railway Company of Jersey City, for ejecting a city detective who refused to pay his fare. Both detectives were in plain clothes, but showed their badges and claimed the right to ride free of charge. Both detectives were on duty at the time—one was on his way to report at headquarters; the other to interview the victim of a robbery. The defence in each case was the unconstitutionality of the statute and that the detective, having wrongfully refused to pay his fare, was ejected with no more than necessary force. The police justice, before whom the prosecutions were instituted, found the defendants guilty and fined them. These judgments were affirmed in successive appeals to the Supreme Court and to the Court of Errors and Appeals of New Jersey. 83 N. J. L. 46. 87 N. J. L. 192. The case comes here on writ of error.

The Supreme Court of New Jersey said:

"Policemen are frequently required to be on street cars in the execution of their duties to preserve the peace, to enforce ordinances and to prevent or detect crime. It would be difficult to say that the mere presence of a police officer might not be of value for securing these objects . . . at any rate, the legislature might reason-

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ment shall grant free transportation of uniformed public officers while engaged in the performance of their public duties, or police officers of whatever grade or rank acting as detectives, county detectives, or detectives attached to or connected with the office of the prosecutor of the pleas in any county in this State while engaged in the performance of their public duties, whose duties require police duty to be performed without uniform.

ably think so, and legalize his presence on the car without payment of fare."

Freedom to come and go upon the street cars without the obstacle or discouragement incident to payment of fares may well have been deemed by the legislature essential to efficient and pervasive performance of the police duty. Increased protection may thereby enure to both the company and the general public without imposing upon the former an appreciable burden. If any evidence of the reasonableness of the provision were needed, it could be found in the fact that such officers had been voluntarily carried free by the company and its predecessors for at least eighteen years prior to July 4, 1910, when the practice was prohibited by the Public Utilities Act (P. L. 1910, p. 58). In the following year such free transportation was expressly permitted (P. L. 1911, p. 29), and it was made mandatory by the act here in question. We cannot say that the requirement that city detectives not in uniform be carried free on street cars when in the discharge of their duties is an arbitrary or unreasonable exercise of the police power.

Furthermore the charter of the Railway Company was subject to alteration in the discretion of the legislature (Constitution of New Jersey, Art. IV., § 7, Par. 11. P. L. 1846, p. 17.) The obligation to carry free city detectives engaged in the discharge of their duties is a burden far lighter than others imposed upon street-using corporations which have been sustained by this court as a valid exercise of the reserved power.[1]

The statute is broad in scope, extending also to all "uniformed public officers"; but the court below expressly confined its decision to the case presented, sustaining the

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[1] *Stanislaus County* v. *San Joaquin C. & I. Co.*, 192 U. S. 201; *San Antonio Traction Co.* v. *Altgelt*, 200 U. S. 304; *Fair Haven & Westville R. R. Co.* v. *New Haven*, 203 U. S. 379.

law "in so far as it applies to police officers"; and our decision is likewise so limited.

The judgments are

Affirmed.

MR. JUSTICE MCKENNA and MR. JUSTICE PITNEY dissent.

UNITED COPPER SECURITIES COMPANY ET AL. *v.* AMALGAMATED COPPER COMPANY ET AL.

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

No. 208. Argued April 24, 1917.—Decided May 21, 1917.

The established principles limiting the right of a stockholder to sue on behalf of the corporation when it refuses to do so, restated and held applicable to an action for damages based on alleged injury to the corporation through violations of the Sherman Act.

The rule which confines the individual stockholder to the equitable forum when seeking to enforce a right of the corporation applies when the cause of action arises under the Sherman Act, as in other cases. *Fleitmann* v. *Welsbach Co.*, 240 U. S. 27, distinguished.

Whether or not in an action by stockholders to enforce an alleged right of their corporation this court has power to substitute as plaintiffs persons appointed receivers of the corporation while the writ of error is pending, *Held* that in the circumstances stated in the opinion such a motion was without merit in this case.

223 Fed. Rep. 421, affirmed.

THE case is stated in the opinion.

Mr. Ferdinand E. M. Bullowa, with whom *Mr. Ralph James M. Bullowa, Mr. Emilie M. Bullowa* and *Mr. Robert H. McCarter* were on the briefs, for plaintiffs in error.

Mr. John A. Garver for defendants in error Amalgamated Copper Company *et al.*

Mr. Louis Marshall for defendant in error Adolph Lewisohn.

Mr. Justice Brandeis delivered the opinion of the court.

This is an action at law. The complaint alleges that plaintiffs are the holders of more than 200 of the 500,000 shares of the outstanding stock of the defendant United Copper Company, a New Jersey corporation; that the defendants other than that company have by conduct violating the Sherman Law (Act of July 2, 1890, c. 647, 26 Stat. 209) injured it to the extent of more than $5,000,000,[1] and that:

"IV. In or about the month of January, 1912, and before the commencement of this action the plaintiffs, United Copper Securities Company and Arthur P. Heinze, each made a demand upon the defendant, United Copper Company, that this or a like action be instituted by said corporation defendant, and said corporation defendant, and its Board of Directors, have refused to comply with said demand, and have failed and refused to commence or cause to be commenced any action whatever in compliance therewith.

"V. This action is commenced and prosecuted by the

[1] The bill is framed on the theory that the injury to the United Copper Company was suffered directly, as a competitor of the other defendants, and the case will be discussed on that supposition. It is proper to observe, however, that the allegations of the bill are ambiguous in this respect, and that the United Copper Company appears to have been a mere holding company, which suffered injury only indirectly as controlling stockholder in various mining companies alleged to have been damaged by the conspiracy and which were not made parties to this suit.

plaintiff United Copper Securities Company, and by the plaintiff, Arthur P. Heinze, each individually and for himself and also on his own behalf and on behalf of all the other stockholders of said United Copper Company."

The complaint concludes:

"Wherefore, the plaintiffs demand judgment in their favor and in favor of any stockholders of the United Copper Company who may join with them in the prosecution of this action in the sum of three-fold damages under Section 7 of the Act of Congress aforesaid, and that each of the defendants shall be compelled to pay the damages sustained by the United Copper Company, as hereinbefore alleged."

The District Court sustained a demurrer and dismissed the complaint. Its judgment was affirmed by the Circuit Court of Appeals, 223 Fed. Rep. 421; and the case comes here on writ of error. A motion for substitution of plaintiffs, hereafter referred to, was made in this court and argued with the merits.

There is no statement in the complaint that the alleged wrongful acts have caused injury to the plaintiffs as individual shareholders; and no recovery is sought for damages to them or to their property. The case involves, therefore, this single question: Whether a stockholder in a corporation which is alleged to have a cause of action in damages against others for conduct in violation of the Sherman Act, may sue at law to recover such damages in the right of the corporation, if, after request, it refuses to institute the suit itself? Insuperable obstacles to the maintenance of the action are presented both by the substantive law and by the law of procedure.

Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders. Courts inter-

fere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment; and, as a rule, only after application to the stockholders, unless it appears that there was no opportunity for such application, that such application would be futile (as where the wrongdoers control the corporation), or that the delay involved would defeat recovery.[1] In the instant case there is no allegation that the United Copper Company is in the control of the alleged wrongdoers or that its directors stand in any relations to them or that they have been guilty of any misconduct whatsoever. Nor is there even an allegation that their action in refusing to bring such suit is unwise. No application appears to have been made to the stockholders as a body or indeed to any other stockholders individually; nor does it appear that there was no opportunity to make it, and no special facts are shown which render such application unnecessary. For aught that appears, the course pursued by the directors has the approval of all the stockholders except the plaintiffs. The fact that the cause of action is based on the Sherman Law does not limit the discretion of the directors or the power of the body of stockholders; nor does it give to individual shareholders the right to interfere with the internal management of the corporation.

But even if the circumstances were such as to justify individual stockholders in seeking the aid of the court to enforce rights of the corporation, it is clear that their remedy is not at law.[2] The particular equitable relief

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[1] *Hawes* v. *Oakland*, 104 U. S. 450; *Quincy* v. *Steel*, 120 U. S. 241; *Corbus* v. *Alaska Treadwell Gold Mining Co.*, 187 U. S. 455; *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.*, 213 U. S. 435. See *Macon, D. & S. R. Co.* v. *Shailer*, 141 Fed. Rep. 585.

[2] *Hawes* v. *Oakland*, 104 U. S. 450, 454; *Quincy* v. *Steel*, 120 U. S. 241. The latter case was an equity suit by a stockholder to enforce a purely

sought in *Fleitmann* v. *Welsbach Co.*, 240 U. S. 27, was denied; but this denial affords no reason for assuming that the long settled rule under which stockholders may seek such relief only in a court of equity will be departed from because the cause of action involved arises under the Sherman Law.

This action was commenced May 3, 1912. The judgment dismissing the complaint was rendered in the District Court September 24, 1914, and affirmed by the Circuit Court of Appeals April 13, 1915. The case was entered in this court July 27, 1915. On April 7, 1917, about a fortnight before the case was reached for argument, George D. Hendrickson and Luther Martin, Jr., filed in this court a motion that they be substituted as plaintiffs in error. The motion recites that they had, on March 1, 1917, been appointed receivers of the United Copper Company by the Court of Chancery of New Jersey, and had on April 2, 1917, been authorized by it to apply for such substitution. Annexed to the motion is a copy of the petition for appointment of the receivers which alleges that the United Copper Company had on February 28, 1912, been dissolved by proclamation of the Governor of New Jersey for failure to pay franchise taxes; and that it had assets of large value; but that its directors named (who under the statute thereupon became trustees for the corporation) had taken no steps whatever to collect its assets or settle its affairs and were not fit and proper persons to be entrusted with them. Only by opposing affidavits filed by defendants was it disclosed that, on February 10, 1913, more than four years previously, the District Court of the United States for the Southern District of New York had appointed others receivers of the

legal claim of the corporation—damages for breach of contract; and the court sustained a demurrer to the bill, not because the suit should have been at law, but because the bill failed to show that complainant had made sufficient effort to induce the directors to enter suit.

United Copper Company, and had vested in those receivers the possession of "all the properties owned by the defendant [the United Copper Company], or in which the said defendant has any ownership or interest, whether such property be real, personal or mixed, of whatsoever kind and description, and wheresoever situated, including . . . things in action, credits, stocks, bonds, securities, shares of stock in the corporations described in said bill of complaint, and all shares of stock, certificates of equitable interest and other certificates representing any interest in any property and all other securities of whatsoever character owned by the defendant company, on or in which it has any interest, or which it controls directly or indirectly," and that on February 14, 1913, the same persons had been appointed ancillary receivers by the United States District Court for the District of New Jersey. We have no occasion to consider the power of this court to grant the motion for substitution. See *Railway Co.* v. *Twombly*, 100 U. S. 78, 81. It is without merit and is denied.

Judgment affirmed.

HAMER ET AL. *v.* NEW YORK RAILWAYS COMPANY ET AL.

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

No. 968. Argued April 10, 1917.—Decided May 21, 1917.

With the delivery of a mortgage to secure bonds of one corporation there was delivered to the trustee stamped on each bond a guaranty by another corporation whereby the latter guaranteed "to the Trustee of the within-mentioned mortgage, for the benefit of the holders thereof, punctual payment of the principal of the within bond and the interest thereon . . . according to the tenor of

the several coupons belonging thereto." Upon foreclosing the mortgage, the trustee obtained judgment against the guarantor company for a deficiency.

Held: (1) That whether the guaranty were treated as having created an aggregation of as many obligations as there were bonds, each constituting a separate contract between the guarantor and the respective bondholder, or a single obligation for the benefit of the bondholders collectively, in either case there was a merger of the original cause or causes of action in the single judgment recovered by the trustee.

(2) The judgment being held as an unit by the trustee, for the benefit of all the bondholders, a suit to enforce it by a majority of them, though alleged to be on behalf also of all others similarly situated, could not be maintained without joining the trustee as a necessary party.

(3) In such suit, for the purpose of testing the District Court's jurisdiction on the basis of diverse citizenship, the trustee, though made a defendant, must be realigned as a plaintiff, no hostility on its part appearing beyond a refusal to institute the action, assignable to no other motive than to aid the federal jurisdiction, and its real attitude being friendly as evinced by its answer.

One corporation, after guaranteeing bonds of another, passed into a receivership in the District Court which ended in foreclosure of its own bonds and sale of its property, without reservation in the decree of liens or similar rights or power of the court concerning them. Meanwhile by independent proceedings in a state court the bonds of the second company were foreclosed and a deficiency judgment was rendered against the first company on the guaranty, which judgment being presented as a claim in the District Court proceedings was rejected because the first company's liability to pay it was contingent at the date set for proving claims in that court. *Held*, that a suit brought later in the District Court upon the ground that by its decree the equities of persons interested in the deficiency judgment were wrongly ignored and seeking to have that judgment impressed as a lien upon the property so sold, was not within the District Court's jurisdiction as a suit ancillary to the foreclosure proceedings in which its decree was rendered.

Affirmed.

THE case is stated in the opinion.

Mr. A. S. Gilbert for appellants.

Mr. Richard Reid Rogers for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This appeal presents the single question whether the District Court erred in dismissing the bill for want of jurisdiction, on the ground that the controversy involved was not one between citizens of different States. The question was duly certified in conformity to § 238 of the Judicial Code. The facts are these:

The Twenty-eighth and Twenty-ninth Street Crosstown Railroad Company, of New York City, issued, on October 1, 1896, bonds to the amount of $1,500,000, and secured them by a mortgage of its property to the Central Trust Company. The Metropolitan Street Railway Company having previously leased the Crosstown Railroad, delivered with the mortgage stamped on each of the bonds a guaranty to the Trust Company in the following terms:

"FOR VALUE RECEIVED, the Metropolitan Street Railway Company hereby guarantees to the Trustee of the within-mentioned mortgage, for the benefit of the holders thereof, punctual payment of the principal of the within bond and the interest thereon at the time and in the manner therein specified and according to the tenor of the several coupons belonging thereto."

In September, 1907, the Metropolitan Company passed into the hands of receivers appointed by the Circuit (now District) Court of the United States for the Southern District of New York. Soon thereafter default was made in the payment of interest on the Crosstown bonds. The customary bondholders' committee was formed; and 1373 of the 1500 bonds outstanding were deposited with it. At its request the Trust Company declared the bonds due and brought suit in the Supreme Court of New York to foreclose the mortgage. The court by special order granted an application of the Trust Company for permission to liquidate, in the foreclosure suit, its claim against

the Metropolitan Company on the guarantee. For that purpose the Metropolitan Company was joined as defendant; and a deficiency judgment for $1,745,344.21 was entered against it on February 20, 1912, in favor of the Trust Company.

The property of the Metropolitan Company had meanwhile been administered by receivers appointed by the District Court of the United States for the Southern District of New York; and the several committees representing its bondholders, stockholders and creditors had adopted a plan and agreement for the reorganization of that company. Pursuant thereto its franchise and assets had been, on January 1, 1912, transferred to a new corporation, the New York Railways Company; and the securities and cash issued in exchange therefor were distributed among security holders, creditors, and otherwise, as in the plan provided. No provision was made in the plan for adjusting the liability of the Metropolitan Company arising out of its guaranty of the Crosstown bonds. The District Court refused to allow the claim on the deficiency judgment to be proved in the Metropolitan receivership; because the date as of which claims against the property were ordered to be proved was January 15, 1908; and the claim on the guaranty was at that date contingent merely. Consequently neither the Committee nor the Trust Company representing the Crosstown bondholders assented to the plan for reorganizing the Metropolitan Company.

In October, 1913, the members of the Crosstown bondholders' Committee, suing on behalf of themselves and "all other similarly situated bondholders," brought suit in the District Court of the United States for the Southern District of New York against the New York Company, the Metropolitan Company and the Central Trust Company, to enforce out of the property of the New York Company satisfaction of the liability of the Metropolitan Com-

pany arising out of its guaranty. The bill set forth facts to bring the case within the rule declared in *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482, and *Kansas City Southern Ry. Co.* v. *Guardian Trust Co.*, 240 U. S. 166; and as reason for the suit being brought in the name of the bondholders alleged the following:

"That the defendant Central Trust Company of New York holds the said judgment against the defendant Metropolitan Street Railway Company, amounting to $1,745,344.21, for the benefit of and as the trustee for the plaintiffs and the other holders of said bonds of the Twenty-eighth and Twenty-ninth Streets Crosstown Railroad Company hereinbefore described; and that the reason why this action is brought by the plaintiffs and why the Central Trust Company of New York is made a party defendant is that the plaintiffs are the lawful owners and holders of said bonds in the amount hereinbefore alleged, and the beneficial and equitable owners of said judgment held by the defendant Central Trust Company of New York; and that the defendant Central Trust Company of New York has refused to bring this action after due demand by the plaintiffs upon said defendant Central Trust Co. of N. Y., although the plaintiffs have offered proper indemnification to the said defendant Central Trust Company of New York, as such Trustee, to institute this suit to enforce the rights of the Trustee and of the bondholders under said judgment and guarantee made by said defendant Metropolitan Street Railway Company as aforesaid."

Jurisdiction of the District Court was rested wholly on diversity of citizenship, plaintiffs being all citizens and residents of States other than New York, and the three defendants, corporations organized under the laws of that State. The Trust Company filed an answer in substance joining in the prayer of the bill and admitting its allegations. The New York Railways Company besides answering to the merits, alleged:

"That the interests of the plaintiffs, and all other security holders, and the interests of said defendant Central Trust Company of New York, are identical and in all respects similar to the interests of the plaintiffs, and all other owners or holders of bonds secured by the mortgage . . . ; that the parties to this action should be realigned by the Court, and placed according to their interests in the subject-matter of this suit, and for the reasons hereinbefore alleged, and for divers other reasons appearing on the face of the Bill upon the trial of this action, this defendant alleges that this Court is without jurisdiction to entertain this complaint, or to give judgment for the relief demanded therein."

It also appeared by stipulation that the holders of a large part of the Crosstown bonds deposited with the committee were citizens and residents of New York.

Plaintiffs admit that in respect to the Crosstown Company no cause of action on the bond vested in any one bondholder; since the bondholders were bound by the terms of the mortgage under which all right to sue on the bonds and to foreclose the mortgage was in the Trust Company. But they insist that the rights of the bondholders against the Metropolitan Company on the guaranty were entirely distinct from their rights against the Crosstown Company on the bonds; that the guaranty vested in the holder of each bond a cause of action on which he could sue in his own name; that the original guaranty to the Trust Company was a naked promise to one for the benefit of another; that the judgment obtained by the Trust Company belongs to the holders of the bonds; that it is in this suit merely a "use plaintiff," a title owner of the judgment who owes no duty to the plaintiff or other bondholders with reference thereto, has no interest in the result of the suit and need not have been made a party thereto; and that being a merely formal party should be disregarded in determining the question

of jurisdiction. Before discussing whether the Trust Company has an interest and, if so, its character and effect, the nature of this suit should be considered.

1. *The cause of action.*

This is not a suit upon the original guaranty. It is a suit to enforce a judgment. The prayer of the bill is that the property acquired by the New York Railways Company "be declared to be subject to the lien of said judgment." The rights on the original guaranty, whether they be treated, by virtue of the stamping on each bond, as an aggregation of 1500 separate causes of action or be treated as a single cause of action for the benefit of the 1500 bondholders, were merged in that judgment. This is true, even if, as contended, the guaranty to the Trust Company stamped on each bond "for the benefit of the holders thereof" be construed as importing a promise of payment directly to the holder on which he was at liberty to sue in his own name. For the recovery of the judgment extinguished through merger the original cause or causes of action and the judgment is one recovered by the Trust Company as trustee.[1]

2. *The interest of the Trust Company.*

Whatever may have been the situation originally with respect to rights of individual bondholders on the guaranty, we have now a single judgment held by the Trust Company as trustee for the pro rata benefit of 1500 bondholders. The plaintiffs allege that they hold 1373 of these bonds—that is, a fraction only of the beneficial interest. It is thus clear that the minority bondholders as well as the railway companies defendant require for the protec-

[1] "If there be any one principle of law settled beyond all question, it is this, that whensoever a cause of action, in the language of the law, *transit in rem judicatam*, and the judgment thereupon remains in full force unreversed, the original cause of action is merged and gone forever." *United States* v. *Leffler*, 11 Pet. 86, 100, 101. See also *Mason* v. *Eldred*, 6 Wall. 231; *Gaines* v. *Miller*, 111 U. S. 395, 399.

tion of their respective interests that the Trust Company be a party to the litigation; the minority bondholders, so that they may share ratably in the proceeds; the railway companies, in order that they may upon paying the amount of the judgment be discharged from the possibility of further liability. The judgment is a unit and the relief sought on it is necessarily for the benefit of all. *Blacklock* v. *Small*, 127 U. S. 96, 104. But a suit by some bondholders does not, by the allegation that it is in behalf of all others similarly situated, become a class suit binding on all. *Wabash R. R. Co.* v. *Adelbert College*, 208 U. S. 38, 57. And for the protection of the Trust Company itself joinder as a party is essential, in order that upon distribution of any proceeds it may be discharged from obligations to its beneficiaries.

To the state of facts presented here, *Greene* v. *Republic Fire Insurance Co.*, 84 N. Y. 572, which is strongly relied upon by plaintiffs, has no application. In that case the assignee of a chose in action, having recovered a judgment in Mississippi, where he was obliged (as by the common law procedure) to sue for his own use in the assignor's name, was permitted to sue on the judgment in New York in his own name; since the New York Code requires suit to be brought in the name of the real party in interest. There the assignor having assigned the cause of action had no interest in it when the action was commenced in Mississippi and consequently no interest in the judgment; and the judgment record so recited, declaring that it was "for the use and benefit of Edward A. Greene." Here there has been no assignment either of the cause of action or of the judgment. The prayer of the complaint was that the Trust Company "as trustee may have judgment against . . . said Metropolitan Company"; and in accordance with that prayer judgment for the deficiency was entered. So far as the record discloses, the deficiency judgment against the Metropolitan Company,

like that against the Crosstown Company and the property transferred by the mortgage, is held by the Trust Company as trustee for all the bondholders.[1] That under such circumstances the trustee is a necessary party to this suit is clear.

3. *The affiliation of the Trust Company.*

It is clear that the interest of the Trust Company in this controversy lies wholly with the plaintiffs. This is shown, among other things, by the request in its answer that the relief prayed for in the bill be granted. No reason is assigned in the bill or in the answer of the Trust Company for its refusal to sue; and none suggests itself save the willingness of an accommodating trustee to enable its beneficiaries to present that appearance of diversity of citizenship essential to conducting this litigation in the federal court. It is not contended that this refusal to sue makes the Trust Company an adversary to be classed for purposes of jurisdiction with the real defendants—as in those cases where the refusal to sue was part of a fraudulent participation in the wrongdoing, and where the trustee or corporation in effect ranged itself in opposition to the relief sought.[2] The Trust Company having, as we have shown, a real interest in the controversy, which makes it a necessary party to the suit, must be aligned as a party plaintiff, where its interest lies.[3]

Since the necessary realignment of the Trust Company as party plaintiff is fatal to the jurisdiction of the District Court, it is unnecessary to consider the legal effect of the fact stipulated, that a large part of the bondholders rep-

[1] See *Knapp* v. *Railroad Company*, 20 Wall. 117, 123; *Richter* v. *Jerome*, 123 U. S. 233, 246.

[2] *Venner* v. *Great Northern Ry. Co.*, 209 U. S. 24; *Doctor* v. *Harrington*, 196 U. S. 579; *Kelly* v. *Mississippi River Coaling Co.*, 175 Fed. Rep. 482; *Groel* v. *United Electric Co.*, 132 Fed. Rep. 252.

[3] *Blacklock* v. *Small*, 127 U. S. 96, 104; *Harter* v. *Kernochan*, 103 U. S. 562; *Pacific Railroad* v. *Ketchum*, 101 U. S. 289; *Allen-West Commission Co.* v. *Brashear*, 176 Fed. Rep. 119; *Shipp* v. *Williams*, 62 Fed. Rep. 4.

resented by plaintiffs are likewise citizens and residents of New York.

4. *Whether the suit is an ancillary one.*

The plaintiffs, relying upon *Wabash R. R. Co.* v. *Adelbert College*, 208 U. S. 38, 53, attempt to sustain the jurisdiction of the court on the ground that this suit is ancillary to the foreclosure proceedings against the Metropolitan Company in the District Court. But the facts in that case bear no resemblance to those here under consideration. There the rights and lien which it was declared the federal court had exclusive jurisdiction to ascertain and enforce were expressly reserved by the decree; and the purchaser under the decree took title expressly subject to them. The decree of foreclosure under which sale was made of the property of the Metropolitan Company, which was later transferred to the New York Company, contained, so far as appears from the record, no reservation whatsoever concerning liens or similar rights. And there is in the answer of the New York Company the uncontroverted statement that the properties subject to the foreclosure "were sold to the purchasers and to the New York Railways Company, free and clear of any lien, claims or interest in any party outstanding, except the interests" of those expressly provided for in the Plan of Reorganization; and that the proceedings resulting in the deficiency judgment against the Metropolitan Company here sued on "did not constitute a claim against, or a lien on, or an interest in any of the property rights or estate of the Metropolitan Street Railway Company." Furthermore the bill in the instant case does not purport to be ancillary to the Metropolitan Company foreclosure proceedings. Plaintiffs here seek merely to establish an equity against the property of the New York Company, on the theory that the rights of the Crosstown bondholders have been improperly ignored. They set up a wholly independent cause of action. *Decree affirmed.*

NORFOLK SOUTHERN RAILROAD COMPANY *v.* CHATMAN.

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

No. 192. Argued April 20, 1917.—Decided May 21, 1917.

Under the doctrine established by *Railroad Company* v. *Lockwood*, 17 Wall. 357, and many cases decided since, a person traveling by railroad as a caretaker of live stock on a "free" or "drover's" pass is a passenger for hire as to whom a stipulation that the carrier shall not be liable for personal injuries caused by its negligence is void.

As applied to caretakers of live stock, § 1 of the Hepburn Act of June 29, 1906, uses the term "free pass" in the sense which established custom had given it and judicial determination had sanctioned long before the act, viz., as meaning not a gratuitous pass but one issued for a consideration constituting the caretaker a passenger for hire, within the doctrine of the *Lockwood Case*. *Charleston & Western Carolina Ry. Co.* v. *Thompson*, 234 U. S. 576, distinguished.

Where a connecting carrier, sued for personal injuries by a person traveling on a drover's pass, based its defense on a release of liability for negligence contained in the contract of carriage issued by, and in accordance with the tariffs of, the initial carrier, under the Carmack Amendment, *Held* that it was estopped from claiming also that under its own tariff the issuance of such passes was forbidden and unlawful and that therefore such traveler was unlawfully upon its train.

A provision in a tariff that "free or reduced transportation shall not be issued for shippers or caretakers in charge of live stock shipments, . . . and such shippers or caretakers shall pay full fare *returning*," is construed as implying that such transportation will be allowed to the destination of the shipment, but not for the return trip of the caretaker.

When connecting interstate carriers, in accordance with tariffs of the initial carrier duly filed and published, contract to carry a shipment of live stock with a caretaker for a specified rate in money, the carriage *quoad* the caretaker is a carriage for money, part of the total rate, and the mere fact that the part attributable to the caretaker is

not stated separately in a passenger tariff does not render the contract to carry him invalid under the Act to Regulate Commerce.

Separation of the rate in such a case is an administrative matter affecting the form of tariffs, which is committed to the Interstate Commerce Commission by § 6 of the Commerce Act, as amended, and concerning which the courts will not interfere in advance of application to the Commission.

222 Fed. Rep. 802, affirmed.

THE case is stated in the opinion.

Mr. C. M. Bain (by special leave), with whom *Mr. John H. Small*, *Mr. W. B. Rodman* and *Mr. J. Kenyon Wilson* were on the briefs, for plaintiff in error.

Mr. Charles Whedbee and *Mr. P. W. McMullan* for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

The judgment obtained in this case by the plaintiff in the District Court, W. C. Chatman, affirmed by the Circuit Court of Appeals for the Fourth Circuit, is here for review on writ of error.

On December 1, 1911, the plaintiff below (hereinafter designated as the plaintiff) delivered to the Pennsylvania Railroad Company at Jersey City a carload of horses to be carried to Hertford, N. C., and was tendered by an agent of the company for his signature the customary "Uniform Live Stock Contract" of the Pennsylvania Company, the essential provisions of which are printed in the margin.[1]

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[1] The provisions of the contract essential to be considered are, in substance, that the company had received from Chatman a carload of horses for transportation to Port Norfolk for Hertford, N. C., "with W. C. Chatman in charge;" and that it was received by the Pennsylvania Company "for itself and on behalf of connecting carriers for

This contract was retained by the company but from it was detached a "coupon" which was given to Chatman, containing, in substance, an acknowledgment that he had delivered live stock of the kind and nature therein described, consigned to W. C. Chatman, destination Port Norfolk, Va., for Hertford, N. C., "W. C. Chatman, man

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transportation, subject to the official tariffs, classifications and rules of the said company"; and "that the said shipper is at his own sole risk and expense to load and take care of and feed and water said stock whilst being transported . . . and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same . . . That the shipper shall see that all doors and openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock." It further provided that in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge, other than the sum paid or to be paid for the transportation of the live stock in his or her charge, that the said shipper shall and will indemnify and save harmless said carrier and every connecting carrier from all claims and liabilities of every kind, by reason of personal injury sustained by the person in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier, or otherwise.

There was printed upon this contract, as a part of it, the following:

"RELEASE FOR MAN OR MEN IN CHARGE.

"In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid or to be paid for the carriage upon said freight train of the livestock mentioned in said contract, of which livestock . . . in charge, the undersigned does hereby voluntarily assume all risks of accidents or damage to his person or property, and does hereby release and discharge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature and description for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees or otherwise.

(signature of man in charge)
W. C. CHATMAN."

in charge." Without other pass or ticket than this "coupon" and without other payment than the published tariff on the carload of stock, the Pennsylvania Railroad Company carried the plaintiff, with his carload of horses, on a freight train to Norfolk, Virginia, where the car was delivered to and accepted by the defendant company for transportation to its destination.

The plaintiff testifies that defendant's conductor saw him and knew he was on the car up to the time the accident complained of occurred.

The car in which the horses and the plaintiff were being carried was derailed on defendant's line, and the plaintiff, being injured, sued for damages and secured the judgment which we have before us.

The negligence of the defendant is not disputed.

On this record the defendant claims two defenses, the first of which is:

That the plaintiff is not entitled to recover, because, when injured, he was traveling on a free pass issued pursuant to the terms of the live stock contract in which he had released the carriers from all liability for any personal injury which he might sustain, thus bringing his claim within the authority of *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440.

In *Railroad Company* v. *Lockwood*, 17 Wall. 357, 384, it was decided that a person traveling on a "drover's pass," issued upon a live stock contract precisely similar in its terms to that which we have in this case, was a passenger for hire and that a release from liability for injuries caused by the carrier's negligence was void because a common carrier could not lawfully stipulate for such exemption.

This decision was rendered in 1873, and has been frequently approved: *Railway Company* v. *Stevens*, 95 U. S. 655; *Liverpool & Great Western Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397; *Baltimore & Ohio Southwestern*

Ry. Co. v. *Voigt*, 176 U. S. 498, 505; *Santa Fe, Prescott & Phœnix Ry. Co.* v. *Grant Brothers Construction Co.*, 228 U. S. 177, 184; *Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278, 283. This court continues of the opinion expressed by it in 1900, in *Baltimore & Ohio Southwestern Ry. Co.* v. *Voigt, supra*, that the *Lockwood Case* must "be regarded as establishing a settled rule of policy."

But the plaintiff in error claims that this rule is no longer applicable to such a case as this we are considering, for the reason that, while the plaintiff as the shipper of the stock was within the exception of § 1 of the amendment to the act "to regulate commerce" of June 29, 1906, 34 Stat. 584, prohibiting the issuance of any "interstate . . . free pass . . . except . . . to necessary care takers of live stock, poultry and fruit" yet this exception permitted him to travel free of charge upon a "free pass or free transportation," and not as a passenger for hire on a free pass, which would be a contradiction in terms.

The *Lockwood Case* shows that live stock contracts such as we have here, providing for the transportation of caretakers of stock on free passes, were in use by carriers as early as 1859 (17 Wall. 357, 365), and that they have continued in use up to this time is apparent from the decisions hereinbefore cited, from the case at bar and from many recently reported cases. *Tripp* v. *Michigan Central R. R. Co.*, 238 Fed. Rep. 449. Notwithstanding the fact, as we have seen, that such transportation has been declared by a long line of decisions not to be "free" in the popular sense, but to be transportation for hire, with all of the legal incidents of paid transportation, the carriers of the country have continued to issue it and to designate it as "free."

With this legal and commercial history before us we must conclude that the designation "free pass," as applied to transportation issued or given by railroad companies to

shippers and caretakers of stock, had acquired a definite and well known meaning, sanctioned by the decisions of this court and widely by the decisions of the courts of the various States, long prior to the enactment of June 29, 1906, and that, therefore, Congress must be presumed to have used the designation "free pass" in the sense given to it by this judicial determination when, in § 1 of that act, by specific exception, it permitted the continuance of the then long established custom of issuing free transportation or passes to shippers or caretakers of live stock. *Kepner* v. *United States*, 195 U. S. 100; *Lawder* v. *Stone*, 187 U. S. 281, 293; Sutherland on Statutory Construction, § 333.

It results that the "settled rule of policy" established by the *Lockwood Case*, and the decisions following it, must be considered unmodified by the Act to Regulate Commerce, that the plaintiff in charge of his stock, traveling upon a pass permitted to be issued by that act, was a passenger for hire, and that defendant's first claim must therefore be denied.

The claim of the defendant that the plaintiff was unlawfully upon its train because its published tariff did not allow the issuing of such a pass as that which the plaintiff was using when injured is without merit.

The extract from the defendant's tariff relied upon to sustain this claim reads:

"Free or reduced transportation shall not be issued for shippers or caretakers in charge of live stock shipments, whether carloads or less, and such shippers or caretakers shall pay full fare *returning*."

It is sufficient answer to this claim to say that the railroad company is here defending under the release from liability contained in a contract of carriage, issued as required by law (§ 7 of the Act of June 29, 1906, 34 Stat. 595), pursuant to the published tariffs of its connecting, the initial carrier, the Pennsylvania Railroad Company,

and it will not be heard in the courts to urge the inconsistent defense that its own tariff made unlawful this contract on which in the alternative it relies.

To this we add that passes for caretakers, not only to destination but returning to point of shipment, were formerly general (*Cleveland, Painesville &c. R. R. Co.* v. *Curran*, 19 Ohio St. 1), and in some parts of the country are still issued (*Kirkendall* v. *Union Pacific R. R. Co.*, 200 Fed. Rep. 197, 200), and that, in our opinion, the language of the notice quoted, while obscurely worded, implies that such passes will be issued by the defendant to destination of the shipment and was intended as notice to shippers that return passes would not be allowed. The meaning now claimed for this notice would have been unmistakably expressed without the final clause "and such shippers or caretakers shall pay full fare *returning*." Why "returning" if full fare were also to be paid "going"? Tariffs must not be made cunningly devised nets in which to entangle unsuspicious or inexperienced shippers.

The second defense of the railroad company is in the alternative, and must be considered because its first defense has failed.

This claim is that under the Interstate Commerce Law payment for the transportation of passengers for hire could be made only in money, and at a rate stated in a tariff filed and published in the manner required by law; that no separate payment for plaintiff's transportation was made in money, and the consideration for it must be found, if at all, incorporated in the rate charged for the stock or in the service which he was to render in caring for it in transit, and that, as neither of these was separately stated in any filed and published tariff the plaintiff's presence upon the car was unlawful and he should not recover for injuries sustained.

In the consideration of this second claim of the defend-

ant these facts appearing of record are decisive: The defendant relies for its defense upon the terms of the live stock contract entered into between its connecting carrier the Pennsylvania Company and the plaintiff and, averring in its answer that it received the shipment of horses "in accordance with the terms of the said contract," it claims immunity from liability for damages to the plaintiff under the declaration of that contract, that: "In consideration of the carriage of the undersigned [plaintiff] upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid or to be paid for the carriage . . . of the live stock" the plaintiff assumed the risk of accident and released said carrier or carriers from all liability to him for any injury which he might sustain.

While the record is not as clear as could be wished the excerpts which it contains from the filed tariffs of the Pennsylvania Company and the live stock contract, both introduced in evidence by the defendant, justify the conclusion, certainly as against the defendant, that the contract was a part of the tariffs of the Pennsylvania Company filed and published according to law and that the defendant is bound by its terms.

Treating this live stock contract as a part of the lawfully published tariffs of the Pennsylvania Company, under which the contract for the carriage of the plaintiff was made, and by which the defendant confesses itself bound, it is clear that such tariffs show the two carriers declaring that for the published rate payable in money the plaintiff's carload of stock and the plaintiff himself, as a caretaker, would be carried on freight trains from Jersey City to the North Carolina destination, and as we have seen the law declares that a caretaker so carried is a passenger for hire against whom the release of liability on which the defendant relies must be treated as unreasonable and void.

The objection that the published tariff of the Pennsylvania Company did not specify how much of the stipulated payment by the plaintiff should be treated as payment for the transportation of the stock and how much for the transportation of the caretaker, and that the payment for the carriage of the plaintiff was not separately stated in a passenger tariff, cannot be considered in this case for the reason that the Act to Regulate Commerce (§ 6, as amended June 29, 1906, June 18, 1910, and August 24, 1912) commits to the Interstate Commerce Commission the determining and prescribing of the form in which tariff schedules shall be prepared and arranged, and this is an obviously administrative function with which the courts will not interfere in advance of a prior application to the Interstate Commerce Commission. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 232 U. S. 199, 221; *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138.

It results that the second claim of the defendant must be rejected because the fare of the plaintiff was paid in money pursuant to published tariffs, which clearly showed the terms of the shipment of the stock with transportation for the plaintiff included, in a form which in the state of this record must be considered as having been satisfactory to the Interstate Commerce Commission, to which the determination of such form was committed by law.

The claim that *Charleston & Western Carolina Ry. Co.* v. *Thompson*, 234 U. S. 576, rules this case cannot be allowed, for the sufficient reason that the plaintiff in that case was found to be traveling upon a gratuitous pass, issued without consideration to a member of the family of an employee. Behind such a pass there lay no such background of court decision and of railroad practice as we have here, giving definite interpretation to the statute as applied to "caretakers' passes" and therefore that case fell without the scope of the *Lockwood* decision and within

the principle of *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440, and *Boering* v. *Chesapeake Beach Ry. Co.*, 193 U. S. 442.

The judgment of the Circuit Court of Appeals is

Affirmed.

RAILROAD SUPPLY COMPANY *v.* ELYRIA IRON & STEEL COMPANY.

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

No. 95. Argued April 17, 18, 1917.—Decided May 21, 1917.

The following patents, viz., No. 538,809, of May 7, 1895, No. 691,332, of January 14, 1902, and No. 721,644, of February 24, 1903, all granted to one Wolhaupter for alleged new and useful improvements in railroad tie plates, are here examined in respect of certain of their claims in comparison with the prior art, and are *held* invalid for want of novelty and invention.

Flanges and teeth projecting from the under surfaces of tie plates, for the purpose of holding them to the ties, and flanges or shoulders on the upper surfaces, designed to receive and resist the lateral thrust of the rails and thus preserve the gauge of the track, having been described in earlier patents and become well known, invention in the Wolhaupter plates is left to depend upon the method of combining strength with economy by providing flanges upon the upper surfaces for the rails to rest upon; but this feature also, besides having been in substance anticipated by earlier patents, is *held* to be no more than the product of ordinary mechanical skill, since resort to channels, grooves and corrugations was a familiar method of reducing the cost of iron plates by reducing their weight without decreasing their strength.

A patentee is presumed to have had all prior patents before him when he applied for his patent.

Mere carrying forward of the original thought, a change only in form, proportions or degree, doing the same thing in the same way, by

substantially the same means, with better results, is not such invention as will sustain a patent.

Patents claiming merely improvements in devices already well exploited in the prior art must be limited strictly to the forms described in the claims.

213 Fed. Rep. 789, affirmed.

THE case is stated in the opinion.

Mr. Taylor E. Brown, with whom *Mr. Clarence E. Mehlhope* was on the brief, for petitioner.

Mr. Frederick P. Fish and *Mr. Frank F. Reed*, with whom *Mr. Edward S. Rogers* was on the briefs, for respondent.

MR. JUSTICE CLARKE delivered the opinion of the court.

On March 26, 1909, The Railroad Supply Company, petitioner, commenced this suit against The Elyria Iron & Steel Company in the Circuit (now District) Court for the Northern District of Ohio, claiming infringement of claim No. 8 of United States Letters Patent No. 538,809, granted May 7, 1895, of claims Nos. 1, 2 and 3 of Patent No. 691,332, granted January 14, 1902, and of claims Nos. 7 and 9 of Patent No. 721,644, granted February 24, 1903. All of these patents, granted to B. Wolhaupter, were acquired by the petitioner, and each of the three purported to describe a new and useful improvement in railroad tie-plates.

Such proceedings were had in the case that on March 4, 1912, the District Court decided that the petitioner's patents were not infringed by the device manufactured and sold by the defendant.

On appeal to the Circuit Court of Appeals for the Sixth Circuit, that court on April 7, 1914, affirmed the decree of the District Court dismissing the bill, and held in its

opinion that the claims of the patents relied upon were void for want of patentable novelty. This decree is now here for review on certiorari.

A railroad tie-plate, sometimes called a "wear plate," is a rectangular piece of metal, originally with both surfaces flat, designed to be placed upon the tie immediately under the rail, for the purpose of protecting the tie from the wear, which in soft wood is very great, incident to the vibration of the rail caused by passing engines and trains and for the purpose of holding the rail more firmly in place than it could otherwise be held by the spikes without the plate, thereby preserving the gauge of the track.

In the early days of railroading when engines and cars were small and light, when speed was comparatively slow and when hardwood, which held the spikes firmly in place, was abundant and cheap, such plates were little used; but the increase in weight of rails and rolling stock, the higher speed of trains and the necessary use of the cheaper soft woods for ties have brought them into extensive use. The general use of these plates with heavy rolling stock and traffic presented the problem of making them as strong and inexpensive as possible and in a form such that they would adhere firmly to the ties while doing the least possible damage to the fibre of the wood.

The statement of this problem shows convincingly that even at the beginning it offered a very limited field for invention, if, indeed, it presented any field at all for the exercise of that inventive genius which it is the policy of the law to protect and reward with a monopoly for seventeen years.

The claims of the patents declared on are as follows: Claim 8 of Patent No. 538,809 reads:

"A railway-tie plate formed on the under side with devices more or less sharpened adapted to penetrate and engage the tie, and on its upper side with a series of flanges on which the rail rests, substantially as described."

It would be difficult to write in more general terms a description of any plate, whether channeled, corrugated, grooved or ribbed on both sides.

Claims Nos. 1 and 2 of Patent No. 691,332, differ so slightly that No. 1 will suffice:

"A railway-tie plate provided on its upper side with one or more flanges on which the rail may rest or by which it is directly sustained and on the under side with one or more tie-engaging flanges extending parallel with the upper flanges and directly beneath the latter, substantially as described."

Claims 7 and 9 of Patent No. 721,644 are so similar that only No. 7 need be quoted:

"A tie-plate provided in its rail-supporting surface with transverse grooves or channels, and at one margin of said supporting surface with a transverse rail-abutting shoulder."

Wolhaupter the grantee of the three patents was a civil engineer employed by a railroad company and he testifies that he first turned his attention to tie-plates for the purpose of improving them "in the year 1893 or early in 1894" and the earliest of his three patents in suit is dated May 7, 1895.

The earliest patent for a "wear" or tie-plate by that specific name, which is shown by this record, was issued in 1881 and between that date and the date of the issuing of the first patent in suit to Wolhaupter in 1895 twenty-six patents were issued, and in the seven years between 1895 and 1902, when Wolhaupter's second patent in suit was issued, nineteen more patents were issued for various forms of this simple device.

Thus it is seen that Wolhaupter came late into this narrow, and even then much exhausted, field of investigation and in his first patent (not here in suit), dated December 11, 1894, he claims invention for placing one, or permissibly two, "elongated divided ridges" on the under

side of such a plate to engage the tie and on the upper side a series of ridges parallel with those on the lower side, but adapted after being rolled to being cut away to form a seat for the rail. There is no claim as to the relative positions of the ridges on the two faces of the plate.

In his second patent (the first in suit), his claim of invention is for "one or more" flanges "more or less sharpened" (not divided now) on the under side of the plate to engage the tie, and on the upper side a series of flanges (ridges) on which the rail may rest. The flanges (ridges) on the upper surface must not be placed vertically above the flanges or ridges on the lower and there is no provision for cutting them away for a rail seat as in the first patent. The dominating thought of this patent is the cutting of the plate "on a diagonal line with respect to the rail flange," but as this form of plate is not claimed by the patentee in his later patents, and as no merit is claimed for it in the testimony in the record, it will be neglected.

In his third patent Wolhaupter's inventive genius placed the flanges on the under side parallel with and directly beneath those on the upper side of the plate, instead of between them as in the second patent, or regardless of either position as in the first.

In his fourth patent the flanges on the lower side are given a position "transverse" to the ridges on the upper side.

In the first three of petitioner's patents the flanges on both surfaces of the plate are for use parallel to the grain of the tie and transverse to the length of the rail. In the fourth patent the flanges on the under side are described in the specifications and drawings as transverse to, but in claim four as parallel to, the grain of the tie.

The minute and obviously wholly tentative variations, thus described, in the plates in the Wolhaupter patents, are fairly illustrative of the slight differences in form given to this simple device on which this record shows forty-

five separate patents were granted during the twenty-two years between 1881 and 1903.

This discussion of the record and reference to the respondent's patents brings us to the question, Do the claims of these patents describe an "invention or discovery" or "a new and useful . . . manufacture . . . or improvement thereof," such as our patent laws were designed to protect?

We have seen that long before Wolhaupter's patents tie-plates were used for the purposes for which his plates were designed. It was certainly obvious that if wedge shaped flanges, or ribs or claws, or other downward projections, were placed on the under side of such plates they would penetrate the ties when weight was put upon them and thus assist in holding the rail in place.

Very certainly it was also general knowledge before 1895 that if one wished to reduce the weight of a plate without loss of strength this could be done by using channel iron, angle iron or corrugated iron, or, which comes to the same thing, by having the plate made with flanges or ribs (*Servis Railroad Tie Plate Co.* v. *Hamilton Steel & Iron Co.*, 8 Can. Exch. Rep. 381), and the placing of flanges on the upper side of such plates to engage the outer flange of the bottom of the rail, and thus to receive the lateral thrust caused by the flanges of the wheels tending to spread the rails, was also obvious and well known before Wolhaupter's patents.

To the obviousness of the elements necessary to the solution of this problem must be added the state of the art, if such it may be called, when Wolhaupter, late in 1893 or early in 1894, began, as he says, the investigation of tie-plates and "familiarized himself with the literature of the subject." He testifies that he had seen the tie-plates of Servis (patented 1881, No. 249,407; 1884, No. 294,816) and of Goldie (patented 1887, No. 356,760; 1890, No. 426,530; 1891, No. 457,584; 1891, No. 457,585, and

1892, No. 485,030) and he is presumed by the law to have had all prior patents before him when he applied for his patent. *Duer* v. *Corbin Cabinet Lock Co.*, 149 U. S. 216, 223; *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485, 493.

In the plates of Servis, Wolhaupter saw a plate with "a flange or flanges formed on the lower side" to engage the tie lengthwise of the grain of the wood and, of course, transverse to the rail, and in the Goldie patents he saw in No. 457,584 "a triangular tooth like projection" extending downward from the bottom of the plate and a raised shoulder on the upper side to receive the lateral thrust of the edge of the rail flange, and in patent No. 485,030 he saw a plate with two downward projecting ribs to engage the tie, with a shoulder on the upper side to receive the thrust of the rail, and with a "transverse depression" in the upper surface, and bearings or flanges on each side of this depression to receive and support the base of the rail.

We thus have Wolhaupter confessing that before he applied for a patent he had knowledge of tie-plates with "ridges," "flanges" and "teeth" projecting downward from the under side of them to engage the tie, differing at most only in form, and in this but slightly, from the similar downward projecting flanges "more or less sharpened" which appear in all three of his patents in suit; that he had knowledge of plates with a shoulder on the upper surface to receive the thrust of the side of the bottom of the rail, not differing from the "rail abutting shoulder" shown in all three of his patents, and that he also had knowledge of the latest Goldie patented plate, with the upper surface "channeled" by having a depression extending across the plate under the central portion of the bottom of the rail and with a bearing on each side of it to support the rail.

It is thus made very clear that the only appearance

even of novelty or of invention in the Wolhaupter plates is in their having flanges on the upper surface, on which it is intended the rail shall rest, for downward extending flanges on the under side and the rail abutting shoulder on the upper side are found in earlier patents in almost precisely the form which he gave to them. But such flanges on the upper surface of the Wolhaupter plate cannot constitute of themselves patentable invention or novelty, for it is very clear, as we have already said, that a resort to channels, grooves and corrugations was a familiar method of reducing the weight and thereby the cost of iron plates without decreasing their strength, long before the Wolhaupter patents, and this form was, therefore, one to which any skilful mechanic would turn to accomplish the purpose that Wolhaupter claimed for it, and that others did so resort to this form is sufficiently shown by reference to the Wells patent, No. 203,570 (1878), the Wilson patent, No. 522,867 (1894) and the Dunham patent, No. 469,386 (1892).

With these facts before him the most that can be said for the patents in suit is that they gave a somewhat different form to three features which were perfectly familiar and were similarly grouped in prior forms of tie-plates but without giving to any of them any new function and without accomplishing by them any new result. This brings the patents within the principle so often declared that "a mere carrying forward of the original thought, a change only in form, proportions, or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent." *Roberts* v. *Ryer*, 91 U. S. 150; *Belding Mfg. Co.* v. *Challenge Corn Planter Co.*, 152 U. S. 100; *Market Street Cable Ry. Co.* v. *Rowley*, 155 U. S. 621, 629.

The device involved in these patents is so simple and familiar in all of its forms that a description of it seems

sufficient to visualize it to the reader, but cuts of it in various forms may be found in the reported decisions of this case, *Railroad Supply Co.* v. *Elyria Iron & Steel Co.*, 213 Fed. Rep. 789, and in the report of the case, involving the same claims of the same patents, in the Seventh Circuit, to be found in *Railroad Supply Co.* v. *Hart Steel Co.*, 193 Fed. Rep. 418 and 222 Fed. Rep. 261.

Clearly persuaded as we are that the slight variations claimed for the patents in suit from the plates which had gone before do not constitute patentable invention we cannot consent to further extend this discussion by a minute comparison of them with earlier patents appearing in the record, but we content ourselves with adopting as comment not to be improved upon in such a case as we have here the following from a former decision of this court:

"The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith." *Atlantic Works* v. *Brady*, 107 U. S. 192, 200.

We add that each of the patents of the petitioner being in terms for an "improvement in tie-plates," the state of the "prior art" as described in this opinion requires that they be limited strictly to the form described in the claims, and therefore the patents in suit, even if they had proved valid, would not have been infringed by the plates manufactured by the defendant.

The decree of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE DAY did not take any part in the decision of this case.

HART STEEL COMPANY ET AL. *v.* RAILROAD SUPPLY COMPANY.

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

No. 67. Argued April 17, 18, 1917.—Decided May 21, 1917.

A patent owner sued for infringement in two circuits, the defendants being, in one case, a corporation which manufactured the articles complained of, and, in the other, a second corporation whose shares were owned, and whose conduct was controlled, by the first and which, with its manager (joined with it as co-defendant), was acting as the selling agent of the first corporation under its authority and in its interest. The subject-matter and relief prayed were the same in both suits. *Held*, that there was such privity between the defendants that a judgment against the plaintiff rendered by the Circuit Court of Appeals in the suit against the manufacturer was *res judicata* as to the other suit, then pending before the Circuit Court of Appeals for the other circuit.

A decree against the plaintiff in a patent infringement suit was affirmed by the Circuit Court of Appeals for the Sixth Circuit while its appeal

from a like decree in another suit involving the same controversy was pending unheard before the Circuit Court of Appeals for the Seventh Circuit. *Held*, that a motion for an affirmance, seasonably made to the latter court and supported by certified copies of the record and journal entries in the other case, establishing legal identity of the subject-matter and privity of the parties, was a proper means of interposing the defense of *res judicata*, and that the motion should have been granted.

222 Fed. Rep. 261, reversed.

THE case is stated in the opinion.

Mr. Frederick P. Fish and *Mr. Frank F. Reed*, with whom *Mr. Edward S. Rogers* was on the briefs, for petitioners.

Mr. Taylor E. Brown, with whom *Mr. Clarence E. Mehlhope* was on the brief, for respondent.

MR. JUSTICE CLARKE delivered the opinion of the court.

This suit is here on certiorari to review the decision of the Circuit Court of Appeals for the Seventh Circuit.

On December 9, 1908, the respondent herein, The Railroad Supply Company, as owner of three United States patents, viz., Nos. 538,809, 691,332 and 721,644, filed a bill in the District Court for the Northern District of Illinois against The Hart Steel Company and Guilford S. Wood, praying that the defendants be restrained from infringing certain designated claims of its patents, which are described in their specifications as covering new and useful improvements in railway tie-plates. This case will be hereinafter referred to as the First Case.

Three months later, on March 26, 1909, the same plaintiff commenced a second suit against The Elyria Iron & Steel Company in the District Court for the Northern District of Ohio, praying for the same relief with respect to the same claims of the same patents as in the First Case.

The two bills differed only as to the parties defendant. The Elyria Iron & Steel Company, the defendant in the Second Case, was a manufacturing corporation and was the owner of all of the capital stock of The Hart Steel Company, the defendant in the First Case, which was the selling agent of the Elyria Company, and Wood was its manager.

The same defenses being relied upon in the two cases, the evidence was taken in the first one, and by stipulation a carbon copy of it was filed in the second, and the same exhibits were used in the two.

The claimed infringement consisted in the manufacture of a single order of tie-plates by the Elyria Company and the sale of them by the Hart Company, with Wood as its manager, to the Atchison, Topeka & Santa Fe Railroad Company.

Such proceedings were had in the First Case that on December 18, 1911, the Circuit Court for the Northern District of Illinois decided that the construction or device sold by the defendants did not infringe the claims of the plaintiff's patents relied upon, and dismissed the bill for want of equity.

In the Second Case such proceedings were had that on March 4, 1912, the District Court for the Northern District of Ohio entered precisely the same decree as was entered in the First Case.

Each case was appealed to the appropriate Circuit Court of Appeals and on April 7, 1914, that court for the Sixth Circuit, in a carefully considered opinion, found the claims of the patents relied upon void for want of novelty and invention and affirmed the decision of the District Court. A petition for rehearing was denied on the thirtieth day of the following June.

On the sixth day of October, 1914, the first day of the next ensuing term of the Circuit Court of Appeals for the Seventh Circuit, the defendants in the first suit, which

was still pending undetermined, filed a motion praying that court to affirm the decree of the Circuit Court, upon the ground that all of the issues in the case had been fully and finally determined and adjudicated by the Circuit Court of Appeals for the Sixth Circuit in the Second Case between the plaintiff and The Elyria Iron & Steel Company, with which the moving defendants The Hart Steel Company and Guilford S. Wood were in privity. In support of this motion a copy of the record and journal entries in the Second Case was filed which showed that the two records were "identical."

The record shows that this motion to affirm the decree of the Circuit Court was argued orally on October 6, 1914, and was on the same day denied, but no reason appears in the record for such denial.

Subsequently the case was argued on its merits and on January 5th, 1915, the Circuit Court of Appeals for the Seventh Circuit found the plaintiff's patents valid and infringed and, reversing the decision of the Circuit Court (then the District Court) remanded the case with an order for an accounting.

The Hart Steel Company and Wood, as petitioners in this court, assign as error the overruling by the Circuit Court of Appeals for the Seventh Circuit of their motion to affirm the decision of the Circuit Court in their favor.

It is apparent from the foregoing statement that the question presented to the Circuit Court of Appeals for the Seventh Circuit by the petitioner's motion to affirm was whether or not the decree of the Circuit Court of Appeals for the Sixth Circuit was a final determination of the issues presented in the case pending and not yet argued in the Circuit Court of Appeals for the Seventh Circuit so as to be *res judicata* and binding on that court because of the identity of the subject-matter and the claims and because of the privity of the parties.

The doctrine of *res judicata* is fully applicable to cases

of patent infringement, Robinson on Patents, § 983; Walker on Patents, § 468, and while the record does not show the grounds upon which the motion to affirm was overruled, it does show that the motion was argued, was considered by the court and denied. If authority be needed to the point that the claim thus made for the effect of the judgment of the Circuit Court of Appeals for the Sixth Circuit was presented properly and in time it may be found in *Stout* v. *Lye*, 103 U. S. 66; *Sheldon* v. *Patterson*, 55 Illinois, 507; *Howard* v. *Mitchell*, 14 Massachusetts, 241.

There can be no doubt from the record before us that the Elyria Company owned all of the capital stock of the Hart Company, that the latter company was a mere sales agent of the former, that Wood was the salaried manager of the latter, that both the Hart Company and Wood were agents subject to the control of the Elyria Company and that in selling the tie-plates and as defendants in the litigation they acted wholly under the authority and in the interest of their principal. Identity of interest could not be clearer or closer than it was between the defendants in the two cases,—they represented precisely the same, single interest, and the Hart Company and Wood as agents of the Elyria Company were obviously and necessarily privies to the judgment rendered in its favor in the Circuit Court of Appeals for the Sixth Circuit. *Bank of Kentucky* v. *Stone*, 88 Fed. Rep. 383, affirmed in *Kentucky Bank Tax Cases*, 174 U. S. 408; *Emery* v. *Fowler*, 39 Maine, 326; *Castle* v. *Noyes*, 14 N. Y. 329; *Emma Silver Mining Co.* v. *Emma Silver Mining Co. of New York*, 7 Fed. Rep. 401.

With the identity of the subject-matter and issues of the two cases admitted, the privity of parties to them clear, and the question of the ruling effect of the decree of the Circuit Court of Appeals for the Sixth Circuit presented in an appropriate manner to the Circuit Court of Appeals for the Seventh Circuit, a court of coördinate jurisdiction,

we cannot doubt that the latter court fell into error in not sustaining the motion of the petitioners to affirm the decision of the Circuit Court. The defendants should not have been put to further expense, delay and trouble after the motion was presented. The question is ruled by *Kessler* v. *Eldred*, 206 U. S. 285; *Brill* v. *Washington Ry. & Elec. Co.*, 215 U. S. 527, and *Russell* v. *Place*, 94 U. S. 606.

This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, "of public policy and of private peace," which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect. *Kessler* v. *Eldred*, *supra*.

The conclusion which we have reached in the Second Case (*Railroad Supply Co.* v. *Elyria Iron & Steel Co.*), this day decided, *ante*, 285, with respect to the merits of the patents involved in this litigation is such that it leaves our decision in this case uncomplicated by the one in that. The decree of the Circuit Court of Appeals is

Reversed.

MR. JUSTICE DAY did not take any part in the decision of this case.

CUYAHOGA RIVER POWER COMPANY *v.* NORTHERN REALTY COMPANY ET AL.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

No. 342. Argued May 8, 9, 1917.—Decided June 4, 1917.

The Supreme Court of Ohio, after refusing to review a judgment of the Ohio Court of Appeals by certiorari, dismissed a writ of error to the judgment for want of jurisdiction. *Held*, that under Jud. Code, § 237, the writ of this court ran properly to the Court of Appeals. *Stratton* v. *Stratton*, 239 U. S. 55.

In a controversy in the courts of Ohio over the right of one corporation to condemn land of another, *Held*, that the existence of the petitioning corporation, its right to condemn, its inability to agree as to compensation to be paid for the property, and the necessity for the appropriation, were matters depending purely on the local law.

It not appearing otherwise whether the judgment of the Ohio Court of Appeals was based on provisions of local law or upon a question which was raised under the Federal Constitution, *semble*, that the action of the Supreme Court of the State in dismissing a writ of error to the judgment for want of jurisdiction, upon the express ground that no question under the state or federal constitutions was involved in the judgment, would warrant this court in concluding that the judgment had a non-federal basis only.

Where the judgment of a state court may rest upon either a federal or a non-federal ground, and the basis actually adopted does not appear by the state court's opinion or otherwise, this court has no jurisdiction to review.

Dismissed.

THE case is stated in the opinion.

Mr. Carroll G. Walter, with whom *Mr. William Z. Davis* and *Mr. John L. Wells* were on the briefs, for plaintiff in error.

Mr. Joseph S. Clark, with whom *Mr. John C. Weadock* and *Mr. T. H. Hogsett* were on the briefs, for defendants in error.

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

The Cuyahoga River Power Company, plaintiff in error, was chartered under the laws of Ohio to build and maintain a system of dams, canals and locks in the Big Cuyahoga River for the generation of electricity for light, heat and other purposes. The corporation was granted authority to acquire by condemnation or purchase property necessary for the conduct of its business. In January, 1911, the Power Company commenced this action against the Northern Realty Company, one of the defendants in error, to condemn a large tract of land owned by it adjacent to the river. After the suit was brought this land was sold by the defendant company and was ultimately acquired by The Northern Ohio Traction & Light Company, chartered by the State to operate an interurban electric railway and upon the land thus bought by it after the commencement of the suit that company for its charter purposes built and was operating two large power plants.

Upon its own motion the Traction Company was made a party to the pending suit for expropriation. In conformity with the Ohio statutes regulating the procedure in eminent domain, four preliminary questions were required to be passed upon by the court without a jury, and if decided in favor of the plaintiff, a jury was then required to determine the question of compensation. The four preliminary questions were these: (a) The existence of the petitioning corporation, (b) its right to make the appropriation, (c) its inability to agree as to the compensation to be paid for the property and (d) the necessity for the appropriation. The defendants not only relied upon these four preliminary propositions but also resisted the taking on the ground that a condemnation of the land under the petition of the Power Company would be incon-

sistent with and destructive of the public use to which the land had been applied by the Traction Company. The court did not come to a jury trial on the question of compensation because, after hearing evidence on the preliminary issues, on motion of the defendants it entered an order dismissing the petition, no reason for such decision having been expressed.

The case was taken to the Court of Appeals, it being assigned as error that the trial court had erred in its rulings on the four preliminary questions, and it was further alleged that the refusal of the court to order the condemnation of the land upon the theory that it was not subject to be condemned because after the suit had been brought it had been acquired by the Traction Company and by it dedicated to a public use, constituted an impairment of the contract rights of the plaintiff and a taking of its property without due process of law in violation of the Constitution of the United States. Following a judgment of affirmance without a written opinion, the Power Company applied to the Supreme Court of the State to direct the Court of Appeals to certify the record for review, which was denied, and a writ of error which was prosecuted to the Court of Appeals from the Supreme Court was dismissed for want of jurisdiction for the stated ground that the case did not "involve any question arising under the Constitution of the United States or the State of Ohio." Because of the asserted denial of the alleged federal rights referred to the case is here, the writ of error being directed to the Court of Appeals.

Our jurisdiction to review is challenged by a motion to dismiss based upon two grounds which we consider separately.

1. It is contended that as under § 237 of the Judicial Code we have jurisdiction to review only final judgments of the highest court of the State in which a decision could be had, the writ of error should have been prosecuted to

the Supreme Court of Ohio. In view, however, of the denial by that court of the application to direct the Court of Appeals to certify the record for review, and its order dismissing the writ of error for want of jurisdiction, the contention is without merit. *Stratton* v. *Stratton*, 239 U. S. 55; *Valley Steamship Company* v. *Wattawa*, 241 U. S. 642; *Second National Bank* v. *First National Bank*, 242 U. S. 600.

2. It is contended that, conceding the existence of federal questions in the case, nevertheless as there were independent state grounds broad enough to sustain the judgment, there is no jurisdiction. We think the contention is sound. Despite some suggestion to the contrary it is certain that the four preliminary propositions concerned purely local law and, if decided adversely to the plaintiff, were broad enough to sustain the judgment irrespective of the merits of the federal question which it is insisted was involved in the particular defence made by the Traction Company concerning the public character of the use to which it had applied the property and the consequent want of authority to take it for the benefit of the Power Company, which was submitted to the court along with the preliminary questions. Leaving aside any inference sustaining the view that the Supreme Court treated the preliminary questions as having been adversely decided and the constitutional questions as having been eliminated when it refused to order up the record for review, that conclusion is sustained by its express declaration made in refusing the writ of error that there was no question under the state or Federal Constitution involved,—a conclusion which if it had not been in so many words declared would by necessary implication have resulted from the dismissal of the writ of error for want of jurisdiction since under the constitution and laws of Ohio if a question under the Constitution of the United States or the state constitution had existed, the duty to take jurisdiction would have been obvious.

But assuming that we are not controlled by the statement of the Supreme Court of Ohio on this subject and must determine it upon our own conception as to what was done by the court whose judgment is under review, the result would be the same. We so conclude because looked at from the point of view of the action of the trial court and of the Court of Appeals, the case presents the single question of what principle is to be applied where from an absence of an opinion expressed by the court below it is impossible to say whether its judgment was rested upon state questions adequate to sustain it independent of the federal questions or upon such federal questions, both being in the case. But the rule which controls such a situation has long prevailed and was clearly expressed in *Allen* v. *Arguimbau*, 198 U. S. 149, 154–155, where a writ of error to the Supreme Court of Florida was dismissed, as follows: "The Supreme Court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad, but if the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this court will not take jurisdiction. *Dibble* v. *Bellingham Bay Land Company*, 163 U. S. 63; *Klinger* v. *Missouri*, 13 Wall. 257; *Johnson* v. *Risk*, 137 U. S. 300." *Bachtel* v. *Wilson*, 204 U. S. 36; *Adams* v. *Russell*, 229 U. S. 353.

Dismissed for want of jurisdiction.

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

DOEPEL ET AL., HEIRS AT LAW OF FEARNOW, *v.* JONES ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 571. Argued May 8, 1917.—Decided June 4, 1917.

A preliminary homestead entry, made in the Territory of Oklahoma under agreement between the applicant and his mother that he would make the entry, pay rent for the land while the entry was being completed and deed the land to her upon the issuance of patent, is absolutely void under § 24 of the act providing a temporary government for that Territory, etc. (Act of May 2, 1890, c. 182, 26 Stat. 81), and confers no rights upon the applicant or his heirs.

When such an entry, because of the illegal agreement, has been provisionally cancelled by the Land Department during the entryman's lifetime, and, after his death, one claiming to be his widow has relinquished her rights therein and made a new entry independently, in her own right, the original entry can afford no basis for the entryman's heirs to contest the widow's entry before the Department upon the ground that her marriage was void, if they do not deny the illegal agreement or seek to have the original entry re-instated on its merits.

The first entry, being a nullity, could beget no equity entitling the heirs to affix a trust to the land when patented to the widow.

156 Pac. Rep. 309, affirmed.

IT is sought upon this writ of error to reverse a judgment which sustained the validity of a patent issued by the United States to the defendant in error, Luttie B. Jones, under the homestead laws. The controversy originated in a suit brought by the plaintiffs in error charging that the Land Department had without warrant of law overruled contests which they had filed against the right of the defendant in error to take the land under the homestead law and that therefore she held the patent for the same in trust for their benefit.

The facts stipulated or shown by documentary evidence as to which there is no dispute, are these: Hollen

H. Fearnow being qualified to make a homestead entry, applied in 1899 to make such entry in his own name. Before making the application he had agreed with his mother, for a promised consideration, that he would make the entry, comply with the homestead laws and pay rent for the use of the land in the meanwhile, and that when the patent was issued it would be for her and not for his account and he would deed the land to her. About two years after the entry was made a marriage ceremony was performed between the applicant and Luttie B. Fearnow and they lived together as husband and wife and resided on the land. Some years later after the marriage ceremony and before final proof or patent, Lena Barnes instituted in the local land office a contest against the right of Fearnow to make the homestead entry. This contest was based upon the fact that the agreement which we have stated had been made and upon the charge that under the law of the United States it absolutely disqualified him from making the entry. In December, 1903, after a hearing in the local land office the contest was sustained, the application by Fearnow was cancelled and an entry by Barnes under the homestead law was allowed. This order was taken for review to the Commissioner of the General Land Office and in January, 1905, on the ground of an irregularity or deficiency of notice in the contest proceeding the order was reversed and the local land office was directed "to appoint a day for the hearing of this contest, of which both parties shall have at least thirty days' notice. Upon the final determination of the case, should plaintiff be held to have established the truth of the averments of her affidavit of contest, said H. E. No. 13690 [the Barnes entry] which is hereby suspended, will remain intact; otherwise it will be cancelled and said H. E. 10171 [the Fearnow entry] reinstated."

Ten months after this order the entryman, Fearnow, died, it not appearing that in the intervening time any

further steps were taken concerning the reinstatement of his homestead entry, and after the elapsing of more than a year from his death the entry-woman, Barnes, dismissed her contest and relinquished her homestead entry. On the same day, November 26, 1906, Luttie B. Fearnow, as the widow of Fearnow, filed a relinquishment of his homestead entry and on that day also made her own application to enter in her own individual right the land as a homestead and this application was allowed. The following month the plaintiffs in error, asserting themselves to be the heirs of Hollen H. Fearnow, and as such entitled under the law to the benefits of his homestead entry and to complete the same, contested the application of Luttie B. Fearnow on the ground that she was not his widow and not entitled to the land as such because she bore such a relation of consanguinity to her alleged deceased husband as to cause the pretended marriage relation between them to be incestuous under the laws of Oklahoma where the land was situated as well as under the laws of Kansas where the marriage between them purported to have been celebrated. The local land office rejected the contest following previous decisions of the Land Department holding that the question of the existence of a marriage was one for judicial cognizance and until its nullity was declared or found by a competent court the marriage was binding on the Land Department. The Commissioner of the General Land Office in reviewing, recited the previous facts as to the Barnes contest, the action taken upon it, the cancellation of the Fearnow homestead entry, the setting aside of the contest proceeding and the order made in it and affirmed the action on the authorities which the local land office had relied upon. In reviewing and sustaining this action on appeal the Secretary of the Interior decided that the subject matter of the marriage and its nullity was not primarily cognizable in the Interior Department. Independently of this, however, his

action was placed in addition on distinct and different grounds, as follows:

"But independent of this contestants have presented no grounds upon which their contest can be sustained. They do not allege a priority of right to make entry or that the entryman has not complied with the law. Their claim rests upon their relationship to Hollen H. Fearnow and if they have any right whatever by virtue of their heirship to Hollen H. Fearnow it is a right to perfect his entry, not to make entry in their own right. To avail themselves of this right it would be necessary to reinstate that entry and to show that it was improperly cancelled not by reason of any technical objection in the procedure, but upon its merits. Furthermore their delay in not presenting their claim, even if valid, is a sufficient reason for rejecting their application to contest this entry."

The consequence was to definitely reject the contest and affirm the right to enter of Luttie B. Jones, she having in the meantime remarried, and on the making of final proof and compliance with the legal requirements a patent for the land to her issued in March, 1909. This suit, as we have said, was then begun for the purpose previously stated, the basis of the relief being substantially the claim which had been pressed in the controversy in the Department.

Mr. Samuel Herrick, with whom *Mr. Milton Brown*, *Mr. L. A. Maris* and *Mr. Cody Fowler* were on the briefs, for plaintiffs in error.

Mr. J. F. King, with whom *Mr. W. P. Hackney* and *Mr. L. D. Moore* were on the brief, for defendants in error.

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

It cannot be seriously disputed that if the agreement was made by Fearnow, the original applicant, that he

would make the homestead entry not for himself but for the benefit of another, would during the time that he was apparently taking the steps to complete the entry pay rent for the land to such other person and when the patent was issued deed the land to such person, such agreement caused that entry to be absolutely void for repugnancy to § 24 of the Act of Congress of May 2, 1890, c. 182, 26 Stat. 81. But as it was expressly stipulated that the facts as to such agreement were true, it must follow necessarily that the entryman derived no right from his entry and transmitted none to his heirs and vested them with no right after his death to complete that which was not susceptible of being completed.

Moreover as it is not disputable that the Land Department in its final ruling against the contestants placed its action upon the prior cancellation of the homestead entry because of the particular agreement referred to which was the basis of the Barnes contest, it must necessarily result that there is an absence of the essential foundation upon which alone the asserted rights of the plaintiffs in error could possibly rest. But putting this latter view aside, we are of opinion that the court below was clearly right in holding that as the facts were admitted which absolutely destroyed the effect of the original Fearnow homestead entry and therefore caused it to be impossible for that entry to be the generating source of rights in favor of the plaintiffs in error, no equitable rights arose in their favor growing out of the cancellation of that entry and the issue of the patent to the defendant in error. It seems superfluous to reason to demonstrate that no equitable right to hold the patentee as a trustee could possibly arise in favor of the plaintiffs in error since the application to enter upon which they rely was in legal contemplation nonexistent and hence could afford no basis for equitable rights of any character.

Affirmed.

SEABOARD AIR LINE RAILWAY *v.* BLACKWELL.

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

No. 213. Submitted April 24, 1917.—Decided June 4, 1917.

That provision of the "Blow-Post" law of Georgia (Civil Code, 1910, §§ 2675–2677), which requires railroad companies to check the speed of trains before public road crossings so that trains may be stopped in time should any person or thing be crossing the track there, is a direct and unconstitutional interference with interstate commerce as applied to the state of facts specifically pleaded by the defendant interstate carrier in this case, whereby it appears that, to comply with the requirement, the interstate train in question would have been obliged to come practically to a stop at each of 124 ordinary grade crossings within a distance of 123 miles in Georgia extending from Atlanta to the South Carolina line, and that more than six hours would thus have been added to the schedule time of four hours and thirty minutes. *Southern Railway Co.* v. *King*, 217 U. S. 524, distinguished.

16 Ga. App. 504, reversed.

THE case is stated in the opinion.

Mr. Lamar C. Rucker, Mr. Andrew J. Cobb, Mr. Howell C. Erwin and *Mr. W. L. Erwin* for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This writ of error is directed to a judgment entered upon a verdict for the sum of $1,000 in the city court of Elberton, Georgia, for the death of a son of defendant in error alleged to have been caused by the railway company.

The judgment was affirmed by the Court of Appeals of Georgia.

The facts as charged are: That the deceased was driving a horse and buggy along a public road in the county of Elbert and while crossing the railroad track of the railway company at a public crossing outside of the city of Elberton he was struck by the engine of one of the company's passenger trains and received injuries from which he died three days later.

That the employees of the company in charge of the train failed to blow the engine whistle at the blow-post 400 yards south of the crossing, failed to keep blowing it until the train arrived at the crossing, and failed to check the speed of the train at such blow-post and keep it checked until the train reached the crossing, and, so failing, the company was guilty of negligence.

That the employees of the company failed to keep the train under control and approached the crossing at a high and dangerous rate of speed so that they could not stop the same in time to save the life of the deceased, and that such conduct was negligence. And that "such conduct was negligence if they saw said deceased on the crossing, and it was negligence if they did not see him, and it was negligence under the blow-post law,[1] and it was negligence regardless of the blow-post law."

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[1] "Sec. 2675. *A post to be erected.* There must be fixed on the line of said roads, and at the distance of four hundred yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road.

"Sec. 2676. *Neglecting to erect such posts.* Should any company fail or neglect to put up said posts, the superintendent thereof shall be guilty of a misdemeanor.

"Sec. 2677. *Failing to blow whistle.* If any engineer neglects to blow

The company by its answer denied the various acts of negligence charged against it and its employees and denied "that the failure to comply with said blow-post law was negligence on its part relatively to the transaction in question."

The company set out the applicable sections of the law and alleged that its train was running in interstate commerce between the States and especially between Georgia and South Carolina. That between the city of Atlanta, Georgia, and the Savannah River, a distance of 123 miles, where the same is the boundary line of Georgia, there are 124 points where the line of the railroad crosses public roads of the different counties of the State, established pursuant to law, and that all of such crossings are at grade.

That in order to comply with the law the speed of a train would have to be so slackened that there would be practically a full stop at each of the road crossings; that the time required for such purpose would depend upon various conditions, which might or might not exist at the time and at the crossings, among others, the state of the weather and the percentage of grade; but it would not be less than three minutes for a train composed of an engine and three cars, and for a train of a greater number of cars the time would be greater—for an average freight train, not less than five minutes.

That the train alleged to have caused the death of the deceased was composed of an engine, a mail car and two coaches, and that if the blow-post law had been complied

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said whistle as required, and to check the speed as required, he is guilty of a misdemeanor: Provided, that within the corporate limits of the cities, towns, and villages of this State, the several railroad companies shall not be required to blow the whistle of their locomotives on approaching crossings or public roads in said corporate limits, but in lieu thereof the engineer of said locomotive shall be required to signal the approach of their trains to such crossings and public roads in said corporate limits, by tolling the bell of said locomotive; and on failure to do so, the penalties of this section shall apply to such offense."

with on the day in question at least three minutes would have been consumed at each crossing, more than six hours between Atlanta and the Savannah River. That the running time between those points according to the adopted schedule was four hours and thirty minutes. That if the law had been complied with the time consumed between those points would have been more than ten and one-half hours.

That for freight trains the time consumed would be more than sixteen hours, the maximum speed of such trains on the company's road being twenty miles an hour.

That the crossings are the usual and ordinary grade crossings and there are no conditions which make any one of them peculiarly dangerous other than such danger as may result from the crossing of a public road by a railroad track at grade.

That between the City of Atlanta and the Savannah River the line of the company's railroad crosses the tracks of two other railroads and that under the laws of the State a train is required to come to a full stop fifty feet from the crossing and that the time so consumed would increase the time required to operate between the points referred to.

That the law as applied to the train in question is an unreasonable regulation of interstate commerce and a violation of Paragraph 3, § 8, Article I, of the Constitution of the United States, and that therefore the company is not guilty of the various acts of negligence charged against it.

Upon demurrer to the answer of the company the averments in regard to the law were struck out except the denial that the failure to comply with the law was negligence on the company's part "relatively to the transaction in question."

The case so went to the jury, including the defense that the deceased failed to exercise ordinary care and diligence

for his own safety. The jury returned a verdict for the sum of $1,000.

A motion for a new trial was denied. The railway company then took the case to the Court of Appeals of the State and that court invoked the instruction of the Supreme Court upon the question whether that part of the law (§ 2675, Civil Code of the State) which requires the engineer to check the speed of the train on approaching a public crossing, so as to stop in time should any person or thing be crossing the railroad track on its road, is unconstitutional so far as an interstate train is concerned, under the conditions set forth in the answer of the company, for the reason that as thus applied the statute is a regulation of interstate commerce and repugnant to the commerce clause of the Constitution of the United States.

The Supreme Court answered the question in the negative. The opinion of the court is very elaborate, but the basis of it is that the law is a valid exercise of the police power of the State, that there was no displacement of its exercise by congressional action, and that by its exercise in the law in question it did not directly burden interstate commerce.

The Court of Appeals accepted necessarily the views of the Supreme Court and sustained the ruling of the trial court upon the demurrer to the plea of the company that the law violated the commerce clause of the Constitution.

To the contention of the company that the deceased had not observed ordinary care for his own safety and could have avoided the injury which resulted in his death, the court answered that it was a jury question, and said: "In view of the evidence as to the defendant's failure to comply with the provisions of the 'blow-post law' there is sufficient testimony as a whole to support the jury's finding in favor of the plaintiff." The court hence affirmed the judgment.

It will be observed, therefore, from this statement that

the law of the State was an element in the decisions of the state tribunals and its constitutionality was sustained against the attacks of the railway company. The question is, therefore, presented for our consideration. In its consideration we need not descant upon the extent of the police power of the State and the limitations upon it when it encounters the powers conferred upon the National Government. There is pertinent exposition of these in *Southern Railway Co.* v. *King*, 217 U. S. 524, in which the law now under review was passed upon. The case is clear as to the relation of the powers and that the power of the State cannot be exercised to directly burden interstate commerce. It was recognized that there might be crossings the approach to which the State could regulate. But, on the other hand, it was said there might be others so numerous and so near together that to require the slackening of speed would be practically destructive of the successful operation of interstate passenger trains, and, therefore, "statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefore beyond the power of the State to enact."

That case went off on a question of pleading. An answer was filed that did not invoke the Federal Constitution. This was attempted to be done by an amended answer which was very general and to which a demurrer was sustained. At the trial of the action there was an offer of evidence of the specific effect of the law upon the operation of trains as showing the impediment of the law to interstate commerce. The evidence was excluded. This court sustained the ruling on the ground that the evidence was not admissible under the pleadings. The ruling upon the demurrer to the answer was sustained on the ground that the answer contained only general averments constituting "mere conclusions." It was said that the aver-

ments "set forth no facts which would make the operation of the statute unconstitutional. They do not show the number or location of the crossings at which the railway company would be required to check the speed of its trains so as to interfere with their successful operation. For aught that appears as allegations of fact in this answer the crossing at which this injury happened may have been so located and of such dangerous character as to make the slackening of trains at that point necessary to the safety of those using the public highway, and a statute making such requirement only a reasonable police regulation, and not an unlawful attempt to regulate or hinder interstate commerce. In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense, and that the demurrer thereto was properly sustained."

The facts so specified and which it was decided would give illegal operation to the statute are alleged in the present case, and, assuming them to be true—and we must so assume—compel the conclusion that the statute is a direct burden upon interstate commerce, and, being such, is unlawful. The demurrer to the answer averring them was therefore improperly sustained.

We express no opinion on the third defense of the company.

Reversed and case remanded for further proceedings not inconsistent with this opinion.

THE CHIEF JUSTICE, MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS dissent on the ground that the regulation in question was within the class which the State is entitled to enact in the absence of congressional action, and until such action. There having been no action by Congress, there is therefore no ground for holding the state action void as a regulation of interstate commerce.

SAUNDERS *v.* SHAW AND THE BOARD OF DRAINAGE COMMISSIONERS OF THE BAYOU TERRE-AUX-BOEUFS DRAINAGE DISTRICT ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 472. Argued May 9, 1917.—Decided June 4, 1917.

It is a violation of due process of law for a state supreme court to reverse a case and render judgment absolute against the party who succeeded in the trial court, upon a proposition of fact which was ruled to be immaterial at the trial and concerning which he had therefore no occasion and no proper opportunity to introduce his evidence.

In a suit to enjoin the collection of a drainage tax, evidence offered by the plaintiff to prove that his land could not be benefited by the drainage improvement was ruled to be inadmissible upon defendant's objection, but was spread upon the record as carried to the state supreme court upon appeal from the judgment in defendant's favor. The latter court, after affirming the judgment, reversed it on rehearing and granted a permanent injunction against the tax upon finding from the answer and testimony before it that the land had not been and could not be benefited, and declined to consider defendant's application for further rehearing. *Held*, that in thus rendering judgment against the defendant without affording opportunity to introduce evidence upon the question of benefit there was a violation of due process of law, contrary to the Fourteenth Amendment.

Upon the sustaining of his objection to evidence upon the ground that the point to which it is directed is immaterial, a party is under no obligation to offer evidence to rebut that which was offered by his opponent and ruled to be inadmissible.

A claim that a judgment of a state supreme court violates rights under the Fourteenth Amendment is not too late, though first made by the assignment of errors presented to its Chief Justice when the writ of error from this court was granted, if the aggrieved party was under no duty to anticipate the state court's action before the judgment

was rendered and was afforded no opportunity afterwards to present the claim for its consideration.[1]

138 Louisiana, 917, reversed.

THE case is stated in the opinion.

Mr. Wm. Winans Wall for plaintiff in error.

Mr. Frank L. Richardson, with whom *Mr. Frank Soule* was on the brief, for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit for an injunction against the collection of a drainage tax. The drainage district had issued bonds payable out of the tax and the plaintiff in error who held some of these bonds was allowed to intervene in defence. At the trial the plaintiff offered evidence to show that the land taxed was outside of the levee system that the drainage commissioners were building, that it would receive no benefit and really was an island or islands in the Gulf of Mexico. The defendant objected and the evidence was excluded as inadmissible under the pleadings, but it was spread upon the record and completed in order to carry the case to the Supreme Court. The defendant then put in testimony that the land was not in the Gulf of Mexico, and that the maps produced could not be relied upon for the depth of the water when water was indicated, but cross-examination to show the physical condition of the property was objected to—the defendants' position being that the question was not open, and that being the ruling of the court. Judgment was entered for the defendant

[1] REPORTER'S NOTE: Plaintiff in Error's petition for rehearing, mentioned in the opinion, is not copied in the record and *non constat* whether the federal right was there set up. *Semble*, that no opportunity was thus afforded to present the claim, because by the rule of the court, the door was closed against the petition, regardless of what it contained.

and intervenor and was affirmed on appeal by the Supreme Court. A rehearing was granted, however, and the court, observing that the answer and testimony showed that the land was low and marshy, had not been benefited or drained and could not be drained under the present system, held that the case was governed by *Myles Salt Co.* v. *Board of Commissioners of the Iberia & St. Mary Drainage District*, 239 U. S. 478, decided after the first decision in the present case; reversed the judgment and granted an injunction against the assessment upon this land.

The intervening defendant thereupon applied for a rehearing, but the court declined to consider the application under its rule that only one rehearing should be granted. He now brings this writ of error and says that he has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. The Chief Justice and Mr. Justice O'Niell were of opinion that the case should be remanded to the trial court, we presume upon the ground just stated. Probably the majority of the Supreme Court thought that it was so plain on the uncontroverted facts that the case was within the principle of *The Myles Salt Company's Case* that to remand it would be an empty form—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.

The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the State granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation. *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278. It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the Chief Justice of the State by his assignment of errors. We do not see what more he could have done.

Judgment reversed.

ERIE RAILROAD COMPANY *v.* PURUCKER, ADMINISTRATRIX OF MARIETTA.

ERROR TO THE COURT OF APPEALS OF RICHLAND COUNTY, STATE OF OHIO.

No. 211. Argued April 23, 1917.—Decided June 4, 1917.

A request to charge must be calculated to give the jury an accurate understanding of the law with reference to the phase of the case to which it is applicable.

Plaintiff, employed to work upon the tracks of a railroad company, while walking east on the east-bound track to a place of work appointed by his superior, stepped over to the west-bound track to avoid an east-bound train and was run down by an engine backing, without warning signals, on the west-bound track, and was injured. There was evidence that he did not see the engine because of steam and smoke from the avoided train and that those in charge of the backing engine did not see him. *Held:* (1) That a request to charge that if plaintiff was using the tracks voluntarily for his convenience he assumed the risk, was too broad, in ignoring the circumstances which induced him to use them and in taking for granted his knowledge of the conditions, especially the possibility of negligence in backing the engine without warning. (2) That a request to charge that, if plaintiff, in getting off the track on which he saw the train approaching, could with safety and reasonable convenience have stepped to the right or south of such track, and by his own choice stepped on the other track and was struck by a train thereon, he assumed the risk of such choice—was open to the same objections in not covering the elements of assumed risk, and was more properly applicable to the defense of contributory negligence.

Under the Federal Employers' Liability Act, an employee does not assume a risk attributable to the negligence of his co-employees until he is aware of it, unless the risk is so obvious that an ordinarily prudent person in his situation would observe and appreciate it.

Affirmed.

THE case is stated in the opinion.

Mr. C. E. McBride, with whom *Mr. N. M. Wolfe* was on the brief, for plaintiff in error.

Mr. W. S. Kerr for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

Byron B. Marietta brought this suit against the Erie Railroad Company, to recover damages for injuries alleged to have been caused to him by the negligence of the Company. He died pending this proceeding in error and the case was revived in the name of his administratrix. Marietta was what is known as a section man in the em-

ploy of the Company, and had been such for a period of about four weeks before the injury happened. It was his duty to work on the track of the Company wherever directed by the section foreman on the section extending from Pavonia, in Richland County, Ohio, westward for a distance of several miles. The Erie Railroad Company was engaged in both interstate and intrastate commerce. The testimony shows that it was customary for the section foreman to direct Marietta where to work and to tell him on the previous day where to report for work on the following day. On the day before the injury was incurred, he was directed by the foreman to report at a point on the section about a quarter of a mile east of a certain tower, located upon the defendant's track. Early on the morning of the day of the injury, he started from his residence to report to the foreman accordingly. It appears that at and near the place of injury the Company has a double track; that the north track is used for trains going west and the south track for trains going east; that the plaintiff in going to the place designated went upon the south track and was walking eastwardly, when a passenger train bound east came upon this track, and to get out of the way of it he stepped over upon the north or west-bound track; that while walking on that track he was struck and run over by an engine which was running backward and in the opposite direction from that in which trains ordinarily ran upon the north track. This engine had been detached from a train of cars and after pushing another train up a grade on the west-bound track was returning to its own train at the time of the injury. Marietta testified that he had no warning and did not see the approaching engine owing to steam and smoke from the passenger train, which had just passed upon the other track. The engineer and fireman of the backing engine testified that they did not see Marietta until after he was run over by the engine and gave no signal or warning of its approach.

The case was brought, and by the state court was tried, under the state law. No objection reviewable in this court involves the correctness of the charge of the trial court submitting the questions of negligence and contributory negligence to the jury. The Company brings the case here because it contends that it alleged and showed that it was an interstate railroad, engaged in the carriage of freight and passengers between States, and that the train of cars from which the engine which struck Marietta was detached and to which it was returning was engaged in interstate commerce; that inasmuch as he was a section man or track man, employed to work upon the track of an interstate railroad, and was proceeding to his work at the time of his injury, both parties were engaged in interstate commerce and the Federal Employers' Liability Act applied to the case, and that because of the refusal of the trial court to charge as to assumption of risk the Company was deprived of the benefit of that defense.

The Court of Appeals treated the case as one controlled by the state law, and held that the Employers' Liability Act did not apply, as in its view Marietta was not engaged at the time of his injury in interstate commerce, and affirmed the ruling of the trial court in refusing the two requests to charge which are the basis of the assignments of error in this court. These requests were: (1) "If the plaintiff, for his own convenience, voluntarily went along the tracks of the railroad, and this railroad was being at the time used and operated as a highway of interstate commerce, he assumed the risk and danger of so using the tracks"; and (2) "If the plaintiff in getting off the track on which he saw a train approaching could with safety and reasonable convenience have stepped to the right or south of such track, and by his own choice stepped on to a parallel track and was struck by a train on such parallel track, he assumed the risk of such choice." The

refusal to give these requests raises the only federal question in the case.

Conceding, without deciding, that the Federal Employers' Liability Act applied to the circumstances of this case, nevertheless the two requests were properly refused. A request to charge must be calculated to give the jury an accurate understanding of the law having reference to the phase of the case to which it is applicable. *Norfolk & Western Ry. Co.* v. *Earnest*, 229 U. S. 114, 119. The first request simply asked a broad charge that if the plaintiff voluntarily, for his own convenience, went upon the tracks of the railroad, and the railroad was at the time being used and operated as a highway of interstate commerce, he assumed the risk and danger of so using the tracks. This request omitted elements essential to make assumption of risk applicable to the case. It failed to call attention to the circumstances under which the testimony tended to show the plaintiff was using the tracks at the time, and the knowledge of conditions which should have been taken into consideration in order to attribute assumption of risk to him. It failed to take into account the undisputed testimony that the engine ran into Marietta without signal or warning to him. Under such circumstances the injured man would not assume the risk attributable to the negligent operation of the train, if the jury found it to be such, unless the consequent danger was so obvious that an ordinarily prudent person in his situation would have observed and appreciated it. *Chesapeake & Ohio Ry. Co.* v. *De Atley*, 241 U. S. 310, 313, 314; *Chesapeake & Ohio Ry. Co.* v. *Proffitt*, 241 U. S. 462, 468, and cases cited.

The second request pertained to the conduct of the plaintiff, in view of the particular situation, and what he should have done to protect his safety, considering his danger at the time, and is open to the same objections. This request did not cover the elements of assumed risk

and was more properly applicable to the defense of contributory negligence, concerning which the court must be presumed to have given proper instructions to the jury.

Affirmed.

FARMERS IRRIGATION DISTRICT ET AL. *v.* STATE OF NEBRASKA ON THE RELATION OF O'SHEA.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 215. Submitted April 25, 1917.—Decided June 4, 1917.

Under § 3438 of the Revised Statutes of Nebraska, 1913, as construed by the Supreme Court of the State, the owner of an irrigation canal may be compelled to bridge it to afford access between the lands of another which are intersected by it, although the canal was built across the lands by one who owned them at the time and who sold the separated parcels by successive conveyances to their present owner, after the canal had been long in operation and after it had been disposed of to another interest.

In virtue of the right to affix conditions to grants of corporate power, the State of Nebraska, in granting appellant Irrigation District the privilege of obtaining lands for canals, etc., by condemnation, was justified in imposing, by the same law, the duty to build bridges without further compensation in the circumstances indicated in the preceding paragraph, and appellant, having accepted the privilege *cum onere*, can not complain that its property is taken in violation of the due process clause of the Fourteenth Amendment when the requirement is enforced, even though the right of way for the particular canal in question was acquired without resort to condemnation.

A state law laying a duty upon all owners of irrigation canals to construct bridges over them for the benefit of abutting lands does not violate the equal protection clause of the Fourteenth Amendment in not embracing canals devoted to other uses.

98 Nebraska, 239, affirmed.

THE case is stated in the opinion.

Mr. F. A. Wright for plaintiffs in error.

Mr. Thomas M. Morrow and *Mr. William Morrow* for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

Peter O'Shea filed his petition in the District Court of Scotts Bluff County, Nebraska, alleging, among other things, that the Farmers Irrigation District is a corporation organized and existing under and by virtue of an act to provide for the organization and government of irrigation districts, and to provide for acquiring the right of way to build irrigation ditches or canals, and other property, for the dividing of certain portions of the territory of the State of Nebraska into irrigation districts, and for the purpose of buying irrigating canals already constructed, or partially constructed, and paying for the same; that the Farmers Irrigation District is the owner of an irrigation canal in Scotts Bluff County, Nebraska, which canal intersects certain described real estate owned by the relator; that that portion of this real estate lying north of the right of way of the canal does not abut upon any public highway, nor has the relator any private way from this real estate lying north of the canal to any highway; that the only convenient way by which the real estate on the north side of the canal can be used with that on the south side is to construct a bridge across the canal; that that portion of the land lying south of the canal abuts upon a public highway, but that portion lying north of the right of way of the canal is completely cut off from any public highway, because of the fact that the canal forms an impassable barrier unless a bridge is constructed over the same; that the portion of said real estate north of said

canal is a quarter of a mile from the east side of the same to a public highway, and is also a distance of a quarter of a mile from the west side of said real estate to a public highway, and is also a distance of one-half mile from the north side of the same to a public highway, without any private way leading to any highway, and the lands between the east, west and north side of said real estate, and the public highways, are held in private ownership; that it is necessary for the free and convenient use of the lands on both sides of the canal by the owner thereof that the owner of the canal erect a suitable and convenient bridge across the canal; that demand has been made upon the respondents to erect a bridge across the canal at a point to be indicated by the relator on these premises, and that respondents have refused to erect such bridge; that the owner of the premises has no way of ingress and egress from that portion of the premises lying north of the right of way of the canal except through the private property of others. Wherefore, relator prayed that an alternative writ of mandamus issue to the respondents, commanding them forthwith to erect a suitable and convenient wagon bridge over the canal at a point to be designated by the relator, or to show cause why a peremptory writ of mandamus should not issue.

The alternative writ of mandamus was issued as prayed for, and the respondents thereupon appeared and answered, alleging that in and prior to the year 1906 the land on both sides of the canal was owned by the Tri-State Land Company; that said Tri-State Land Company while the owner of said land caused an irrigation ditch or canal to be constructed over and across the same, which irrigation ditch is the same now owned by the Farmers Irrigation District, the Tri-State Land Company originally being the owner of both the land and the irrigation ditch; that thereafter the Tri-State Land Company sold and conveyed the canal together with the right of way to the

Farmers Mutual Canal Company, and the latter company thereafter sold and conveyed the canal and the right of way to the respondent, the Farmers Irrigation District, which now holds the same; that the Tri-State Land Company treated the parcel of land lying north of the canal and the parcel lying south of the canal as two separate tracts and parcels of lands; that the Tri-State Land Company conveyed these tracts at different times and as separate parcels to the relator, Peter O'Shea, and that O'Shea purchased the lands after the construction of the irrigation canal and at different times as two separate and distinct tracts of land divided from each other by the right of way and canal of the Farmers Mutual Canal Company; and that therefore the rights of the relator, O'Shea, are derived from and through the Tri-State Land Company and that he has no greater or other right in the premises than the Tri-State Land Company would have.

The respondents for a further defense alleged that § 3438 of the Revised Statutes of the State of Nebraska for the year 1913, which attempts to confer the right on land owners under certain circumstances to compel the owners of irrigation canals to build bridges thereover is unconstitutional, null and void; that said section deprives the respondent, Farmers Irrigation District, of its property without due process of law and deprives it of equal protection of the laws, and is class legislation in that it purports to require the building of certain bridges only by the owners of irrigation canals and does not apply to other canals of similar nature carrying water, such as drainage canals and mill races.

The case coming to trial, it was ordered by the court that a peremptory writ of mandamus be denied and that the action be dismissed. Appeal was taken to the Supreme Court of Nebraska, which court reversed the judgment and granted a peremptory writ of mandamus, 98 Nebraska, 239, and a writ of error brings the case to this court.

This action was brought under the terms of § 3438, Revised Statutes of Nebraska, 1913, which reads:

"Any person, company, corporation, or association constructing a ditch or canal through the lands of any person, company, or corporation having no interest in said ditch or canal shall build such ditch or canal in a substantial manner so as to prevent damage to such land; in all cases where necessary for the free and convenient use of lands on both sides of the ditch or canal by the owner or owners of such lands, the owner or those in control of such ditch shall erect substantial and convenient bridges across such canal or ditch, and they shall erect and keep in order suitable gates at the point of entrance and exit of such ditch through any enclosed field."

It appears from a stipulation between the parties to this case that during the year 1906 the Tri-State Land Company was the owner of the lands here involved, and that during that year it constructed this canal over the lands; that afterwards, in 1909, the canal and right of way were conveyed to the Farmers Mutual Canal Company, which company on the seventeenth day of December, 1912, conveyed the same to the Farmers Irrigation District; that on April 25, 1910, the Tri-State Land Company conveyed to O'Shea the parcel of land lying north of the canal, and on July 14, 1911, the parcel of land lying south of the canal, and that these are the only conveyances under which O'Shea claims title; that at the times of these conveyances the canal was fully completed, and had been in operation a number of years, the canal being built forty-six feet wide on the bottom with a carrying capacity of at least seven feet in depth, and constructed by excavating to a depth of about three feet in the ground, and with banks above the natural surface of the ground to a height of about eight feet, with a slope of one and one-half to one.

The District Court of Scotts Bluff County, Nebraska, held that the portion of the land occupied by the right of

way of the irrigation canal was never owned by Peter O'Shea, and for that reason denied his right to a writ of mandamus. The Supreme Court of Nebraska held that while the canal was built over the land by the then owner of the land, nevertheless under the statute it was the duty of the present owner of the canal to build the bridge required by the act.

The Supreme Court of the State construed § 3438, Revised Statutes of Nebraska, 1913, as applicable to the situation here presented, inasmuch as it applies to "all cases," and held that the fact that the Tri-State Land Company, when the canal was constructed, owned the land upon which it was built and on both sides of the canal did not relieve the Farmers Irrigation District, successor in title to the Tri-State Land Company in the ownership of the canal, from the statutory obligation to build the bridge at the instance of one who subsequently purchased the adjacent lands. There is much discussion of the meaning of the statute in the opinion of the court with which we have nothing to do upon this writ of error. The construction of the state statute by the highest court of the State is conclusive in this court.

The questions here to be decided arise under the Fourteenth Amendment to the Federal Constitution, it being contended by the plaintiffs in error that the property of the Farmers Irrigation District was taken for private use without compensation, and that the statute as construed by the state court has the effect to deprive it of the equal protection of the laws.

The Farmers Irrigation District is incorporated under a statute (Laws of Nebraska, 1895, pp. 269, 277), which gives it the right to enter upon any land in the district and to locate the line for any canals and necessary branches thereof, and to acquire, either by purchase or condemnation, all lands and waters and other property necessary for the construction, use, maintenance, repair and im-

provement of the canals and works, lands for reservoirs for the storage of water. It is also given the statutory authority to acquire by purchase any irrigation ditches, canals or reservoirs already constructed. The Supreme Court of Nebraska, construing this statute as imposing the obligation to build bridges for the benefit of adjacent land owners, and reading the same in connection with the authority conferred upon the corporation to exercise the right of eminent domain, held that the company must take the burdens of the legislation with its benefits, and that having by its incorporation accepted the rights conferred under the statute of its creation it must exercise them within the limitations and upon the conditions therein named. In other words, it was held that the State had said to the corporation of its own creation: "You may have the right to appropriate property to the public use which you are authorized to serve, but when the canals constructed for that purpose divide land so that it is necessary to connect the several portions thereof by bridges, you shall construct them at your own expense." It is familiar law that a State may impose conditions, within constitutional limitations, upon the exercise of corporate authority conferred by it. The State was not obliged to confer upon this corporation the sovereign authority to take property by the right of eminent domain. When it did so, we do not think it took the property of the corporation without compensation when it also obliged the latter to comply with the conditions of this grant of power, one of which was that it should construct bridges under the circumstances now presented.

Nor do we think it makes any difference that the corporation was not obliged to exercise the power of eminent domain to obtain this particular right of way. This right existed, was conferred by the State, and might be used to construct other portions of the canal for the purposes intended. In this construction and application of the legis-

lation of the State we are unable to find the taking of property without compensation, as is contended by the plaintiffs in error.

As to the denial of the equal protection of the laws, this court has frequently held that there is nothing in this provision of the Fourteenth Amendment to prevent the States from reasonable classification of subjects for legislative action. This statute applies equally to all owners of irrigation canals. The fact that it does not embrace canals constructed for other uses and purposes does not make it obnoxious to the equal protection clause of the Fourteenth Amendment.

It follows that the judgment of the Supreme Court of Nebraska must be

Affirmed.

ERIE RAILROAD COMPANY *v.* STONE ET AL., PARTNERS, DOING BUSINESS UNDER THE NAME OF STONE & NOBLE.

ERROR TO THE COURT OF APPEALS OF CRAWFORD COUNTY, STATE OF OHIO.

No. 254. Argued May 3, 1917.—Decided June 4, 1917.

In a limited liability contract governing an interstate shipment of live stock, it was stipulated, in accordance with provisions duly published and filed with the Interstate Commerce Commission, that the connecting carrier's liability for damage should be conditional upon the filing with its agent of a written notice of the shipper's claim within five days from the removal of the stock from the cars. *Held*, reasonable and valid.

The right of parties to an interstate shipment to limit the carrier's liability for damage to the goods, in consideration of optional reduced

rates and in accordance with schedules and a form of contract duly published and filed with the Commission, is well settled.

Such provisions for notice of claim and limited liability bind the parties until changed by the Commission.

Reversed.

THE case is stated in the opinion.

Mr. William E. Cushing, with whom *Mr. C. E. McBride* and *Mr. N. M. Wolfe* were on the brief, for plaintiff in error.

No brief filed for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

Suit was brought in the Common Pleas Court of Crawford County, Ohio, by Stone and Noble, present defendants in error, hereinafter designated as the plaintiffs, against the Lake Erie & Western Railroad Company and the present plaintiff in error, the Erie Railroad Company, to recover damages to certain horses shipped under bills of lading hereinafter referred to. Plaintiffs recovered a judgment in the court of original jurisdiction, and the same was affirmed by the Court of Appeals of Crawford County, to review which judgment a writ of error brings the case to this court.

The horses were shipped under a contract designated "Limited Liability Live Stock Contract," which was executed in duplicate on the part of the Lake Erie & Western Railroad Company and the shippers. That contract contained the following stipulation:

"That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the Erie Ry. agent of said

carrier at his office in East Buffalo, N. Y., within five days from the time said stock is removed from said car or cars; and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs."

At a trial some four years before the one in which a verdict and judgment were rendered against the Erie Railroad Company, a verdict and judgment were rendered in favor of the Lake Erie & Western Railroad Company, and that company is out of the case.

The suit was tried as to the Erie Railroad Company at the February Term, 1914, of the Common Pleas Court of Crawford County, and the court charged the jury, among other things, that it was conceded that no written claim was filed within five days after the shipments respectively arrived at their destinations, and submitted to the jury the question whether this limitation was reasonable. The jury gave a verdict in favor of the plaintiffs for a sum which included the interstate shipments here involved and an intrastate shipment for which a separate cause of action was stated in the amended petition. It is this judgment upon the lump sum which was affirmed by the Court of Appeals of Crawford County.

For a defense the Erie Railroad Company set up, among other things, that the horses were shipped under the terms of the written live-stock contract above referred to; that this contract contained the requirement of notice already stated and gave a choice of two published tariff rates, the lower one based upon the agreed valuation of not exceeding one hundred dollars for each horse. The recovery in the case was for the full value of the horses, and not for the limited liability valuation. The answer further set up that each of the interstate shipments in question came into the hands of the Erie Railroad Com-

pany for transportation from Ohio to East Buffalo, New York; that its official tariffs, classifications and rules applicable to such interstate shipments, and in print and in force at and during the term of shipments, were duly filed with the Interstate Commerce Commission, pursuant to the acts of Congress. At the trial the Erie Railroad Company put in evidence its tariff rates, showing the alternative rate based upon the lower valuation, and the contract containing the stipulation as to notice already set forth.

The federal question here presented is whether the court was right in leaving to the jury the question of the reasonableness of the requirement that notice should be given within five days, and permitting the jury if it found that this limit was unreasonable to give a verdict in excess of the limited liability contracted for.

This case requires little discussion, as the principles governing it have been settled by frequent decisions of this court. We need not stop to consider whether the requirement of the live-stock contract that a claim for damages should be presented within five days from the time the stock was removed from the cars was reasonable or not, for this question has been answered in favor of the reasonableness of such stipulation in the recent case of *Northern Pacific Ry. Co.* v. *Wall*, 241 U. S. 87. See also *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592.

In the case under consideration it appears that the reduced rates under which these horses were shipped and the limited liability arising from shipping under such reduced rates were fixed by the tariff schedules and the form of limited liability contract duly published and filed with the Interstate Commerce Commission, as required by law. These rates and that contract which contained the notice requirement thus became binding upon the parties until changed by order of the Commission. This is too well

settled to need discussion. The rules and regulations, duly published and filed, which in any wise affect the rates or the value of the service to be rendered are controlling upon both parties to the shipping contract. (Act of June 29, 1906, 34 Stat. 586, § 2.) The binding force of these contracts and regulations has been affirmed in many cases; among them, *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 652; *Boston & Maine Railroad* v. *Hooker*, 233 U. S. 97, 112; *Louisville & Nashville R. R. Co.* v. *Maxwell*, 237 U. S. 94, 98; *Great Northern Ry. Co.* v. *O'Connor*, 232 U. S. 508, 515; *Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278, 285; *Southern Railway Co.* v. *Prescott*, 240 U. S. 632, 638; *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin*, 241 U. S. 319; *Norfolk Southern R. R. Co.* v. *Chatman*, *ante*, 276.

It follows that the judgment of the Court of Appeals of Crawford County must be reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *v.* UNITED STATES.

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

No. 267. Argued May 4, 1917.—Decided June 4, 1917.

The Hours of Service Act of March 4, 1907, 34 Stat. 1415, is remedial, passed to protect both public and employees from the dangers arising from overwork in railway employment, and should be construed, in effectuation of this purpose, as requiring the carrier to do all reasonably within its power to confine the hours of service within the limits stated.

It was the intention of the proviso in § 3, not to relieve the carrier from a diligent effort to avoid exceeding the limits of service which the act specifies, but only to afford relief in cases where service beyond those limits is necessarily entailed by the causes mentioned in the proviso.

If, as the result of delay due to unavoidable accident, a train crew will not be able to take the train to the terminal of their normal run without serving beyond the time limit prescribed by the act, it becomes the carrier's duty to prevent such excessive service by substituting a fresh crew whenever, in the exercise of all reasonable diligence, it is able to do so.

220 Fed. Rep. 748, affirmed.

THE case is stated in the opinion.

Mr. Paul Burks, with whom *Mr. Robert Dunlap*, *Mr. E. W. Camp* and *Mr. Gardiner Lathrop* were on the brief, for plaintiff in error.

Mr. Assistant Attorney General Underwood, with whom *Mr. Alex Koplin* was on the brief, for the United States.

MR. JUSTICE DAY delivered the opinion of the court.

The United States brought an action in the District Court of the United States for the Southern District of California, Southern Division, against the Atchison, Topeka & Santa Fe Railway Company, to recover the sum of $1500 for three alleged violations of the Hours of Service Act of March 4, 1907, 34 Stat. 1415, 1416, the relevant parts of which are as follows:

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive

hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: . . .

"Sec. 3. . . . *Provided,* That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen. . . ."

From the stipulated facts the following appears: That the Atchison, Topeka and Santa Fe Railway Company is a corporation duly organized and existing under the laws of Kansas, and was at the times mentioned in the complaint a common carrier engaged in interstate commerce by rail. That at the times mentioned in the petition this railway company operated a certain interstate passenger train from Los Angeles, California, to Phoenix, Arizona, known as train No. 18, and a similar train from Phoenix to Los Angeles known as train No. 17. That this latter train customarily, and on the dates in question, moved from Phoenix to Parker, Arizona, in charge of train and engine crews, which crews were changed at Parker, where there was attached to the train an engine in charge of a crew which ran from Parker to Barstow, California, a distance of 183.5 miles. That at Parker train No. 17 was taken in charge of and handled from that point to Los Angeles, a distance of 335.3 miles, by a passenger train crew, consisting of a conductor and two brakemen, who were the employees of the railroad company mentioned in the complaint.

That the terminals for the passenger train crews engaged in the operation of trains Nos. 17 and 18 are Los Angeles and Parker. That the employees described in

the complaint resided and had their homes in Los Angeles, from which point they customarily left for Parker in charge of train No. 18, which arrived at Parker at or about 1:15 o'clock A. M., whereupon they were relieved until 10:40 o'clock P. M., on the same day. That during the interval they were permitted to enjoy the accommodations for rest at Parker, which was their "away-from-home-terminal." That at 10:40 o'clock P. M. they reported for the return trip to Los Angeles on train No. 17, and customarily reached Los Angeles at or about 10:15 o'clock A. M. on the next day, from which time until 10:30 o'clock P. M. on the following day they were not on duty, and during that time they were permitted to repair to and remain at their respective homes in Los Angeles, which was their "home-terminal."

That on October 2nd and 3rd, 1912, passenger train No. 17 was operated between Parker and Los Angeles by the employees named in the complaint, and that they were compelled to be and remain on duty in connection with the movement of that train from 10:40 o'clock P. M. on October 2nd, until 8:25 o'clock P. M. on October 3rd, under the circumstances hereinafter set forth.

That the employees named reported for duty at Parker, at 10:40 o'clock P. M. on October 2nd, and at 11:10 o'clock P. M. departed from Parker in charge of train No. 17, which arrived at Barstow, California, at 7:10 o'clock A. M. on October 3rd, having been delayed for a period of two hours and thirty minutes on account of washouts, the cause of this delay not being known to the defendant, or to any of its officers or agents in charge of the employees at the time they left Parker, and incapable of being foreseen. That train No. 17 was scheduled to leave Barstow at 4:45 o'clock A. M. on October 3rd, but by reason of the delay in reaching Barstow it actually left that point at 7:45 o'clock A. M., with ample time then remaining to reach Los Angeles within less than sixteen hours after

the conductor and brakemen entered upon their service, but at 8:30 o'clock and while the train was being operated between Barstow and San Bernardino, California, an axle broke under the tank of the engine, whereby the movement of the train was necessarily and unavoidably delayed for a period of six hours and ten minutes, with the result that instead of reaching San Bernardino at 7:35 o'clock A. M., according to its usual schedule, or at 10:35 o'clock A. M., as it would have done but for the delays in reaching and leaving Barstow, it actually arrived at San Bernardino at 5:30 o'clock P. M., and that instead of reaching Los Angeles at 10:15 o'clock A. M., in accordance with its usual schedule, or at 1:16 o'clock P. M., as it would have done but for the delays in reaching and leaving Barstow had there been no further delays, it actually reached Los Angeles at 8:25 o'clock P. M. on October 3rd, the employees having been on duty for twenty-one hours and forty-five minutes. That the breaking of the axle whereby the train was delayed for six hours and ten minutes was a casualty and an unavoidable accident, and the delay to the train caused thereby was the result of causes not known to defendant, or to any of its officers or agents in charge at the time the employees left Parker, and which could not have been foreseen.

That train No. 17, after having been delayed in reaching and leaving Barstow, and after having been delayed six hours and ten minutes by the broken axle, proceeded to Los Angeles in charge of the employees who were in charge when it left Parker, and that in going to Los Angeles the train and employees passed through the station of San Bernardino, California, which is a point known and designated as a division terminal, and which was a place appointed and customarily used as a terminal from and to which crews of certain other passenger and freight trains of the defendant brought their trains, but which was not a terminal for train crews in charge of trains Nos. 17 and 18

or of any other trains operating between Parker and Los Angeles. That at and previous to the time the employees in charge of train No. 17 had been continuously on duty for a period of sixteen hours, defendant had in its employ at Los Angeles and also at San Bernardino passenger train crews which were customarily assigned to other passenger trains, and crews which were subject to call which were customarily used in operating freight trains, who were qualified should necessity require to operate passenger trains between San Bernardino and Los Angeles. That the employees in charge of train No. 17 could have been relieved at San Bernardino and the train placed in charge of one of such other freight or passenger train crews at a time which would have permitted the employees in charge of train No. 17 to "deadhead" from San Bernardino to Los Angeles on that train without performing any service.

That before the delay of six hours and ten minutes which resulted from the broken axle had expired, and before the damage which had caused such delay had been repaired, and before the train left the point where the damage occurred, it was known to the defendant and its officers and agents that such employees would have been on duty in excess of sixteen hours by the time they reached San Bernardino, but that no effort was made to relieve them before they had been on duty continuously in excess of sixteen hours, either previous to or at the time of their arrival at San Bernardino, or at any time before they reached Los Angeles.

That it is commonly understood by railroad men with a knowledge of the practical operation of trains that the word "terminal" has reference to certain train or trains or certain crew or crews, and means the beginning or the end of the employee's run or the point at which in the regular course of business he would go on duty as a member of a particular crew, or at which in the regular course

of business he would cease to be a member of such crew of a particular train and be relieved from duty.

Judgment was rendered in the sum of $100 upon each cause of action against the railroad company. Upon proceedings in error, this judgment was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit (220 Fed. Rep. 748), and a writ of certiorari brings the case here.

It is the contention of the railroad company that the detention in service beyond the period prescribed by the statute being due to an unavoidable accident, the limitation of the statute for that trip was at an end and the company was not liable for the penalty imposed because of the extra service required upon that trip. On the other hand, the Government insists that in view of the prime purpose of the statute to limit the hours of service so as to keep within the time prescribed, and not to subject the men to service beyond these hours, it was the company's duty to relieve the crew at San Bernardino by supplying their places with others instead of keeping them on duty to Los Angeles, thereby requiring service in excess of that permitted by the statute.

Considering these opposing contentions, it must be remembered that the purpose of the act was to prevent the dangers which must necessarily arise to the employee and to the public from continuing men in a dangerous and hazardous business for periods so long as to render them unfit to give that service which is essential to the protection of themselves and those entrusted to their care. It is common knowledge that the enactment of this legislation was induced by reason of the many casualties in railroad transportation which resulted from requiring the discharge of arduous duties by tired and exhausted men whose power of service and energy had been so weakened by overwork as to render them inattentive to duty or incapable of discharging the responsible labors of their positions.

To promote the end in view, so essential to public and private welfare, Congress, in this Hours of Service Act, provided the limitations named upon the hours of service. The act is remedial and in the public interest, and should be construed in the light of its humane purpose. Congress also realized that it might be impracticable in all cases to keep the employment within the hours fixed in the act, and added a proviso to relieve from the general application of the requirements of the law so that it might not apply when the employment beyond the periods named was caused by casualty or unavoidable accident or the act of God, or where the delay was the result of a cause not known to the carrier or its officer or agent at the time the employee left a terminal, and which could not have been foreseen.

It was not the intention of the proviso, as we read it, to relieve the carrier from the exercise of diligence to comply with the general provisions of the act, but only to relieve it from accidents arising from unknown causes which necessarily entailed overtime employment and service. *United States* v. *Dickson,* 15 Pet. 141. It is still the duty of the carrier to do all reasonably within its power to limit the hours of service in accordance with the requirements of the law.

Applying this view to the present case, it was the duty of the company, after the breakdown between Barstow and San Bernardino, to use all reasonable diligence to avoid the consequences of the unavoidable accidents which had delayed the movement of the train and to relieve the crew by the means practically at hand. This the company might have done by putting on a relief crew at San Bernardino instead of permitting an already exhausted crew, when their condition is judged by the service performed, to hazard their own lives and safety as well as the safety of others by continuing the journey to Los Angeles.

The requirement of continued service after the train reached San Bernardino was not occasioned by the unforeseen accidents, but was the direct consequence of the failure of the company to relieve the employees by the substitution of a fresh crew, as the record shows could readily have been done.

It is contended by the company that this construction of the statute is opposed to that given by the Interstate Commerce Commission, the body entrusted by Congress with the enforcement of the act, and is against the understanding of the law which the Commission had given the company to believe would be enforced.

It appears that two constructions of the act have been given by the Interstate Commerce Commission; one on March 16, 1908, as follows:

"The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point."

This construction would plainly require the railroad company to have substituted a new crew at San Bernardino and not to require the further service to Los Angeles. The other construction, and the one which the company contends should be controlling, was given later, on May 24, 1908, and is as follows:

"Section 3 of the law provides that: 'The provisions of this Act shall not apply in any case of casualty or unavoidable accident or act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.'

"Any employee so delayed may therefore continue on

duty to the terminal or end of that run. The proviso removes the application of the law to that trip. (See Rule 287.)"

These possibly diverse rulings of the Commission were rescinded on April 9, 1917, by the following order of the Commission:

"Conference Rulings 88 (b) and 287 (i), relating to the Hours-of-Service-Law, rescinded, for the reason that they were issued as informal expressions of the Commission's views to act as guides until the questions could be judicially interpreted, and they having been judicially interpreted and are now before the court on appeal there is no further occasion for these former views of the Commission."

If the construction contended for by the company be adopted, it would follow that the employees might be kept in service for indefinite periods, until the termination or end of the run should be reached, which it is not difficult to suppose might require many hours of service beyond the limitations prescribed in the body of the act. This construction would defeat the purpose of the act by permitting the employees to endanger themselves and the public by the continued service of tired and exhausted men. We reach the conclusion that in keeping the crew in service beyond San Bernardino the Company was guilty of a violation of the statute.

We find no error in the judgment of the Circuit Court of Appeals, and the same is

Affirmed.

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

WESTERN OIL REFINING COMPANY *v.* LIPSCOMB, CLERK OF THE COUNTY COURT OF MAURY COUNTY, TENNESSEE, AS SUCCESSOR OF THOMAS.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 168. Submitted March 23, 1917.—Decided June 4, 1917.

It is the essential character of commerce which determines whether it is interstate or intrastate, and not the accident of through or local bills of lading.

Where commodities are in fact destined from one State to another, a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder.

Plaintiff, an Indiana corporation, for the purpose of filling orders taken by its salesmen in Tennessee, shipped into that State a tank car of oil and a carload of barrels and filled the orders from the cars through a traveling agent, who drew the oil from the tank into the barrels, or into others furnished by the customers, and made delivery to the latter, collecting the price at the time. The cars were billed to the plaintiff to a point in Tennessee where part of the orders was filled, and thence rebilled to the plaintiff to another point in that State where the remaining orders were filled and the supply of oil and barrels exhausted, this in pursuance of plaintiff's plan and intention at the time of original shipment that the cars should remain at the first place only long enough to fill the orders from there and should then proceed to the second. *Held*, that the movement of the goods to the first place and its continuance thence to the second were connected parts of a continuing interstate commerce movement to the latter, and that plaintiff could not be subjected to an occupation or privilege tax under the law of Tennessee because of the sales consummated at either destination.

Reversed.

THE case is stated in the opinion.

Mr. H. C. True and *Mr. A. L. Dorsey* for plaintiff in error.

Mr. Frank M. Thompson, Attorney General of the State of Tennessee, for defendant in error.

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

This was a suit by an Indiana corporation to recover money paid under protest as an occupation or privilege tax in Tennessee. The plaintiff had an oil refinery in Illinois and a steel barrel factory in Indiana and was selling the products of its refinery and factory upon orders taken by traveling salesmen in its employ. For the purpose of filling orders so taken in Maury County, Tennessee, it shipped into that county from its refinery a tank car of oil and from its factory a car of steel barrels. Both cars were billed to the plaintiff at Columbia, in that county, and, after the orders from that place were filled, were rebilled to the plaintiff at Mount Pleasant, in the same county, where the orders from the latter place were filled. At both places the orders were filled directly from the cars by a traveling agent of the plaintiff and the purchase price was collected at the time—this being what was contemplated when the orders were taken. If the order was for both oil and barrels the oil was drawn out of the tank car into the barrels and the two were jointly delivered, and if oil alone was ordered it was drawn from the tank car into barrels otherwise provided by the buyer. When the cars were originally shipped they contained just the quantity of oil and the number of barrels required to fill the orders from the two places, and the plaintiff intended that they should remain at Columbia only long enough to fill the orders from that place and then should be sent to Mount Pleasant so the orders from that place could also be filled. The quantity of oil and the number of barrels required to fill the orders from Mount Pleasant were in the cars continuously from the time of the original shipment

until the cars reached that place. The plaintiff had no office or local agent in Tennessee, nor any oil depot, storage tank or warehouse in that State.

The statute, c. 479, Acts 1909, § 4, under which the tax was exacted and paid, provides:

"Each and every person, firm, partnership, corporation, or local agent having oil depots, storage tanks, or warehouses for the purpose of selling, delivering, or distributing oil of any description, and each and every person, firm, partnership, corporation, or local agent using a railroad car or railroad depots for such purposes, shall pay a privilege tax as follows."

The objection made to the tax, as applied in the circumstances stated, was that it was a tax upon interstate commerce and therefore violative of the commerce clause of the Constitution. In the county court judgment was given for plaintiff and this was reversed by the Supreme Court of the State, which held, first, that what was done up to and including the filling of the orders from Columbia was interstate commerce and the State could not exact a privilege tax therefor consistently with the commerce clause of the Constitution (see *Western Oil Refining Co.* v. *Dalton*, 131 Tennessee, 329), and, second, that what was done thereafter—rebilling and forwarding the cars from Columbia to Mount Pleasant and then filling the orders from that place—was intrastate commerce and afforded an adequate basis for exacting the tax.

Of the first part of the decision it is enough to say it is supported by a long line of adjudicated cases in this court, among them being these: *Caldwell* v. *North Carolina*, 187 U. S. 622; *Dozier* v. *Alabama*, 218 U. S. 124; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Stewart* v. *Michigan*, 232 U. S. 665.

In the second part of the decision we think the court erred. Unlike *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas*, 204 U. S. 403, this is not a case where at the time of the

original billing the shipper had no purpose to continue the transportation beyond the destination then indicated; nor is it a suit, as was that, to penalize a carrier which rightly conformed its action to what was said in the bill of lading. On the contrary, it is a case where the shipper intended from the beginning that the transportation should be continued beyond the destination originally indicated and where there is nothing which requires that decisive effect be given to the bill of lading. Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one State to another a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498; *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101; *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; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa*, 233 U. S. 334, 343; *South Covington & Cincinnati Street Ry. Co.* v. *Covington*, 235 U. S. 537, 545.

Here, when the cars were started from Illinois and Indiana, it was intended by the shipper, as is expressly conceded, that they should be taken to Columbia, Tennessee, where a portion—a definite portion—of the contents of each was to be taken out and delivered, and that the cars, with the remainder of the contents, should proceed to Mount Pleasant in the same State; and this is what actually was done. Columbia was the destination of only a part of the merchandise, not of all. As to part it was merely the place of a temporary stop en route. The orig-

inal billing to Columbia and the rebilling from there to Mount Pleasant operated in the same way as would an original billing to Mount Pleasant with the privilege of stopping en route at Columbia to deliver a part of the merchandise. Indeed, it is stipulated that the reason for not billing the cars through to Mount Pleasant in this way was because the carriers receiving the shipments "would not allow such stop-over privilege, though the same is allowed on nearly every other kind of shipment." Certainly the transportation of the merchandise destined to Mount Pleasant was not completed when it reached Columbia; nor was the continuity of its movement broken by its temporary stop at that place. As to that merchandise the journey to Columbia and the journey from there to Mount Pleasant were not independent, each of the other, but in fact and in legal contemplation were connected parts of a continuing interstate movement to the latter place.

It results that the tax was imposed for carrying on interstate commerce, and so was repugnant to the Constitution and void.

Judgment reversed.

The CHIEF JUSTICE dissents, being of opinion that the case is controlled by *May* v. *New Orleans*, 178 U. S. 496.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO *v.* UNITED STATES.

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

No. 176. Argued April 18, 19, 1917.—Decided June 4, 1917.

The power to establish forest reservations, bestowed upon the President by acts of Congress, includes the power to withdraw lands temporarily from disposition under the public land laws in order that they may be examined, and, if found suitable, may be permanently reserved as forests.

An act of the Secretary of the Interior in directing the making of a temporary withdrawal for forest reserve purposes is in legal contemplation the act of the President.

Lands reserved for forest purposes, whether by temporary withdrawal or permanent reservation, are "specially reserved from sale" within the meaning of § 5 of the general railroad right of way act of March 3, 1875, c. 152, 18 Stat. 482, and also, like the military, park and Indian reservations therein mentioned, are set apart for a public purpose, and are not subject to the provisions of that act.

Under the provision relating to the subject in the Act of March 3, 1899, c. 427, 30 Stat. 1233, a railroad right of way may be obtained over a temporary or permanent forest reservation only if in the judgment of the Secretary of the Interior the public interests will not be injuriously affected thereby, and, in exercising his broad discretion under this provision, the Secretary may condition his approval of an application upon the prior filing of a stipulation, binding upon the applicant, respecting the use and enjoyment of the privilege granted, the prevention of forest fires, and compensation for timber cut or destroyed or for other injuries done to the reservation.

Where, for the purpose of securing a right of way under the Act of 1899, *supra*, with immediate permission to proceed with construction work, a railroad company's agent agreed in writing that it would later execute and abide by a stipulation touching its rights and conduct in the reservation, but the agreement was made subject to ratification by the company, *Held*, that the company's action in availing itself of the permission and proceeding with the construction work with knowledge of the manner in which the permission

had been obtained, and its acceptance of ensuing benefits, amounted to an implied ratification of its agent's agreement, binding the company either to execute the required stipulation or to discontinue the construction and operation of its railroad within the reservation.

A suit by the United States to enjoin a railroad company from constructing and operating its road through a national forest in default of the execution and filing by it of a stipulation required by the Secretary of the Interior, and to obtain damages for timber cut and destroyed and for injury done in the course of the construction and operation of such railroad, is cognizable in equity, and a bill praying such relief is not multifarious.

The damages assessed against the appellant in this case are in part justified by the terms of the stipulation which it agreed to execute, and in other respects are sustained by the concurring decisions of the courts below.

In the absence of either cross-appeal by the Government or objection by the appellant company, the court will not decide whether the decree, instead of commanding unconditionally that the company execute the stipulation agreed upon, should not have provided, in the alternative, for ousting the company from the reservation if it did not execute such stipulation within a certain time.

218 Fed. Rep. 288, affirmed.

THE case is stated in the opinion.

Mr. F. M. Dudley and *Mr. H. H. Field* for appellant.

Mr. Assistant Attorney General Kearful, with whom *Mr. W. W. Dyar* was on the brief, for the United States.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit by the United States to enjoin a railroad company from constructing or operating its railroad through a national forest reserve in Idaho unless it executes and files with the Secretary of the Interior a stipulation required by that officer, and to obtain damages for timber cut and destroyed and injury done in the course

of the construction and operation of such railroad. In the District Court, 207 Fed. Rep. 164, and in the Circuit Court of Appeals, 218 Fed. Rep. 288, the Government prevailed. The railroad company prosecutes this appeal.

The forest reserve had its inception in an order by the Commissioner of the General Land Office, made March 21, 1905, temporarily withdrawing a large body of public lands from all disposal, save under the mineral land laws. The order was made by direction of the Secretary of the Interior with a view to the creation of a permanent forest reserve, under § 24 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, if after further examination that should receive the President's approval. The permanent reserve was created November 6, 1906, by a proclamation of the President. Between the temporary withdrawal and the President's proclamation the railroad company was incorporated under the laws of Idaho and filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization. During the same period it also filed in the local land office a map or profile of its proposed railroad through the reserve, and after the President's proclamation it filed in that office a second and then a third map. The line of the proposed road shown upon the second map differed widely from that upon the first and the line shown upon the third differed materially from those upon the others. The first and second maps, neither of which had been approved, were returned to the company as superseded by the third. It was filed May 10, 1907. At that time, as also before any map was filed, the regulations governing applications for railroad rights of way in forest reserves required the applicant to enter into a stipulation respecting the use and enjoyment of the privilege, the prevention of forest fires, the compensation to be made for timber cut or destroyed and the duty of the company to pay for any injury otherwise done to the reserve. 32 L. D. 481; 34

L. D. 583. One provision in the regulations said: "No construction can be allowed on a reservation until an application for right of way has been regularly filed in accordance with the laws of the United States and has been approved by the Department, or has been considered by this office or the Department, and permission for such construction has been specifically given." After filing the third map the company sought permission from the Forest Office to proceed with the construction of its railroad in advance of the approval of its map, and to that end its authorized representative, Mr. George R. Peck, in its behalf, signed and filed in the Forest Office the following memorandum:

"Whereas, the Chicago, Milwaukee & St. Paul Railway Company of Idaho desires immediate permission from the Forest Service to begin construction of the company's railroad in the Coeur d'Alene National Forest, Idaho, I hereby promise and agree on behalf of the company that it will execute and abide by stipulations and conditions to be prescribed by the Forester in respect to said railroad; such stipulation and conditions to be as nearly as practicable like those executed by the company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana."

The Forester wrote upon the memorandum, and signed, an endorsement, saying: "Approved and advance permission given to construct, subject to ratification hereof by the company." At the same time a telegram was sent to the supervisor of the reserve, saying: "Advance permission given today St. Paul Railroad Company to construct railroad through Coeur d'Alene, subject usual stipulations. Supervise clearing and piling and scale all timber cut."

There was no express ratification of the Peck memorandum, but shortly after it was made the company entered upon the reserve and actively proceeded with the construction of its road, which it would not have been per-

mitted to do without the memorandum. Not until the work had proceeded for some months was there any indication that the memorandum was not satisfactory to the company. It then declined to execute the stipulation called for by the memorandum and assigned as a reason that Mr. Peck had acted upon the mistaken belief that the President's proclamation creating the permanent reserve preceded the filing of the first map, when in fact the map was filed before the proclamation was issued, and that the execution of such a stipulation as was called for by the memorandum was indispensable, when, as the company asserted, it was entitled, under the Act of March 3, 1875, *infra*, to a right of way through the reserve without entering into any stipulation or assenting to any conditions. But the officers of the Forest Service insisted, with the full sanction of the Secretary of the Interior and of the Secretary of Agriculture, that the stipulation be executed and that without it the company was not entitled to proceed. This resulted in a conference at which the company particularly requested that its construction work be not disturbed and assented to an arrangement for further negotiations or, if need be, a "friendly lawsuit." Further negotiations failed and the present suit followed. When it was begun the road through the reserve was nearly completed and was in operation, the construction being on the line shown on the third map. Approval had not been given to this map but had been withheld awaiting the company's execution of the prescribed stipulation.

The District Court, after concluding and announcing that the company was bound by the Peck memorandum and that the Government was entitled to a decree, gave the parties an opportunity to agree upon the form of stipulation called for by that memorandum and then postponed the assessment of damages as a matter which might be affected materially by the terms of the stipula-

tion. Afterward the parties brought into court a form of stipulation, which they agreed was what was required by the Peck memorandum, and that form was adopted by the court, with the addition only of a paragraph declaring that the stipulation should be deemed to have been executed as of May 10, 1907, which was the date of the Peck memorandum, of the permission to proceed with the construction and of the filing of the map according to which the road was constructed.

Rights of way for railroads over lands of the United States were granted only by special acts until March 3, 1875, when Congress enacted a general law upon the subject and confided its administration to the Land Department. Chap. 152, 18 Stat. 482. But that law, by its fifth section, was declared to be inapplicable to "any military, park, or Indian reservation, or other lands specially reserved from sale." Lands in a forest reserve not only are specially reserved from sale, but, like those in the reservations particularly named, are set apart for a public purpose. Act June 4, 1897, c. 2, 30 Stat. 34–36. That they come within the excepting provision of the fifth section, as do lands in other public reservations, is plain. Both Congress and the Land Department have so regarded them. House Report No. 1212, 54th Cong., 1st sess.; House Report No. 1790, 55th Cong., 3rd sess.; *Brainard and Northern Minnesota Ry. Co.*, 29 L. D. 257. Thus the company neither did nor could acquire a right of way over these lands under the law of 1875. And this is true notwithstanding the preliminary steps taken, as before recited, in advance of the creation of the permanent reserve. The temporary withdrawal was made several months before any of those steps were taken—indeed, before the company came into existence—and remained in force until the permanent reserve was created. While the withdrawal was in force it was as much of an obstacle to the acquisition of a railroad right of way over

these lands as was the permanent reserve thereafter. The power to establish the reserve included the power to make the temporary withdrawal, and the act of the Secretary of the Interior in directing the latter was in legal contemplation the act of the President. *United States* v. *Morrison*, 240 U. S. 192, 212; *Wilcox* v. *Jackson*, 13 Pet. 498, 512–513; *Wolsey* v. *Chapman*, 101 U. S. 755, 769–770.

We come then to the provision in the Appropriation Act of March 3, 1899, c. 427, 30 Stat. 1233, which says:

"That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby."

Doubtless if this provision were separately considered, its purpose would seem obscure, but it must be considered in connection with the law of 1875 and the rulings thereunder, and when this is done its purpose seems reasonably plain. That law, by its first section, provides in general terms for rights of way for railroads over public lands. By its fourth section it deals with the identification of the desired right of way by a survey and plat and provides for filing the plat and securing its approval by the Secretary of the Interior. By its fifth section, as has been seen, it excepts forest and other reservations from its operation. Because of this exception the Secretary of the Interior was ruling—properly so, as we think—that his authority did not extend to receiving and approving surveys and plats of rights of way in forest reserves. And so, to obtain such a right of way it was necessary to go to Congress. The requests for special acts came to be frequent, especially as the reserves were increasing in number. In this situation Congress passed the provision last quoted. It is a general and continuing provision, and says, in substance, that rights of way for railroads

through forest reserves may be secured when, and only when, the public interests will not be injuriously affected, and it commits the solution of that question to the Secretary of the Interior. If "in his judgment" the public interests will not be jeopardized, he "may file and approve" surveys and plats of any such right of way. In short, he is invested with a large measure of discretion to be exercised for the conservation of the public interests, and only through his approval can the right of way be acquired without further action by Congress.

Here the Secretary made it manifest, through the regulations before noticed and otherwise, that in his judgment due regard for the public interests required that a stipulation, such as was described in the Peck memorandum, be exacted of the company as a condition to the approval of the survey and map, that is, to securing the right of way. Rightly understanding that this was so, Mr. Peck, the company's representative, promised on its behalf that it would comply with that condition. The promise was given for the purpose of securing permission to proceed at once with the construction of the road, and on the faith of the promise the permission was given. While this was said to be subject to the company's ratification, it must be held upon this record that there was an implied ratification. The company promptly availed itself of the permission and proceeded with the work of construction. The circumstances were such that it must have known how the permission was obtained. It was largely benefited thereby and to these benefits it ever since has held fast. True, after some months had elapsed, it manifested a purpose to disaffirm Mr. Peck's promise, but that was after the implied ratification and after the construction had proceeded so far that restoration of the original situation was not possible.

It follows that the company not only is bound by the Peck memorandum but is in a position where it must

execute the required stipulation or discontinue the construction and operation of its railroad in the reserve.

It is objected that the case is not one which is cognizable in a court of equity and that the bill is multifarious. Both branches of the objection are without merit, so plainly so that a discussion of them would serve no purpose.

The assessment of the damages is called in question, but without any good reason. The stipulation agreed upon as conforming to the Peck memorandum was rightly regarded as decisive of several of the questions bearing upon the assessment and no reason is perceived for disturbing the concurring decisions below upon the others.

The decree unconditionally commands the execution and filing of the prescribed stipulation without awarding an alternative injunction, and counsel for the Government suggest that it should have enjoined the company from the further occupation of the reserve unless within a prescribed time the stipulation be executed and filed. The criticism is not without merit and doubtless is prompted by a careful study of the bill. But as the Government has not appealed and the company is not complaining of the failure to put the matter in the alternative, the point may be passed without further notice.

Decree affirmed.

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

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY *v.* TONSELLITO, AN INFANT, ETC.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY *v.* TONSELLITO.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

Nos. 239, 240. Submitted April 30, 1917.—Decided June 4, 1917.

In an action under the Federal Employers' Liability Act the questions whether plaintiff was engaged in interstate commerce when injured, whether the railroad was negligent, whether he assumed the risk, and whether he was a mere volunteer, will not evoke discussion by this court where there was adequate evidence upon them for submission to the jury, where there was no evident, material error in the charge, where both state courts below have sustained the judgment, and no special circumstances are present demanding comment.

The Federal Employers' Liability Act does not allow the father a right of action for expenses and loss of service resulting from his minor son's injuries in addition to the son's right of action.

The rights of action provided by the Federal Employers' Liability Act are exclusive as to the cases which it covers and no other can be added by the law of a State. *New York Central R. R. Co.* v. *Winfield*, *ante*, 147.

87 N. J. L. 651, affirmed in part and reversed in part.

THE case is stated in the opinion.

Mr. Albert C. Wall and *Mr. John A. Hartpence* for plaintiff in error.

Mr. Alexander Simpson for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

By stipulation, these causes were tried together before the same jury and upon the same testimony. Michael

Tonsellito, an infant seventeen years old, suing by his father, James Tonsellito, as next friend and relying upon the Federal Employers' Liability Act, obtained a judgment for personal injuries suffered while employed by plaintiff in error—Number 239. These injuries, he alleged, resulted from negligence in constructing and maintaining its road-bed and in starting a locomotive without giving him a reasonable opportunity to climb thereon. James Tonsellito recovered for himself on account of expenses incurred for medical attention to his son and loss of the latter's services—Number 240. Both judgments were affirmed by the Court of Errors and Appeals. 87 N. J. L. 651.

Reversal is asked in the cause instituted by Michael Tonsellito because (1) he was not engaged in interstate commerce when injured; (2) no negligence by the railroad was shown; (3) he assumed the risk; and (4) he was a mere volunteer when the accident occurred. We think there was adequate evidence to justify submission of all these matters to the jury; and we are unable to say the charge contains material error. Both state courts have sustained the judgment; there are no special circumstances demanding comment; and it seems enough to announce our conclusion. *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464, 466; *Erie Railroad Co.* v. *Welsh*, 242 U. S. 303.

The Court of Errors and Appeals ruled, and it is now maintained, that the right of action asserted by the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the contrary view, we think, is clearly settled by our recent opinions in *New York Central R. R. Co.* v. *Winfield ante*, 147, and *Erie Railroad Co.* v. *Winfield, ante*, 170. There we held the act "is comprehensive and, also, exclusive" in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce. "It establishes a rule or regulation which is intended to op-

erate uniformly in all the States, as respects interstate commerce, and in that field it is both paramount and exclusive." Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State.

The judgment in Number 239 is

Affirmed.

In Number 240 the judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE BRANDEIS concurs in the result announced in No. 240.

MASON ET AL. *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, SECOND DIVISION.

No. 604. Submitted April 11, 1917.—Decided June 4, 1917.

The Fifth Amendment does not relieve a witness from answering merely on his own declaration or judgment that an answer might incriminate him; whether he must answer is determinable by the trial court in the exercise of its sound discretion; and unless there is reasonable ground, as distinct from a remote or speculative possibility, to apprehend that a direct answer may prove dangerous to the witness, his answer should be compelled.

In the absence of manifest error, the ruling of a trial judge upon a witness' objection that an answer may incriminate him, will not be reversed by this court.

Affirmed.

THE case is stated in the opinion.

Mr. George B. Grigsby for plaintiffs in error.

The Solicitor General and *Mr. Robert Szold* for the United States.

Mr. Justice McReynolds delivered the opinion of the court.

Plaintiffs in error were separately called to testify before a Grand Jury at Nome, Alaska, engaged in investigating a charge of gambling against six other men. Both were duly sworn. After stating that he was sitting at a table in the Arctic Billiard Parlors when these men were there arrested, Mason refused to answer two questions, claiming so to do might tend to incriminate him. (1) "Was there a game of cards being played on this particular evening at the table at which you were sitting?" (2) "Was there a game of cards being played at another table at this time?" Having said that at the specified time and place he, also, was sitting at a table, Hanson made the same claim and refused to answer two questions. (1) "If at this time or just prior to this time that yourself and others were arrested in the Arctic Billiard Parlors if you saw any one there playing 'stud poker' or 'pangingi'?" (2) "If at this same time you saw any one playing a game of cards at the table at which you were sitting?"

The foreman of the Grand Jury promptly reported the foregoing facts and the judge at once heard the recalcitrant witnesses; but as the record contains no detailed statement of what then occurred we cannot know the exact circumstances. The court, being of opinion "that each and all of said questions are proper and that the answers thereto would not tend to incriminate the witnesses," directed them to return before the Grand Jury and reply. Appearing there, Mason again refused to answer the first question propounded to him, but, half

yielding to frustration, said in response to the second, "I don't know." Hanson refused to answer either question.

A second report was presented by the foreman; the witnesses were once more brought into court; and after hearing evidence adduced by both sides and arguments of counsel they were adjudged in contempt. It was further ordered "that they each be fined in the sum of one hundred dollars, and that they each be imprisoned until they comply with the orders of the court by answering the questions." Immediately following this order they made answers, but these are not set out in the record. The fines are unpaid; and we are asked to reverse the trial court's action in undertaking to impose them because it conflicts with the inhibition of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself."

During the trial of Aaron Burr, *In re Willie*, 25 Fed. Cas. No. 14,692e, pp. 38, 39, the witness was required to answer notwithstanding his refusal upon the ground that he might thereby incriminate himself. Chief Justice Marshall announced the applicable doctrine as follows: "When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule and of the exception to that rule, by observing that course which it is conceived courts have generally observed. It is this: When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the

negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be."

The constitutional protection against self-incrimination "is confined to real danger and does not extend to remote possibilities out of the ordinary course of law." *Heike* v. *United States*, 227 U. S. 131, 144; *Brown* v. *Walker*, 161 U. S. 591, 599, 600.

In *The Queen* v. *Boyes* (1861), 1 B. & S. 311, 329, 330, Cockburn, C. J., said:

"It was also contended that a bare possibility of legal peril was sufficient to entitle a witness to protection; nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law; and that the statement of his belief to that effect, if not manifestly made *mala fide*, should be received as conclusive. With the latter of these propositions we are altogether unable to concur. . . . To entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question: . . . A question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation, a Judge is, in our opinion, bound to insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril."

"Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with

reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice."

The statement of the law in *The Queen* v. *Boyes* was expressly approved by all the judges in *Ex parte Reynolds* (1882), 20 Ch. Div. 294. Similar announcements of it may be found in *Ex parte Irvine*, 74 Fed. Rep. 954, 960; *Ward* v. *State*, 2 Missouri, 120, 122; *Ex parte Buskett*, 106 Missouri, 602, 608.

The general rule under which the trial judge must determine each claim according to its own particular circumstances, we think, is indicated with adequate certainty in the above cited opinions. Ordinarily, he is in much better position to appreciate the essential facts than an appellate court can hold and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere.

In the present case the witnesses certainly were not relieved from answering merely because they declared

that so to do might incriminate them. The wisdom of the rule in this regard is well illustrated by the enforced answer, "I don't know," given by Mason to the second question, after he had refused to reply under a claim of constitutional privilege.

No suggestion is made that it is criminal in Alaska to sit at a table where cards are being played or to join in such game unless played for something of value. The relevant statutory provision is § 2032, Compiled Laws of Alaska, 1913, copied in the margin.[1]

The court below evidently thought neither witness had reasonable cause to apprehend danger to himself from a direct answer to any question propounded and, in the circumstances disclosed, we cannot say he reached an erroneous conclusion.

Separate errors are also assigned to the trial court's action in permitting counsel to introduce two documents in evidence; but we think the points are without substantial merit.

The judgment under review is

Affirmed.

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[1] "Sec. 2032. That each and every person who shall deal, play, or carry on, open or cause to be opened, or who shall conduct, either as owner, proprietor or employee, whether for hire or not, any game of faro, monte, roulette, rouge-et-noir, lansquenet, rondo, vingt-un, twenty-one, poker, draw poker, brag, bluff, thaw, craps, or any banking or other game played with cards, dice, or any other device, whether the same shall be played for money, checks, credit, or any other representative of value, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars, and shall be imprisoned in the county jail until such fine and costs are paid: *Provided*, That such person so convicted shall be imprisoned one day for every two dollars of such fine and costs: *And provided further*, That such imprisonment shall not exceed one year."

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* McKNIGHT ET AL., RAILROAD COMMISSIONERS OF THE STATE OF ARKANSAS, ET AL.

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

No. 183. Argued May 2, 1917.—Decided June 4, 1917.

Where a carrier, by reason of temporary and permanent injunctions against state officials and shippers and travellers as a class, collects rates in excess of those fixed by law, the right of a person, who did not appear, to sue for the excess paid by him during the restraint revives when the final decree is reversed by this court and its mandate is issued to dismiss the bill.

Viewed from the standpoint of equitable jurisdiction, a class bill to restrain all such persons from suing to recover their overpayments is not maintainable as a bill to prevent multiplicity of suits, in the absence of any controverted question of fact or law common to their claims.

In a suit to test the validity of rates fixed by the State of Arkansas, the District Court, by injunction *pendente lite* and later by final decree, enjoined the enforcement of the rates, and prohibited shippers and travellers generally from suing the carrier for its failure to keep them in effect. The decree having been reversed by this court and mandate issued with directions to dismiss the bill, *Allen* v. *St. Louis, Iron Mountain & Southern Ry. Co.*, 230 U. S. 553, *Held*, that thereafter the District Court was without power to inquire into and assess the damages sustained by shippers or travellers by reason of the temporary and permanent injunctions, for the purpose of fixing liability on the temporary injunction bonds, at least as to persons who did not elect to appear and make claim; and that, therefore, a reference to that end could afford no basis for an ancillary suit to enjoin such persons from suing in the state court (after the dismissal of the original bill) to recover excess rates collected by the carrier under the temporary and permanent injunctions.

Rule 15 of the District Court for the Eastern District of Arkansas, quoted in a footnote to the opinion, *infra*, 373, relates merely to damages recoverable on bonds accompanying restraining orders or temporary injunctions.

Damages arising from the restraints of a permanent injunction, afterwards reversed, are not recoverable on temporary injunction bonds (*Houghton* v. *Meyer*, 208 U. S. 149), particularly where the decree of permanent injunction expressly released further liability on the bonds.

220 Fed. Rep. 876, affirmed.

THE case is stated in the opinion.

Mr. John M. Moore, with whom *Mr. Edw. J. White* was on the briefs, for appellant.

Mr. Allyn Smith for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

On July 18, 1908, the St. Louis, Iron Mountain & Southern Railway Company filed in the Western Division of the Circuit (now District) Court of the United States for the Eastern District of Arkansas a bill against the Railroad Commissioners of that State to enjoin the enforcement of intrastate freight and passenger rates promulgated by them. Two private citizens, Leigh and McLean, who were alleged to be shippers and travellers on the railroad, were joined as defendants; and the bill prayed that they "and all other persons belonging to the same class, including all patrons" of the railroad, be enjoined from instituting any suits for penalties or double damages under the Arkansas statutes. On September 3, 1908, a temporary restraining order was granted which, besides enjoining the Railroad Commissioners from enforcing rates promulgated by them, ordered that the two private citizens "and all other persons and each of them from and after the time that they shall have knowledge of this order be enjoined from at any time instituting any such suit or action for or on account of any failure of the complainant to keep

in effect and observe said inhibited rates or for the recovery of damages by reason of such failure, during the time this order shall continue in effect."

The Railway Company then executed, as ordered, a bond with surety to the United States in the penal sum of $200,000 "conditioned that the said complainant shall keep a correct account, showing, as respects every carriage of passengers or freight, the difference between the tariff actually charged and that which would have been charged had the rate inhibited hereby been applied, showing the particular carriage in question and the stations between which the same occurred, and the name of the person affected as far as may be practicable, which record shall be made and kept subject to the further order of this Court, and further conditioned that if it should eventually be decided that so much of this order as inhibits the enforcement of the existing rates should not have been made, that said complainant, shall, within a reasonable time, to be fixed by the Court, refund in every instance to the party entitled thereto, the excess in charge over what would have been charged had the inhibited rates been applied, together with lawful interest and damages."

On June 23, 1909, an order was made for an additional bond without surety in the sum of $800,000, which provided, among other things, for giving to each passenger or shipper a receipt which would show the amount payable under the enjoined rates.[1]

[1] The condition prescribed was: "that it shall, on and after July 1st, 1909, issue to each person purchasing a ticket or paying cash fare upon the train from one point in the State of Arkansas to another point in the same State, and confined exclusively to intrastate travel, a certificate or coupon showing the amount paid by such passenger for such ticket and the date thereof; and to every shipper or consignee when paying freight on any commodity shipped from one part of the State of Arkansas to another part and which is wholly the subject of intrastate traffic, a receipt or freight bill, showing the amount charged for

On May 11, 1911, a final decree was entered for the Railway Company making permanent the injunction in the terms of the restraining order, and further ordering "that the bond for injunction filed by the complainant here be released and the sureties thereon discharged from liability." The decree was reversed by this court with directions to dismiss the bill without prejudice (*Allen* v. *St. Louis, Iron Mountain & Southern Ry. Co.*, 230 U. S. 553); and upon filing of the mandate in the District Court on July 18, 1913, this was done. But in the decree of dismissal the court "of its own motion, and against the objection of the complainant, refers, under rule 15 of this Court, the matter of damages alleged to have been sustained by the defendants, the Railroad Commission of the State of Arkansas, by reason of the granting of the temporary and permanent injunctions herein, to Jeremiah G. Wallace, Esq., who is hereby appointed a Special Master for the purpose of determining the damages sustained. That in determining these damages, for the recovery of which the said Commissioners are not acting for themselves but for the benefit of all persons, shippers, consignees and passengers, who have sustained any damages by reason of the granting of said injunctions, the Master is hereby authorized, for the purpose of ascertaining these facts, to examine witnesses, administer oaths, and call upon the plaintiff herein for any books or papers, or transcripts thereof, which, in his opinion, are necessary for the purpose of enabling him to determine any facts in issue in connection with any claim filed with him. . . .

"And the Master is further directed to give notice by publication . . . to the effect that all persons having any claims against the complainant by reason of the

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the carriage of such freight, and also endorse on the same bill the amount or rate which would have been charged had the inhibited rate continued in force; which receipt or coupon or freight bill shall be prima facie evidence of the amount paid and the date of payment."

granting of the injunctions herein, shall present the same to him on or before the 1st day of November, 1913, by filing with him the evidence of their claims, or such other proof as they possess."

Thereafter Gallup brought suit in a state court of Arkansas to recover from the Railway Company the difference between the aggregate freight and passenger rates actually collected from him while the injunctions, temporary and permanent, were in force (that is, from September 3, 1908, to July 18, 1913), and the amount which would have been collected if the rates enjoined had been in effect. The Railway Company promptly filed, in the District Court, on leave granted what is called a "supplemental bill of complaint" to restrain Gallup from proceeding in the state court. Metcalf, another shipper, who had not brought suit, but who, it was alleged, was threatening to do so, was also made defendant as representative of the class; and claiming that the facts justified equitable interference on the ground of avoiding multiplicity of suits, an injunction was sought also against him and others similarly situated. The supplemental bill specifically alleged that by virtue of the decree of May 11, 1911, the Railway Company was released from all liability on the bonds or otherwise from any damage accruing from the injunctions.

Gallup and Metcalf each moved to dismiss the bill for want of equity. Gallup also answered, alleging, among other things, that the overcharges sought to be recovered were mainly those arising after the entry of the final decree in the District Court, and also that the aggregate of claims filed with the special master under the decree of July 18, 1913, greatly exceeded $1,000,000, the amount of the bonds. The District Court granted the prayer of the supplemental bill. Upon appeal by Gallup and Metcalf the Circuit Court of Appeals modified the decree "so as to restrain only such actions as are brought on one or

both of the bonds." From the decree as so modified, the Railway Company appealed to this court.

The Railway Company rests its claim to relief upon two grounds:

First: That the District Court assumed by the decree of July 18, 1913, jurisdiction to determine all claims arising out of overcharges, so that the commencement by Gallup of suit in the state court was an interference with its jurisdiction.

Second: That in view of the number and character of the claims of other shippers and travellers, equity should intervene to prevent multiplicity of suits.

It may be doubted whether, in view of the mandate, there was any power in the District Court to order reference to the master to determine the liability on the bonds; but on this question we are not required to express an opinion.[1] For it is clear that even if such power existed it could extend only to such shippers and travellers as elected to file their claims with the master. The order referring the determination of claims for damages to a special master was declared to be "under Rule 15." [2]

[1] In *In re Louisville*, 231 U. S. 639, 645, and *Louisville* v. *Cumberland Telephone & Telegraph Co.*, 231 U. S. 652, where it was held that the District Court had discretion to authorize further proceedings, the mandate ordered that the decree be "reversed with costs, without prejudice," and remanded "for further proceedings not inconsistent with the opinion of this court"; while in the instant case the mandate ordered that the decree be "reversed with costs" and remanded "with directions to dismiss the bill." See also *St. Louis & San Francisco Railroad* v. *Barker*, 210 Fed. Rep. 902; *Ex parte Dubuque & Pacific Railroad*, 1 Wall. 69; *Durant* v. *Essex Co.*, 101 U. S. 555; *Mackall* v. *Richards*, 116 U. S. 45, 47; *In re Washington & Georgetown R. Co.*, 140 U. S. 91, 97; *In re Potts*, 166 U. S. 263; *Evens & Howard Fire Brick Co.* v. *United States*, 236 U. S. 210.

[2] Rule 15 is as follows: "In all cases in which an injunction has been granted, and a bond executed by the complainants, damages sustained by the party enjoined, *in case the injunction is dissolved*, may be assessed in the same proceeding, either by the court or by reference to a master,

That rule relates to damages recoverable on bonds given when a restraining order or temporary injunction is issued. Damages arising between May 11, 1911 (the date of the decree granting the permanent injunction) and July 18, 1913 (the date of the decree on mandate dismissing the bill) were not recoverable on the injunction bond. *Houghton* v. *Meyer*, 208 U. S. 149. If the remedy of shippers and carrier were limited to proceedings on the bond they would be denied all recovery for overcharges after May 11, 1911. Furthermore the decree of May 11, 1911, expressly released the Railway Company and sureties from further liability on the bonds. In so far as the order referred to the master "under Rule 15" the determination also of damages "alleged to have been sustained by reason of the granting" of the permanent injunction, it was clearly erroneous and affords no justification for enjoining suit in a state court to recover for overcharges made after the final decree. It is, indeed, contended by the Railway Company, that the effect of the decree entered by the District Court is to deprive shippers and travellers of all remedy under the bond.[1] But Gallup makes no claim

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and judgment entered in the same action against the sureties on the bond; provided, however, that unless the damages are thus assessed in the cause, or a judgment entered that the party enjoined is entitled to no damages by reason of the improper granting of the injunction, he may proceed on the bond in an action at law without any further order or leave of the court."

[1] The allegations of the supplemental bill are: "Complainant alleges that [by?] the final decree entered in the aforesaid cause on the 11th day of May, 1911, hereinbefore referred to, it was ordered that the bond for injunction filed by the complainant be released and the sureties thereon discharged from further liability, and it is advised and avers that the effect of said order was to relieve complainant of all liability under said bond and preclude any recovery of damages on said bond or by reason of or growing out of the injunctions ordered in the aforesaid cause.

"Complainant avers that upon the rendition of the final decree in said cause perpetuating and making the temporary injunction theretofore granted permanent said bonds ceased, by operation of law, to

under the bond. He sues on causes of action to recover overcharges arising under the Arkansas statutes. His right to sue, suspended by the injunctions improvidently granted, revived as soon as the permanent injunction was dissolved by the decree dismissing the bill. Although the injunctions enjoined all shippers and travellers, and therefore him, from instituting suits on account of alleged overcharges, Gallup did not in fact become a party to the suit in the District Court; and he could not, after the mandate directed dismissal of the bill, be compelled to submit to that court the adjudication of his claim.

The contention of the Railway Company that the "supplemental bill" should be sustained to prevent multiplicity of suits is also unfounded. Unless it is maintainable as an ancillary bill, the federal court was without jurisdiction as there was no diversity of citizenship. But it was not ancillary to any relief properly within the scope of the decree dismissing the original bill. As an independent bill it is also without equity. The only common issue between the Railway Company and the several shippers and travellers, (namely, whether the rates promulgated by the Railroad Commission were confiscatory), had been settled by the decision of this court. In no other respect have shippers and travellers a common interest. The claims of each present a separate controversy unconnected with that of any of the others. This is obviously true as to all issues of fact which will arise in considering their several claims. And the bill contains no allegation or even suggestion that a controverted question of law, common to all the claims, is involved, which will determine their right to recover or even that there is involved a question of law not fundamental in which they have a

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have any effect, and complainant is not liable for any damage that may have accrued to any passenger or shipper on its line of railroad after the rendition of the final decree perpetuating and making the temporary injunction permanent."

common interest. It might be a convenience to the Railway Company to have these numerous claims of shippers determined by the master in the District Court; but such a course would certainly involve great inconvenience to many of the shippers. The bill cannot be maintained as one to prevent multiplicity of suits.

Affirmed.

ILLINOIS SURETY COMPANY *v.* THE JOHN DAVIS COMPANY ET AL.

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

No. 235. Argued April 27, 1917.—Decided June 4, 1917.

The purpose of the Act of February 24, 1905, 33 Stat. 811, is to provide security for the claims of all persons who furnish labor or material on public works of the United States; the act, and bonds given under it, are to be construed liberally to effectuate this purpose; and the release of sureties through mere technicalities is not to be encouraged.

S, while conducting his business under supervision of a creditors' committee, entered into a contract with the United States for the doing of certain work, and gave bond with surety to secure claims for labor and materials under the Act of February 24, 1905, *supra*. After part performance of the contract, he and the creditors formed a corporation to take over his affairs, which, without the consent of the United States or the surety, received a transfer of all his business and assets, and thereafter under the management of S, as president, and the control of the creditors through the board of directors, continued for a time to perform the contract. *Held:* (1) That in view of § 3737, Rev. Stats., the transfer could not effect an assignment of the contract but amounted at most to a subletting.

(2) That as the responsibility of the contractor under the contract and the actual management of the business were not changed, nor

the surety prejudiced, the transfer did not operate to discharge the surety from past or future liability.

(3) That labor and materials furnished in the prosecution of the work under the contract, after the transfer of the contractor's business to the corporation, were to be regarded as furnished to him, within the meaning of the Act of February 24, 1905, *supra*, as well as to the corporation, and that the latter, besides, might be deemed the successor of the contractor within the condition of the bond, binding him "his heirs, successors," etc.

Questions of liability to pay interest under a bond given to secure payment for labor and materials, furnished under a construction contract with the United States, are determinable by the law of the State in which the contract and bond were made and to be performed.

Under the law of Illinois the liability of a surety on a bond is extended beyond the penalty by way of interest from the date when the liability on the bond accrued.

Where claims are all liquidated and amounts are not disputed, but only liability under the bond, the surety, which has not elected to pay into court, is properly chargeable with interest from commencement of suit upon the aggregate of the claims allowed as reduced to the penal amount of the bond.

Acts of creditors upon which the surety neither acted nor relied, which did not affect it and which are not inconsistent with a resort to the security of the bond, afford no basis for an equitable estoppel in favor of the surety.

The renting of a plant of cars, track and equipment actually used in the construction of public work for the United States is a furnishing of " materials "within the meaning of the Act of February 24, 1905; and the rent reserved, together with the loading and freight expenses incident to bringing the plant to and from the place of use, are liabilities covered by the contractor's bond.

226 Fed. Rep. 653, affirmed.

THE case is stated in the opinion.

Mr. Albert J. Hopkins for plaintiff in error.

Mr. William D. McKenzie and *Mr. Worth Allen*, with whom *Mr. Newton Wyeth*, *Mr. Robert J. Cary*, *Mr. F. Harold Schmitt* and *Mr. Charles S. Holt* were on the briefs, for defendants in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This is an action against the Illinois Surety Company on a bond given by one Schott under Act of Congress, February, 24 1905, 33 Stat. 811, to secure performance of his contract for work on the Naval Training Station at Chicago.[1] It is brought for the benefit of persons who furnished labor or materials. The bond provides:

"The condition of the above bond is such, that if the said above bounden principal, W. H. Schott, his or their heirs, successors, executors, or administrators . . . shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in the aforesaid contract, then this obligation to be void and of no effect; otherwise to remain in full force and virtue."

The bond was given on August 3, 1908. Schott was then heavily indebted; and his business was being conducted under the supervision of a creditors' committee. Later, on the advice of that committee, the Schott Engineering Company was incorporated to take over the business; and on January 2, 1909, all the assets were transferred to it. Schott became president, the members

[1] The act, which is entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works" provides that a contractor's bond shall include the obligation to: "promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States."

of the creditors' committee directors. Substantially all the capital stock was issued to Schott, and all was retained by him except $36,000 preferred stock which was later sold—the proceeds being used to pay debts. Neither the Government nor the Surety Company was advised of the transfer, which left the management and the conduct of the business unchanged; and the work was proceeded with continuously from the execution of the bond until January 14, 1910, when both Schott and the Company were adjudicated bankrupt. After a short interruption, the work was resumed by the Receiver under authority of the court; and settlement was made with the Government. Twenty-seven creditors, six of whom furnished labor or materials prior to January 2, 1909, the rest of whom had claims arising between that date and the bankruptcy, sought to recover on the bond.

The District Court allowed recovery on five of the claims aggregating $15,333.24, which accrued prior to the transfer of the business to the Schott Engineering Company. The Circuit Court of Appeals reversed that judgment and allowed the claims of all who joined in the writ of error to that court—nineteen aggregating $38,121.02; but it reduced them *pro rata* to make the aggregate equal the penalty of the bond—$31,047.18. It then allowed interest on all from the date of the commencement of the suit. 226 Fed. Rep. 653. The Surety Company appealed to this court and contends:

(1) As to each claim that it was released from liability by the transfer of the business to the Schott Engineering Company during the progress of the work.

(2) As to each claim that interest should not begin to run before the date when the amount payable on all claims was ascertained by the judgment of the Circuit Court of Appeals.

(3) As to certain claims, that the creditors are estopped by specific acts from enforcing the liability upon the bond.

(4) As to the claim of the United States Equipment Company, that rental for cars, track and equipment is not a claim for "labor and materials" recoverable on bond.

These contentions will be considered in their order.

First: The purpose of the act was to provide security for the payment of all persons who provide labor or material on public work. This was done by giving a claim under the bond in lieu of the lien upon land and buildings customary where property is owned by private persons. Decisions of this court have made it clear that the statute and bonds given under it must be construed liberally, in order to effectuate the purpose of Congress as declared in the act. In every case which has come before this court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the act. Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute.[1] As the basis of recovery is supplying labor and material for the work, he who has supplied them to a subcontractor may claim under the bond, even if the subcontractor has been fully paid. *Mankin* v. *Ludowici-Celadon Co.*, 215 U. S. 533.

[1] *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416; *Hill* v. *American Surety Co.*, 200 U. S. 197; *United States Fidelity Co.* v. *Struthers-Wells Co.*, 209 U. S. 306; *Mankin* v. *Ludowici-Celadon Co.*, 215 U. S. 535; *Title Guaranty & Trust Co.* v. *Crane Co.*, 219 U. S. 24; *United States Fidelity Co.* v. *Bartlett*, 231 U. S. 237; *A. Bryant Co.* v. *N. Y. Steam Fitting Co.*, 235 U. S. 327; *Illinois Surety Co.* v. *Peeler*, 240 U. S. 214. See also *Equitable Surety Co.* v. *McMillan*, 234 U. S. 448. In *Hardaway* v. *National Surety Co.*, 211 U. S. 552, where recovery was denied, the "use plaintiffs" had not furnished materials or labor, but were financiers. In *Texas Cement Co.* v. *McCord*, 233 U. S. 157, the questions involved were whether suit was brought within the statutory period. In *United States Fidelity Co.* v. *Kenyon*, 204 U. S. 349; *United States* v. *Congress Construction Co.*, 222 U. S. 199; *Title Guaranty & Surety Co.* v. *Harlan & Hollingsworth*, 228 U. S. 567, the questions raised were as to the jurisdiction of the court.

If Schott had formally sublet the contract to the Engineering Company, the Surety Company would clearly be liable. But the transfer of the business was, at most, a subletting; since under Rev. Stats., § 3737, Schott could not assign a contract with the United States.

It is urged that the bond referring to Schott provides protection only to those "supplying him or them labor and materials." But the claims in question were in a very practical sense furnished *him*—as well as the Engineering Company. He remained liable on the contract; and no one else was known to the United States. Furthermore, if attention is to be directed to the precise wording of the bond, it should be noted that it refers to Schott "his or their heirs, successors, executors or administrators"; and the Engineering Company may properly be deemed a successor. The argument that the surety's risk ought not to be increased by holding it liable for the default of strangers to the original contract is of no greater force in the case of an assignee than it is in that of the subcontractor. The Surety Company could protect itself by insisting that the contractor require a bond from all subcontractors and assignees. The Surety Company was in nowise prejudiced by the transfer of the business, since the management remained unchanged; and no reason is shown for applying the rule of *strictissimi juris*. *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, 426.

Second: The contract and bond were made in Illinois and were to be performed there. Questions of liability for interest must therefore be determined by the law of that State. *Scotland County* v. *Hill*, 132 U. S. 107, 117. Under the law of Illinois the liability of a surety on a bond is extended beyond the penalty by way of interest from the date when the liability on the bond accrued. *Holmes* v. *Standard Oil Co.*, 183 Illinois, 70. See *United States* v. *U. S. Fidelity Co.*, 236 U. S. 512, 530, 531. The liability here accrued at least as early as the commencement of the

suit. The Surety Company contends that the amount each claimant was to receive was not made definite until it was actually decided by the Court of Appeals. But the claims were all for liquidated amounts; and in no instance was the amount in dispute. The controversy was merely as to which of the claimants should be entitled to share in the liability under the bond. The Surety Company might have paid into court at the commencement of the suit an amount equal to the penalty of the bond. It did not elect to do so; and as the aggregate liability on the claims exceeds the penalty, it was properly held for an additional amount equal to interest from the commencement of the suit.

Third: The contention of the Surety Company that certain of the claimants are estopped from enforcing liability on the bond rests upon different acts in respect to the several creditors. As to some it is because they filed against the estates in bankruptcy of *both* Schott and the Engineering Company the whole of their claims for material delivered in part to each. As to one creditor the estoppel is predicated upon the fact that in answer to an enquiry he recommended that the receiver in bankruptcy complete the contract. As to another creditor the estoppel is predicated upon the fact that he filed his claim in bankruptcy against the Engineering Company while the materials had been furnished to Schott. As to still another, the contention rests upon the fact that having claims against both Schott and the Engineering Company, he had stated to the Engineering Company a single account covering all the items and had accepted part payment; and furthermore had participated in the activities of the creditors' committee which supervised the business throughout the whole period. Such acts lack all the elements of an equitable estoppel. The Surety Company was not led thereby to do or to omit to do anything. It did not rely upon, nor was it affected by, any of the acts it now calls

attention to. *Dickerson* v. *Colgrove*, 100 U. S. 578, 580. There is in fact no inconsistency between the claimants' earlier acts and their attempt to recover on the bond. The Surety Company's contention is without merit.

Fourth: The specific objection made to the claim of the United States Equipment Company, for rental of cars, track and equipment used at the Naval Training Station and the expense of loading the plant and freight thereon to and from the station is also unfounded. The Surety Company contends that this is not supplying "labor and materials." The equipment was used in the prosecution of the work. Material was thus supplied, although,a loan serving the purpose, no purchase of it was made. The expense of loading and freight were properly included with the fixed rental as recoverable under the bond. *Title Guaranty & Trust Co.* v. *Crane Co.*, 219 U. S. 24, 34.

Judgment affirmed.

Dissenting: MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS ET AL. *v.* WARD ET AL., AND HOUSTON & TEXAS CENTRAL RAILROAD COMPANY.

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

No. 241. Submitted April 30, 1917.—Decided June 4, 1917.

Under the Carmack Amendment, the bill of lading issued by the initial carrier governs the entire transportation; the liability of each participating carrier is fixed by its valid, applicable terms; and new con-

ditions can not be introduced by a connecting carrier through a second bill of lading.

Without there being any break in the transportation or readjustment of rates, a connecting carrier issued a second bill of lading containing a stipulation, not in the original bill, by which its liability for damages was made conditional on service of a written claim within a certain time. *Held*, that the shipper's acceptance of the new bill was without effect upon the rights of the parties.

Under the Carmack Amendment, acceptance by the shipper without consideration of a second bill of lading governing a part of the through transportation and which contains new terms more favorable to the carrier is without effect.

169 S. W. Rep. 1035, affirmed.

THE case is stated in the opinion.

Mr. Alexander Britton, Mr. Joseph M. Bryson, Mr. Charles C. Huff, Mr. Alexander H. McKnight and *Mr. C. S. Burg* for plaintiffs in error.

No appearance for defendants in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This is an action to recover damages for injuries to cattle in the course of an interstate shipment. The cattle were delivered on August 23, 1912, by J. R. Ward to the Houston and Texas Central Railroad Company at Llano, Texas, for transportation by it to Elgin, Texas, and over connecting lines, the Missouri, Kansas & Texas Railway Company of Texas, and the Missouri, Kansas & Texas Railway Company, to Winona, Oklahoma. The Houston Company issued a through bill of lading in the form of the "live stock contract" in common use, and charged a through rate, which was paid by the shipper as agreed. The cattle arrived at destination in a crippled and debilitated condition, alleged to have resulted from the

delay, rough handling, and other negligence of the carriers. Plaintiffs brought this suit for damages in the District Court for Llano County, joining the three carriers as defendants. The petition contained no reference to the Carmack Amendment (June 29, 1906, c. 3591, 34 Stat. 584, 595).[1] The Houston Company answered, setting up a provision in the bill of lading limiting liability to injuries occurring on its own line; and alleging that the cattle were transported to Elgin with ordinary care and there delivered in good condition to the connecting carrier. The Missouri, Kansas & Texas Railway Company of Texas, in its answer, denied the allegations of the complaint and, in addition, alleged that it had accepted the cattle at Elgin under a second bill of lading or live stock contract, executed by it and by one E. A. Barrer, as agent of the shipper; that the plaintiff had failed to comply with a stipulation therein, requiring, as a condition precedent to liability, that a written claim for damages be filed within thirty days after the happening of the injuries complained of; and that "the said shipment constituted and was an interstate shipment, originating in Llano, Llano County, Texas, and destined to Wynona, in the State of Oklahoma, . . . and the said provisions of said bill of lading were and are, each and all valid and binding upon [under?] the laws of Congress relating to interstate commerce in force at the time said bill of lading was executed and said shipment made."

The record is silent as to the circumstances under which this second bill of lading was executed; and although it is alleged to have been issued in consideration of a special reduced rate theretofore duly filed with the Interstate Commerce Commission, there is nothing to indicate that it affected the through rate already agreed upon in

[1] The rights of the parties are not affected by the Act of March 4, 1915, c. 176, 38 Stat. 1196, dispensing with the necessity of notice of claim in certain cases.

the original bill of lading. This lower rate referred to appears to have been merely the customary special rate offered in consideration of an agreed maximum valuation on the cattle per head. The same agreed value was stipulated in the original bill of lading, which expressly "limits the liability of carriers in consideration of a lower rate being granted." The Missouri, Kansas & Texas Railway Company set up the same defense, alleging that it had accepted the shipment under the second bill of lading.

A jury trial having been waived, the case was heard by the court, and judgment rendered in favor of the Houston Company, but against the other two defendants in amounts which were found to represent the damage suffered in the course of the transportation through the negligence of their respective agents. Upon appeal by these defendants, the Court of Civil Appeals of the Third Supreme Judicial District affirmed the judgment, on the ground that the liability of the connecting carriers must be governed by the provisions of the bill of lading issued by the initial carrier (which did not require a written claim in thirty days) and that the second bill of lading was void under the Carmack Amendment. 169 S. W. Rep. 1035. Upon denial of a petition for rehearing the case was brought here on writ of error.

The purpose of the Carmack Amendment has been frequently considered by this court.[1] It was to create in the initial carrier unity of responsibility for the transportation to destination. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills,* 219 U. S. 186; *Northern Pacific Ry. Co.* v. *Wall,* 241 U. S. 87, 92. And provisions in the bill of

[1] *Atlantic Coast Line R. R. Co.* v. *Riverside Mills,* 219 U. S. 186; *Adams Express Co.* v. *Croninger,* 226 U. S. 491; *Kansas City Southern Ry. Co.* v. *Carl,* 227 U. S. 639; *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.,* 241 U. S. 190; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird,* 243 U. S. 592.

lading inconsistent with that liability are void. *Norfolk & Western Ry. Co.* v. *Dixie Tobacco Co.*, 228 U. S. 593. While the receiving carrier is thus responsible for the whole carriage, each connecting road may still be sued for damages occurring on its line; and the liability of such participating carrier is fixed by the applicable valid terms of the original bill of lading.[1] The bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation. The terms of the original bill of lading were not altered by the second issued by the connecting carrier. As appellants were already bound to transport the cattle at the rate and upon the terms named in the original bill of lading, the acceptance by the shipper of the second bill was without consideration and was void.

The Railway Companies contend that while the Carmack Amendment makes the receiving carriers pay for all liability incurred by the connecting lines, the question of whether there is any such liability or not must be determined by reference to the separate contracts of each participating carrier, and not to the contract of the initial carrier alone. If, as contended, a shipper must, in order to recover, first file his "verified claim" with the connecting carrier who caused the injury, as provided in a separate bill of lading issued by such carrier, the shipper would still rest under the burden of determining which of the several successive carriers was at fault. Such a construction of the Carmack Amendment would defeat its purpose, which was to relieve shippers of the difficult, and often impossible, task, of determining on which of the several connecting lines the damage occurred. For the purpose of fixing the liability, the several carriers must

[1] *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 194, 196; *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 648. See also *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Dettlebach*, 239 U. S. 588.

be treated, not as independent contracting parties, but as one system; and the connecting lines become in effect mere agents, whose duty it is to forward the goods under the terms of the contract made by their principal, the initial carrier. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186, 206; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Wallace*, 223 U. S. 481, 491.

The Railway Companies also contend that the acceptance of the second bill of lading operated as a waiver of all rights thereafter accruing under the first. The record discloses no evidence of intention to make such a waiver and there was no consideration for it. Furthermore as stated in *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197, "the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act. . . . A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed."

Judgment affirmed.

MISSISSIPPI RAILROAD COMMISSION ET AL. *v.* MOBILE & OHIO RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 256. Submitted May 1, 1917.—Decided June 4, 1917.

While the power of the States over the railways within their borders is very great and comprehensive, the property of the railways is nevertheless protected by the fundamental guaranties of the Constitution, is entitled to as full protection as any other private property devoted to a public use, and can not be taken from its owners without just compensation or without due process of law.

An attempt upon the part of a state commission to exercise the power of regulation in such an arbitrary and unreasonable manner as to prevent a railroad company from obtaining a fair return upon its property invested in the public service is repugnant to due process of law and void under the Fourteenth Amendment.

Upon the facts of this case, *Held* that an order of the Mississippi Railroad Commission, requiring the appellee company to restore certain passenger trains to service on its line within that State, was arbitrary, unreasonable, in excess of the lawful powers of the commission, and void under the due process clause of the Fourteenth Amendment.

The reasonableness of requiring a carrier to operate specified trains can not be made to depend upon the relation of the money return to the "out-of-pocket" cost, i. e., immediate outlay for wages and fuel, involved in their operation. *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585.

The action of the Railroad Commission in this case, though expressed in a separate order as to each train directed to be restored, was based upon one citation and was intended by the commission, and treated by the court below, as in effect but one order for the restoration of all the trains; this court therefore treats it as a unity, without determining whether some improvement of the train service might not properly have been required.

Affirmed.

THE case is stated in the opinion.

Mr. James N. Flowers and *Mr. George H. Ethridge*, Assistant Attorney General of the State of Mississippi, for appellants.

Mr. S. R. Prince and *Mr. Carl Fox* for appellee.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is a direct appeal from an order of the District Court for the Southern District of Mississippi, three judges sitting, granting an interlocutory injunction restraining the Mississippi Railroad Commission and the Attorney General of that State from enforcing six separate orders entered by the commission on one citation in one case on October 7, 1914, requiring the appellee to

restore to service six passenger trains—two each way daily between Meridian and Waynesboro, a town fifty-two miles to the south, and one train each way daily between Meridian and Okolona, a town one hundred and twenty-seven miles to the north—all in the State of Mississippi. The trains between Meridian and Okolona which were discontinued were interstate trains, the others were local to the State.

The appellee averred several grounds for the injunction prayed for, but the conclusion which we have reached calls upon us to consider only one of them, viz:

That the depression of business incident to the European War had so reduced the income of the railroad company that at the time the order was entered it was less than its current expenses; that a large loss would be incurred in operating each of the six trains; that without these trains there remained reasonably adequate service having regard to the population of the territory involved, and that the general financial condition of the company was such that the order if enforced would deprive the company of its property without due process of law and of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

The principles of law applicable to the decision of such a case as this record presents are few and they have become so settled and so familiar by repeated decisions of this court that extended discussion of them would be superfluous. They are these:

A State may regulate the conduct of railways within its borders, either directly or through a body charged with the duty and invested with powers requisite to accomplish such regulation. *Mississippi Railroad Commission* v. *Illinois Central R. R. Co.*, 203 U. S. 335; *Prentis* v. *Atlantic Coast Line R. R. Co.*, 211 U. S. 210; *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298.

Under this power of regulation a State may require

carriers to provide reasonable and adequate facilities to serve not only the local necessities but the local convenience of the communities to which they are directly tributary. *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio,* 173 U. S. 285; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Illinois,* 177 U. S. 514; *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission,* 206 U. S. 1; *Missouri Pacific Ry. Co.* v. *Kansas,* 216 U. S. 262; *Chicago, Burlington & Quincy R. R. Co.* v. *Railroad Commission of Wisconsin,* 237 U. S. 220; and such regulation may extend in a proper case to requiring the running of trains in addition to those provided by the carrier, even where this may involve some pecuniary loss, *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission, supra,* and *Missouri Pacific Ry. Co.* v. *Kansas, supra.*

But, while the scope of this power of regulation over carriers is very great and comprehensive, the property which is invested in the railways of the country is nevertheless under the protection of the fundamental guaranties of the Constitution and is entitled to as full protection of the law as any other private property devoted to a public use, and it cannot be taken from its owners without just compensation or without due process of law. *Wisconsin, Minnesota & Pacific R. R.* v. *Jacobson,* 179 U. S. 287; *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission,* 206 U. S. 1; *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585; *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Wisconsin,* 238 U. S. 491.

If this power of regulation is exercised in such an arbitrary or unreasonable manner as to prevent the company from obtaining a fair return upon the property invested in the public service it passes beyond lawful bounds, and such action is void, because repugnant to the due process of law provision of the Fourteenth Amendment to the Constitution of the United States. *Atlantic Coast Line R. R. Co.*

v. *North Carolina Corporation Commission*, 206 U. S. 1; *Missouri Pacific Ry. Co.* v. *Nebraska*, 217 U. S. 196; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585.

Whether a statute enacted by the legislature of a State or an order passed by a railroad commission exceeds the bounds which the law thus sets to such authority is a question of law arising on the facts of each case (*Mississippi Railroad Commission* v. *Illinois Central R. R. Co.*, *supra*), and the appropriate remedy for determining that question is a bill in equity such as was filed in this case to enjoin its enforcement. *Mississippi Railroad Commission* v. *Illinois Central R. R. Co.*, *supra*; *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Wisconsin*, *supra*.

With these principles in mind we pass to a consideration of the question of law which the facts of this particular case present for our decision.

The case was heard on bill, answer and testimony which are all before us, and the facts appearing may be summarized as follows:

The Mobile & Ohio Railroad Company is an interstate carrier operating a line of railway from Mobile, Alabama, to St. Louis, Missouri. This evidence is uncontradicted: That the company is not overcapitalized, that it has been wisely and economically managed and that, nevertheless, its net earnings above the cost of operation, fixed charges and taxes, and before making any allowance for betterments or for dividends, were only $85,000 for the year ending June 30, 1914. It never paid a greater dividend than five per cent. and this for only a few years in its history; in the month of July, 1914, on its entire system the company earned a surplus over fixed charges and taxes of $11,000; in the month of August it showed a deficit of $25,641, and in September the deficit became $113,627,—this without making any deduction for betterments, or improvements or dividends.

The trains ordered restored were numbered 7, 8, 9, 10, 11 and 12, and they were all put into operation by the defendant railroad company as experiments from time to time within a few years prior to 1914 without any order of the commission, in the hope of building up passenger business, but the record shows that not one of them at any time paid the cost of operation.

The territory under consideration is sparsely settled and the chief traffic of the company is lumber and cotton and the resulting general freight due to a marketing of these commodities. The depression in these staples was very great prior to and at the time the case was heard.

The uncontradicted testimony of the auditor of the company shows that the passenger revenue per train mile, of the trains ordered restored, for the three months next before the passing of the order was: For July, 65 cents, for August, 64 cents and for September, 56 cents; that the average passenger revenue per train mile of trains 7, 8, 9 and 10 from October 1st to October 5th (the next day but one before the order was passed), was 36 cents, and that of trains 11 and 12 for the same six days was 25 cents.

The auditor also testifies that as near an approximation as could be arrived at showed the total revenue of the company derived from passenger traffic for the two months ending August 31, 1914, was $331,102.85, and that the total expenses and taxes allotted to this service amounted to $339,247.60, making the passenger revenue per train mile .9708 and that the expenses and taxes per train mile amounted to .9944, or a net loss per passenger train mile of .0236.

The secretary of the company testified that on September 30, 1914, the company had a working balance of $74,885.79 and that there were unpaid vouchers amounting to $1,027,319, some of which dated as far back as November of the preceding year; that these vouchers did not represent any fixed charges or any interest, and that

the normal amount of approved unpaid vouchers was between $400,000 and $500,000.

The evidence further shows that in order to avoid insolvency the company had reduced expenses in many ways, including even the expense of repairs to locomotives and cars of every description; that the president and vice-president had voluntarily submitted to a reduction of twenty per cent. in their salaries, and that the salaries of all the other officers had been reduced on a sliding scale up to ten per cent.

The falling off in earnings for the first 17 days in October as compared with the preceding year was $165,742, or approximately $10,000 a day, and the estimated saving to the company of the taking off of the six trains involved in this controversy was $10,000 a month.

The company introduced in evidence sixty-one affidavits from what is claimed to be substantially all of the important business men in the towns which would be most affected by the taking off of the trains, who agree in saying that, while these trains were a convenience to the traveling public, owing to business conditions then prevailing there was not much travel and would not be until the trade depression was over; that the taking off of the trains would not materially injure the business of the various towns in which they lived, and that if the trains were losing money and the total business of the company was not profitable, in their judgment the company should be allowed to discontinue them.

The territory between Meridian and Waynesboro is not a productive agricultural section, and in the fifty-two miles between the two towns there are five "fair sized towns" and five small villages, which, according to the 1910 census, had a population of only 5,456, and there is no evidence that the population had increased up to the time of trial.

The service which remained between Meridian and

Waynesboro to the south, after these trains were taken off, consisted of two trains each way each twenty-four hours, and between Meridian and Okolona there remained three trains each way every twenty-four hours.

All of the trains which were continued were through interstate trains, which, while the local trains were being run, made very few stops, but when the local trains were taken off each of these trains made all the stops between Waynesboro, Meridian and Okolona, with the result that, whereas, formerly train No. 4, for example, made seven stops between Meridian and Okolona, under the new schedule it made twenty-two.

The evidence on which the Railroad Commission acted is summarized in the record and it is impressively meager in extent and inadequate in character. It consists of the testimony of two men, wholly without qualifying training or experience, as to the cost of operating such trains and of a number of men as to the inconvenience which would be caused by the taking off of the trains, chiefly to commercial travelers living in Meridian desiring to visit the small villages and hamlets on the line. The testimony of the one member of the commission who appeared as a witness shows that the reasonableness of the order was made to turn on what the commission estimated was the "out of pocket" cost, the immediate cash outlay in wages and fuel, of operating the six trains. But this cannot be accepted as a proper basis for determining such cost. *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 594, 596.

Thus summarized this evidence shows that the plaintiff railroad company, an important interstate carrier, was operating before the business depression incident to the war on a margin so narrow that the $85,000 of profit for the entire preceding year would have been more than swallowed up in nine days by the shrinkage of business of the company as it was when this controversy arose; that

without being able to meet its growing deficit the company had resorted to rigid economies of every sort before it discontinued these six trains the continued operation of which would have involved a loss of $10,000 a month; that the three daily trains each way to the north of Meridian which remained after the taking off of the trains which gave rise to the controversy cannot be said to be inadequate to the needs of the comparatively small population to be served, and that while the service to the south of Meridian—with but two trains each way in twenty-four hours, and these running at hours inconvenient for the transaction of business—cannot be thought a liberal service, yet these orders were intended by the commission to be in effect one order for the restoration of the six trains, they were thus treated in the court below and must be so treated here. Looking to the extent and productiveness of the business of the company as a whole, the small traveling population to be served, the character and large expense of the service required by this order, and to the serious financial conditions confronting the carrier, with the public loss and inconvenience which its financial failure would entail, we fully agree with the District Court in concluding that the order of the commission at the time and under the circumstances when it was issued was arbitrary and unreasonable and in excess of the lawful powers of the commission, and that if enforced it would result in such depriving of the railroad company of its property without due process of law as is forbidden by the Fourteenth Amendment to the Constitution of the United States. The order of the District Court granting the injunction must be

Affirmed.

UNITED STATES OF AMERICA EX REL. THE STATE OF LOUISIANA *v.* HON. GEORGE WHITFIELD JACK, JUDGE OF UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF LOUISIANA.

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

No. 264. Argued May 3, 1917.—Decided June 4, 1917.

The decision of the Supreme Court of Louisiana in *State* v. *Tensas Delta Land Co.*, 126 Louisiana, 59, that the State had no interest or authority entitling it to intervene in a suit brought by the Tensas Basin Levee Board for the recovery of lands which the Board had conveyed after receiving title from the State, is conclusive on this court, in the absence of any later state decision or statute modifying its effect.

The Act of Louisiana of August 19, 1910, making it the duty of the Attorney General, upon the request of the Governor, to represent the State, or any political agency or subdivision thereof, in suits involving land belonging to the State or any such agency or subdivision, etc., did not operate to divest the Levee Board of its authority over suits to recover land and confer it, through the Governor, upon the Attorney General; as concerns the Board, its effect was merely to authorize the Attorney General, at request of the Governor, to represent the Board in the litigation.

This construction of the Act of August 19, 1910, agrees with the practical, contemporary construction placed upon it by two Attorneys General of the State, which the court regards as persuasive authority as to its true meaning.

Generally speaking, the authority of a court to make new parties to a suit, especially after decree, rests in its sound discretion, which, except for abuse, can not be reviewed upon appeal or error, or indirectly, by mandamus.

With exceptions not here applicable, no person may review a judgment by appeal or writ of error who is not a party or privy to the record.

Article 571 of the Code of Practice of Louisiana, providing: "The right of appeal is given not only to those who are parties to a cause in

which a judgment has been rendered against them, but also to third persons not parties to said suit when such third persons allege that they have been aggrieved by the judgment," can have no application to an equity suit in the federal courts.

217 Fed. Rep. 757, affirmed.

THE case is stated in the opinion.

Mr. Harry Gamble, Assistant Attorney General of the State of Louisiana, with whom *Mr. A. V. Coco,* Attorney General of the State of Louisiana, was on the briefs, for petitioner.

Mr. Henry Bernstein and *Mr. Willard F. Keeney* for respondent.

MR. JUSTICE CLARKE delivered the opinion of the court.

By act of its General Assembly in 1886 amended in 1888 the State of Louisiana created the Tensas Basin Levee District for the purpose of providing a system of levees and other works to aid in protecting the lands within its boundaries from floods and overflow. The act provided for the appointment of a Levee Board of Commissioners to have charge of the affairs of the District and constituted this Board a corporation, with power to sue and be sued, and to sell, mortgage, pledge and otherwise dispose of lands which the State donated and caused to be conveyed to the Board.

In 1898 the Levee Board sold to the Tensas Delta Land Company, Limited, a large acreage of the land thus acquired and executed conveyances for it.

Eleven years later, in 1909, suit was brought by the Attorney General of Louisiana in the name of the State, claiming that the sale of 1898 was fraudulent and void and praying that it should be set aside and that the State should be decreed to be the owner of the property.

Such proceedings were had in the case that the Supreme Court of Louisiana held (*State* v. *Tensas Delta Land Co.*, 126 Louisiana, 59) that the only proper party plaintiff in such a suit was the Levee Board and that the State being without authority to maintain it the case must be dismissed.

After the dismissal of the suit of the State the Levee Board brought suit against the Tensas Basin Land Company, Limited, in a District Court of Louisiana upon the same cause of action stated in the prior petition which case was removed to the United States District Court for the appropriate district. The petition was there given the form of a bill in equity, and as amended, a demurrer to it by the defendant was sustained. On appeal this decision was reversed and the case was remanded for further proceedings, but before the time allowed for answer had expired the defendant appeared and informed the District Court that $100,000 had been paid in settlement of the case agreed upon between the parties and moved the court to dismiss the suit. This motion was filed on July 22, 1913, and a rule was forthwith issued to the plaintiff to show cause on the first day of the next term of the court (October 20th) why the motion should not be granted. The return of service of this rule shows personal service on the Attorney General as Solicitor for the Levee Board and acknowledgment of service by the Board itself.

On August 5 the Board, appearing by its President, answered the rule to show cause, averring that it had "apprised its attorney of record" (the Attorney General of the State) "of the said settlement" and, admitting the allegations of the motion, prayed that the suit be forthwith dismissed at its cost.

The Attorney General for the State, not satisfied with the settlement, on October 6th filed a motion, which he signed "R. G. Pleasant, Attorney General, State of Louisiana and Attorney of Record for Complainant." In this

quite anomalous paper he averred somewhat rhetorically that the settlement made by the Levee Board for which he was attorney, was a "condoning and compromising" of a fraud to which the court should not assent, that he was acting in the case under authority of an act of the General Assembly of the State and by order of the Governor, to whom alone he was responsible, and "that the complainant could not compromise this suit, nor dismiss it without the Governor's consent." He prayed that the motion to dismiss be denied, the agreement of settlement disregarded, and that the case be set down for early trial.

The motion to dismiss came on for hearing on October 20th but the court deferred consideration of it until the next day and caused a telegram to be sent to the Attorney General in order that he might have full opportunity to be present and be heard, but he did not appear in person or by representative, and thereupon the court heard the evidence and "ordered, adjudged and decreed that the said compromise . . . be and the same is recognized by this court as having the effect of the thing adjudged and as settling all the issues involved in this case," and dismissed the suit.

It cannot escape notice that there is no allegation contained in any paper filed by the Attorney General that the Levee Board in compromising the controversy and suit did not act in perfect good faith, nor is there any challenge of the character or competency of the members of the Board.

After this entry of dismissal no further action was taken by the Attorney General until on the 6th day of the following April when he presented to the District Court a "petition of the United States of America on the relation of the State of Louisiana" praying that the State be permitted to intervene and appeal from the judgment ratifying the compromise and dismissing the suit.

The District Court denied this petition for leave to

intervene and appeal, and thereupon the Attorney General filed in the Circuit Court of Appeals for the Fifth Circuit a "petition for writs of mandamus and certiorari," in which he prayed that court to order that the State of Louisiana be allowed to intervene in the District Court and to appeal the case and that it order that a transcript of all records be sent up to it for review.

The Circuit Court of Appeals denied this petition assigning two reasons for its action, viz:

(1) Because the Supreme Court of Louisiana, on full consideration, had decided that the State was without real or beneficial interest in the lands in controversy, which decision must be controlling in that court; and

(2) Because the State was not a party to the record in the District Court "and one who is not a party to a record and judgment is not entitled to an appeal therefrom."

This decision is now here for review on certiorari.

This plain statement of the history of this litigation so argues against the claims of the petitioner as to make them in appearance, at least, unsubstantial to the point of being frivolous.

The Supreme Court of Louisiana, considering the statutes of its own State, held, in the case in which the State sought to set aside for fraud the same sale of the same lands involved in this litigation, 126 Louisiana, 59, that the "Legislature vested the absolute title to the lands in controversy in the Board of Commissioners of the Tensas Levee District, with full power to sell the same on such terms as the Board might deem proper. The Legislature also vested in said board full power to sue and be sued, and to stand in judgment, in all matters relating to their gestion and trust." "Most assuredly," also says the court, "the Legislature has divested the State absolutely of all beneficial interest in said lands, and transferred the same to the said Board of Levee Commissioners," and as it "has vested the power to sue and be sued in the Board of

Commissioners of the Tensas Levee District, and has vested no such co-ordinate power in the Governor and Attorney General, we are of the opinion that the institution of this suit in the name of the State is unauthorized."

This decision determining the effect of the state statutes, where no claim of federal right was involved, is accepted as conclusive by this court and unless it has been modified by statute (there has been no modifying decision) the application of the State to intervene and to appeal was properly denied.

To the seemingly insurmountable barrier to the claims of the petitioner presented by this Supreme Court decision we must add that the State was not at any time a party to this record and that its first application for leave to intervene and to appeal was long after the term at which the decree of dismissal was rendered and within a few days of the expiration of the time within which even "a real party in interest" would have been allowed an appeal.

With exceptions not even remotely applicable to a case such as we have here it has long been the law as settled by this court that "no person can bring a writ of error [an appeal is not different] to reverse a judgment who is not a party or privy to the record," *Bayard* v. *Lombard*, 9 How. 530, 551, and in *Ex parte Tobacco Board of Trade*, 222 U. S. 578, it was announced, in a *per curiam* opinion, as a subject no longer open to discussion, that "one who is not a party to a record and judgment is not entitled to appeal therefrom," and that a refusal after decree to permit new parties to a record cannot be reviewed by this court directly on appeal, or indirectly, by writ of mandamus, under circumstances such as were there and are here presented.

Two statutes of Louisiana are relied upon by counsel for petitioner to avoid the obvious and seemingly conclusive result of these decisions by this court and by the Supreme Court of Louisiana.

The first of these statutes is Article 571 of the Code of Practice of Louisiana, which reads: "The right of appeal is given, not only to those who were parties to the cause in which a judgment has been rendered against them, but also to third persons not parties to said suit, when such third persons allege that they have been aggrieved by the judgment."

It is urged in argument that in suits in the United States Courts which originate in Louisiana this statute permits an appeal by strangers to the record "who may allege that they have been aggrieved by the judgment," and the decision of the Supreme Court of Louisiana in 126 Louisiana, 59, *supra*, holding that the State cannot "be aggrieved" by this judgment because it is without beneficial interest in the lands which are the subject-matter of this litigation and is without authority to institute a suit for their recovery, is disposed of by saying that it is the practice in Louisiana courts to allow appeals by strangers to the record upon mere allegation of interest, leaving the validity of such allegation to be examined by the appellate court.

This claim cannot be seriously entertained in the face of the long time perfectly settled law that equity suits in federal courts and the appellate procedure in them are regulated exclusively by federal statutes and decisions unaffected by statutes of the States. Textbook citations will suffice: Federal Equity Practice, Street, §§ 97 and 98; A Federal Equity Suit, Simkins, Chapter 1.

The other statute relied upon by the petitioner was enacted by the General Assembly of Louisiana on August 19, 1910, after the decision by the Supreme Court referred to, and reads:

"Be it enacted by the General Assembly of the State of Louisiana, That it is hereby made the duty of the Attorney General of the State, upon the request of the Governor to represent the State or any political agency or subdivision

thereof, in any suit in any court involving title to any land or real property belonging to the State of Louisiana or any of its political agencies or subdivisions, whether the title to said land or real property is vested in or appears in the name of the State or in the name of any of its political agencies or subdivisions."

The claim made by the Attorney General for the State now is that this act "withdrew the authority theretofore granted to the Levee Board by section 3 of the Act of 1886 to sue in such cases as this, with all of the rights pertinent to the right to sue, and delegated it, through the Governor, to the Attorney General."

This is a large repealing effect by implication to be asserted for a statute so worded and apparently so simple, and that such meaning was not given to it by the present Attorney General's predecessor in office, who was charged with the execution of the statute at the time this litigation was commenced and almost immediately after its enactment, is clear from these facts appearing of record:

The suit by the Levee Board as petitioner was commenced after this Act of August 19, 1910, was passed and yet the petition, signed by the Attorney General as one of the Solicitors of the Board, alleges that it was commenced by virtue of a resolution adopted by the Board on the fourteenth day of the preceding July (thus reciting an authority adopted pursuant to power which it is now claimed had been withdrawn from the Board). The petition also recites that the Attorney General (predecessor of the present incumbent) appears in the suit pursuant to the authority and direction of the Governor "to represent said Board of Levee Commissioners . . . in the prosecution of this suit;" that the board is a corporation with power to sue and be sued, to take title to and to sell lands under the same laws which had been construed by the Louisiana Supreme Court (126 Louisiana, 59) and it prays for a decree "recognizing your petitioner [the Levee Board]

to be the owner of all of said lands so fraudulently and illegally conveyed." The Attorney General, with another, signs the petition as Attorney "of the Board of Levee Commissioners of the Tensas Basin Levee District," and when the case was removed to the United States District Court the petition was recast into a bill in equity in which, after repeating the allegations and prayer of the original bill, the then Attorney General adds that the Levee Board has "in compliance with the law as laid down by the Supreme Court of the State of Louisiana in the opinion and judgment rendered by it as aforesaid" (126 Louisiana, 59) "brought this suit as it understands it is its duty to do."

Even in his protest to the District Court against the settlement, the Attorney General appeared "as Attorney of record for the complainant," the Levee Board, and it was long after term and not until six months, lacking sixteen days, after the decree of the District Court approving the settlement had been entered, that he left off the character of solicitor for the Board and, appearing for the State, petitioned for leave for it to intervene and appeal from the decision affirming the settlement approved by his former client. Even in this petition no claim is made that the Board had been deprived of its powers by the Act of August 19, 1910, or that it had acted otherwise than in the utmost good faith in making the compromise.

The first time that this astonishing assertion of a repeal by implication by the Act of August 19, 1910, appears in the record, so far as we can discover, is in the brief filed by a third Attorney General on April 30, 1917.

This summary of the proceedings in the case out of which the petition we are considering grew shows that the predecessor of the present Attorney General, who was in office when the Act of 1910 was passed, and also the Attorney General who succeeded him, both contended, until

nearly six months after the entry of the settlement decree that the Supreme Court had settled as the law of the case that the State was without title or beneficial interest which would enable it to maintain a suit to set aside the sale alleged to be fraudulent; that the proper plaintiff in such a case was the Levee Board to which the State had committed the title, custody and power of disposition of the lands in controversy and also, apparently, that the purpose of the Act of August, 1910, was simply to authorize the Attorney General, on the request of the Governor, to take charge (in this case with another solicitor) of a suit to be instituted by the Levee Board, and thereby to place his professional learning and the weight of his official character at the service of this plaintiff, an "agency or subdivision" of the State. Both Attorneys General assumed that the powers of the State and of the Levee Board over the subject-matter continued as the Supreme Court had defined them to be before the Act of August, 1910, was passed and, as we have seen, it was not until long after the entry of the settlement decree that the contention first appeared that the act took away from the Levee Board and gave to the State the authority to conduct the required litigation.

This contemporary construction of the act by the two law officers of the State charged with acting under it is persuasive authority as to its true meaning, and, upon full consideration, we think it is the correct interpretation of it.

To this we add that, except in a class of cases to which this case does not belong, the authority of a court to make new parties to a suit, especially after judgment or decree, rests in its sound discretion, which, except for abuse, cannot be reviewed upon an appeal or writ of error. No claim is made of abuse of discretion by the District Court and plainly, if made, it would be groundless, since the judge refusing to permit the State to intervene had before him at

the time of his refusal the decision of its own Supreme Court that the State was without title, legal or beneficial, qualifying it to litigate the questions involved.

In the original bill the not uncommon allegation of fraud is made, which is denied in the answer. It was entirely proper for the parties to such a litigation, in good faith "balancing the hope of gaining with the danger of losing" to compromise the case and make an end of the controversy and, as we have said, it is not claimed anywhere in the record that the members of the Levee Board, which settled the suit, were not men of character and probity or that they did not act in perfect good faith in concluding the settlement. To these men the state law committed the care of the interests of the inhabitants of the district and within the bounds of their authority honestly exercised their action was conclusive upon the State.

It results that the decree of the Circuit Court of Appeals must be

Affirmed.

WALL ET AL. *v.* PARROT SILVER & COPPER COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

No. 271. Argued May 4, 7, 1917.—Decided June 4, 1917.

The court agrees with the District Court in concluding that appellants' allegations of fraud were not sustained.

Generally speaking, when fraud is alleged and denied, the party making the charge will be confined to that issue.

When a constitutional question, asserted as the basis for the jurisdiction of this court on direct appeal from the District Court, is pleaded

as resulting from the execution of a fraudulent scheme, the question ought not to be considered (*semble*), if the charge of fraud fails.

By claiming the benefits of state laws the right to question their constitutionality may be waived.

216 Fed. Rep. 242, affirmed.

THE case is stated in the opinion.

Mr. Francis P. Garland and *Mr. Asa P. French* for appellants.

Mr. L. O. Evans and *Mr. John A. Garver* for appellees.

MR. JUSTICE CLARKE delivered the opinion of the court.

The appellants as owners of 1210 of the 229,850 shares of the capital stock of the Parrot Silver & Copper Company, a corporation organized under the laws of Montana, filed their bill in the United States District Court for the District of Montana, seeking to avoid an executed sale of all the property and assets of that company made on May 31, 1910, to the Anaconda Copper Mining Company, the consideration being a stipulated number of shares of the vendee company.

The claim of the appellants is that in 1899 certain persons acquired control of a majority of the shares of the capital stock of the Parrot Company with the fraudulent purpose of so managing its affairs as to deplete and depreciate its assets "and then to acquire them" for less than their real value, thereby depriving the minority stockholders of "the just and fair value of their right and interest" as shareholders or "of an appraisal of the value of their stock on any adequate basis of value."

It is further claimed that this fraudulent scheme found consummation in the sale to the Anaconda Company, which was made under authority of §§ 4409, 4410, 4411, and 4412 of the Revised Codes of Montana.

Section 4409 provides that a sale may be made of all the assets of any mining corporation when at least two-thirds of the whole number of shares of the capital stock outstanding shall vote in favor of making such sale at a meeting called and notified as provided in the section. Such a sale of the "whole of the property of such corporation" works a dissolution of the corporation under § 4410 and its affairs must be wound up. Section 4411 provides that any stockholder who shall not have voted for or authorized such sale may, within twenty days from the date of the stockholders' meeting authorizing it, give written notice that he does not assent thereto and demand payment of the value of his stock, and ten days after the service of such notice he must, or the corporation may, apply to a designated court and have the value of the stock fixed and appraised. Upon such application the court shall appoint three appraisers who shall take evidence in relation to and shall find the value of the stock of such dissenting stockholder "at the time of his dissent." To any stockholder not satisfied with the award of the appraisers the next section, 4412, allows an appeal to the District Court where the value of the stock shall be re-assessed by a jury in the same manner as in "appeals from the assessment of commissioners in condemnation proceedings provided by law." The judgment on such an award must be entered against both the vendor and the vendee corporation, and by the statute it is made a lien superior to the rights of the vendee upon all of the real property sold.

After the sale to the Anaconda Company complained of the appellants served a notice of dissent on the Parrot corporation and commenced a statutory proceeding for the appraisal of their stock, which has not been brought on for hearing but is still pending.

The claim upon which the appellants come into this court by direct appeal is that the statutes of Montana

referred to are unconstitutional because they provide for a sale of all the property of the corporation upon a favorable vote of less than all (not less than two-thirds) of the shares of the capital stock of the corporation and that dissenting stockholders must accept an award of the value of their stock made as of the date of sale. Such an award in this case, it is claimed, would be based upon a valuation of the assets of the company after they had been fraudulently depleted and depreciated and without its being possible in such a proceeding to add anything to the value of their stock on account of the damage which the persons in control of the defendants by their fraudulent conduct had done to the property of the Parrot Company, and thereby to the value of the appellants' stock prior to the sale. This, it is contended, would result in taking the property of the appellants without just compensation and in violation of the "due process of law" and of the "equal protection of the laws" clauses of the Fourteenth Amendment to the Constitution of the United States.

This summary of this record shows that the claims of the bill presented to the District Court for decision two questions, viz:

(1) Did the defendants fraudulently dissipate and depreciate the assets of the Parrot Company prior to the sale complained of to the damage of the interest of the appellants as stockholders?

(2) If the Montana statutes were given effect, would they so deprive the appellants of a part of the value of their stock as to offend against the designated provisions of the Fourteenth Amendment to the Constitution of the United States?

An examination of this record leads us to fully agree with the trial court in its conclusion that the appellants failed utterly to sustain their allegations that the property of the Parrot Company was fraudulently dissipated and depreciated through the management of the defendants

prior to the sale or that the sale made was in any respect fraudulent. Upon this conclusion the judgment of the District Court might well be affirmed, for the reason that where fraud is charged in a bill or set up in an answer, and is denied, the party making the charge will be confined to that issue, and also for the reason that where the claimed constitutional question on which a direct appeal to this court is based is pleaded as resulting from the carrying into effect of a fraudulent scheme, when such charge of fraud fails the asserted constitutional question ought not to be considered. *French* v. *Shoemaker*, 14 Wall. 314; *Eyre* v. *Potter*, 15 How. 42; *Chicago, Burlington & Quincy Ry. Co.* v. *Babcock*, 204 U. S. 585, 593.

But we prefer not to have the case go off on this seemingly technical but really sound and substantial rule.

There remains the contention that the statutes of Montana which we have epitomized, if enforced, will deprive the appellants of their property without due process of law because they provide that sale may be made of all the assets of the corporation when authorized by not less than two-thirds of the outstanding capital stock of the corporation and that the plaintiffs must accept either the payment for their shares which this large majority of their associates think sufficient or, if they prefer, the value in money of their stock to be determined by three appraisers or, still at the election of appellants by a court and jury.

This record does not call upon us to examine into this challenge of the validity of these statutory provisions, similar as they are to those of many other States and of a seemingly equitable character, for the reason that the appellants by their action in instituting a proceeding for the valuation of their stock, pursuant to these statutes, which is still pending, waived their right to assail the validity of them. *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581; *Electric Co.* v. *Dow*, 166 U. S. 489; *Pierce* v. *Somerset Railway*, 171 U. S. 641; *Leonard* v. *Vicksburg*,

Shreveport & Pacific R. R. Co., 198 U. S. 416, 422. They cannot claim the benefit of statutes and afterwards successfully assert their invalidity. There is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim of right may be.

The decision of the District Court is

Affirmed.

EX PARTE PARK SQUARE AUTOMOBILE STATION, PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

No. 31, Original. Submitted May 21, 1917.—Rule discharged June 11, 1917.

Mandamus will not lie to control the District Court upon a jurisdictional question when other modes of reviewing its decision (writ of error or certiorari) are provided by statute.

This rule obtains even though the decision complained of be manifestly incorrect and though a direct review by mandamus might avert great inconvenience and expense. *Ex parte Harding*, 219 U. S. 363, explained and followed.

So *held* where the object of the application was to require the District Court for the Northern District of New York to remand a case removed from a court of the State of New Hampshire.

Rule discharged.

THE facts are stated in the opinion.

Mr. Edward C. Stone for petitioner.

Mr. Robert G. Dodge for respondent.

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

Upon the ground that the American Locomotive Company, a corporation created under the laws of New York,

was carrying on business in the State of New Hampshire and amenable to the jurisdiction of the courts of that State, the petitioner, the Park Square Automobile Station, a Maine corporation, commenced its suit for breach of contract against the American Locomotive Company in a New Hampshire state court. In such court after service upon it the Locomotive Company prayed a removal of the cause not to the District Court of the United States for the District of New Hampshire, but to the District Court of the United States for the Southern District of New York, and its prayer to this effect was denied by the state court. Some time thereafter the prayer for removal was renewed, modified however by asking that the removal be ordered to the District Court of the United States for the Northern District of New York on the ground that the corporation was an inhabitant of that district and had its principal place of business there. This request being also denied, the Locomotive Company, executing a bond for removal, filed the record in the District Court of the United States for the Northern District of New York. The Automobile Company thereupon moved to remand, not on the ground that the case was not a removable one, but because it was solely entitled to be removed to the proper district, that is, from the state court in New Hampshire to the United States District Court of that State. This motion having been overruled (222 Fed. Rep. 979), the case was brought directly here upon the theory that the alleged error resulting from the refusal to remand was susceptible of being reviewed although no final judgment had been entered in the cause. At this term the writ of error taken for the purpose stated was dismissed because there was no final judgment, 243 U. S. 633, and thereupon on petition to that effect a rule to show cause why a mandamus should not be granted directing the District Court to reverse its ruling refusing to remand the cause was allowed and on a return of the Dis-

trict Court to that rule the subject is before us for consideration.

The contention of the petitioner is that manifest error was committed in taking jurisdiction on a removal of the cause from the state court of New Hampshire since the proper court, upon the assumption that the case was removable, was the District Court of the United States for the District of New Hampshire and that court alone.

At the threshold, however, we are met by the suggestion that, conceding for the sake of the argument that the lower court erred in refusing to remand and in taking jurisdiction, as such error was susceptible of being reviewed by the regular methods provided by the statute, that is, by certificate and direct review on the question of jurisdiction alone after final judgment, or by review of the Circuit Court of Appeals where allowed if the whole case were taken to that court, or by the exercise by this court of its power to issue a writ of certiorari in a proper case, there is hence no power to substitute the writ of mandamus as a means of reviewing for the express remedial processes created by the statute for such purpose.

It is not disputable that the proposition thus relied upon is well founded and hence absolutely debars us from reviewing by mandamus the action of the court below complained of, whatever may be our conviction as to its clear error, *Ex parte Harding*, 219 U. S. 363; *Ex parte Roe*, 234 U. S. 70, unless it be that by some exception the case is taken out of the reach of the control of the cases referred to. It is insisted that this case is such an exceptional one, first, because of the clearly erroneous construction of the statute upon which the court below based its assertion of jurisdiction and the strange result which arose from that construction, that is, the removal of a case pending in the state court of New Hampshire to a district court in the State of New York, and second, because of the grave wrong which would result from forcing the petitioner to

try its case in the State of New York at great inconvenience and expense as a preliminary to securing a review of the question of jurisdiction,—an expense and inconvenience which would be saved if by review now by means of a writ of mandamus the removal statutes be given their natural meaning and thus the wrong and confusion arising from their misconstruction would be avoided. And, in support of the exceptions thus asserted, reliance is placed on expressions contained in the opinion in *Ex parte Harding*, 219 U. S. 363, 373, by which it is contended they are sustained.

But conceding that the error which the proposition attributes to the ruling below is manifest, the conclusion drawn from the opinion in *Ex parte Harding* is obviously a mistaken one. Indisputably in that case the court was called upon to consider in a two-fold aspect some contrariety of views manifested in decided cases, first, as to the power to correct an unwarranted exercise of jurisdiction by way of proceedings in mandamus in a case where no method of review of such question was otherwise provided, and second, the right to resort to mandamus in disregard of and as a substitute for express and positive statutory regulations pointing out the method by which such review could be had. Bearing this in mind, it is plain that the language relied upon in *Ex parte Harding* related to the first class and established the doctrine that even in a case where no means of review were provided by statute, the writ of mandamus could be used only in exceptional cases calling for an exceptional remedy. But this did not in the slightest degree qualify or limit the comprehensive rule which was established as to the second class to the effect that, where statutory methods of review of questions of jurisdiction were provided for, they could not be disregarded, and therefore that there was no power to override the statutory provisions by resorting to the writ of mandamus. And the whole subject will be made

very clear by a consideration of the opinion in *Ex parte Roe*, 234 U. S. 70, which gave effect to and applied the rule laid down in *Ex parte Harding*.

Indeed, when the situation dealt with in *Ex parte Harding* is taken into view, it becomes apparent that the confusion and conflict which had imperceptibly arisen from obscuring the lines dividing the statutory methods for review of questions of jurisdiction and the effort to review them by the writ of mandamus which was corrected by the decision in that case would be recreated by now permitting a resort to the writ of mandamus in this case. And this also makes clear that however grave may be the inconvenience arising in this particular case from the construction which the court gave to the statute and upon which it based its assertion of jurisdiction, greater inconvenience in many other cases would necessarily come from now departing from the established rule and reviewing the action of the court by resort to a writ of mandamus instead of leaving the correction of the error to the orderly methods of review established by law.

Rule discharged.

FIRST NATIONAL BANK OF BAY CITY *v.* FELLOWS, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON THE RELATION OF UNION TRUST COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 764. Argued March 22, 23, 1917.—Decided June 11, 1917.

By the principles fully settled in *McCulloch* v. *Maryland* and *Osborn* v. *Bank*, and other cases, the implied power of Congress to confer a particular function upon a national bank is to be tested, not by the nature of the function viewed by itself, but by its relations to all

the functions and attributes of the bank considered as an entity; the necessity or appropriateness of the function should be considered with reference to the situation to which it relates; and, as to what is necessary or appropriate, a court should not substitute its judgment for the judgment of Congress.

As settled also by those cases, the circumstance that a function is of a class subject to state regulation does not prevent Congress from authorizing a national bank to exercise it; nor would it lie with the state power to forbid this.

A business not inherently such that Congress may empower national banks to engage in it may nevertheless become appropriate to their functions if, by state law, state banking corporations, trust companies, or other rivals of national banks are permitted to carry it on.

Section 11 (k) of the Act of December 23, 1913, establishing the Federal Reserve Board, in authorizing the board "To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe," is, as here construed, a valid exercise of the power of Congress.

The section authorizes the specified functions to be exercised by national banks when the right to perform them is given by state law, or is deducible therefrom through being so conferred on state banks or corporations whose business in some degree rivals that of national banks; and it gives administrative power to the Reserve Board as a means of coördinating such functions, in their exercise by national banks, with the reasonable and nondiscriminating provisions of state law regulating their exercise as to state corporations.

The section is not open to the objection that it confers legislative power on the Reserve Board.

In providing that the specified functions may be exercised "when not in contravention of state or local law," Congress impliedly, if not expressly, authorized the institution and conduct in the state supreme court of proceedings in the nature of *quo warranto* to test whether the exercise of such functions by a national bank is consistent with the state law.

192 Michigan, 640, reversed.

THE case involves the validity of provisions in the Federal Reserve Bank Act authorizing national banks to act as trustees, etc., when allowed by the Reserve Board and not in contravention of state law; also the jurisdiction of

the state court to determine the authority of such banks in proceedings akin to *quo warranto*. The case is stated in the opinion.

Mr. W. C. Elliott and *Mr. Edward S. Clark*, with whom *Mr. H. M. Gillett* was on the briefs, for plaintiff in error.

Mr. Henry M. Campbell and *Mr. John G. Johnson* for defendants in error.

The Solicitor General, with whom *Mr. Joseph P. Cotton* and *Mr. Milton C. Elliott* were on the brief, for the United States, by leave of court.

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

We are of opinion that the procedure resorted to was appropriate and that the state court was competent to administer relief, but we postpone stating our reasons on the subject until the merits have been passed upon.

The court below held that an act of Congress conferring on national banks additional powers was in excess of the authority of Congress and was hence repugnant to the Constitution. 192 Michigan, 640. The correctness of this conclusion is in substance the sole question for decision on the merits.

Although the powers given were new, the principles involved in the right to confer them were long since considered and defined in adjudged cases. We shall first consider the leading of such cases and then, after stating this case, determine whether they are controlling, causing the subject not to be open for original consideration.

In *McCulloch* v. *Maryland*, 4 Wheat. 316, the bank had been incorporated by Congress with powers to transact business of both a governmental and of a private character. The question which was decided was the authority of Congress to grant such charter. Without undertaking

to restate the opinion of Mr. Chief Justice Marshall, it suffices for the purpose of the matter now before us to say that it was held that although Congress was not expressly given the power to confer the charter, authority to do so was to be implied as appropriate to carry out the powers expressly given. In reaching this conclusion it was further decided that to recognize the existence of the implied power was not at all in conflict with Article I, § 8, clause 18, of the Constitution, providing that Congress should have power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers," since that provision did not confine the implied authority to things which were indispensably necessary, but on the contrary gave legislative power to adopt every appropriate means to give effect to the powers expressly given. In terms it was pointed out that this broad authority was not stereotyped as of any particular time but endured, thus furnishing a perpetual and living sanction to the legislative authority within the limits of a just discretion enabling it to take into consideration the changing wants and demands of society and to adopt provisions appropriate to meet every situation which it was deemed required to be provided for. In fact the rulings which we have stated were all summed up in the following passage which ever since has been one of the principal tests by which to determine the scope of the implied power of Congress over subjects committed to its legislative authority:

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the

end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adpated to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." p. 421.

In *Osborn* v. *Bank*, 9 Wheat. 738, where substantially the subject was presented in the same form in which it had been passed upon in *McCulloch* v. *Maryland*, yielding to the request of counsel, the whole subject was reëxamined and the previous doctrines restated and upheld. Considering more fully, however, the question of the possession by the corporation of private powers associated with its public authority and meeting the contention that the two were separable and the one, the public power, should be treated as within and the other, the private, as without the implied power of Congress, it was expressly held that the authority of Congress was to be ascertained by considering the bank as an entity possessing the rights and powers conferred upon it and that the lawful power to create the bank and give it the attributes which were deemed essential could not be rendered unavailing by detaching particular powers and considering them isolatedly and thus destroy the efficacy of the bank as a national instrument. The ruling in effect was that although a particular character of business might not be when isolatedly considered within the implied power of Congress, if such business was appropriate or relevant to the banking business the implied power was to be tested by the right to create the bank and the authority to attach to it that which was relevant in the judgment of Congress to make the business of the bank successful. It was said: "Congress was of opinion, that these faculties were necessary, to enable the bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of the national legislature." p. 864.

As the doctrines thus announced have been reiterated in a multitude of judicial decisions and have been undeviatingly applied in legislative, and enforced in administrative action, we come at once to state the case before us to see whether such doctrines dispose without more as a mere question of authority of the subject under consideration.

Section 11 (k) of the Act of Congress approved December 23, 1913, establishing the Federal Reserve Board (38 Stat. 251, 262, c. 6), gives to that board authority "To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

The First National Bank of Bay City having obtained the certificate required began the exercise of the powers stated. Thereupon certain trust companies which under the laws of Michigan had the authority to do the same character of business petitioned the Attorney General of the State to test the right of the national bank to use the functions on the ground that its doing so was contrary to the laws of the State of Michigan and that the action of the Federal Reserve Board purporting to give authority was in contravention of the Constitution of the United States. The Attorney General then, on the relation of the trust companies, commenced in the Supreme Court of the State a proceeding in the nature of *quo warranto* to test the right of the corporation to exercise the functions. The bank in defense fully stated its federal charter, the rights given by the act of Congress and the action of the Federal Reserve Board taken thereunder. The Attorney General demurred to this defence, first, because Congress had no power to confer the authority which was called in question; second, because if it had the power, it was without right to delegate to the Reserve Board the deter-

mination of when it should be used; and third, because the exercise of the powers was in contravention of the laws and authority of the State and the Reserve Board therefore under the act had no power to grant the certificate.

The case was heard by the full court. In an opinion of one judge which, it would seem, was written before the opinion of the court was prepared, it was elaborately reasoned that the exercise by a national bank of the functions enumerated in the section of the act of Congress under consideration would be contrary to the laws of the State and therefore the Reserve Board under the terms of the act of Congress had no power to authorize their exertion. The opinion of the court, however, fully examining the grounds thus stated and disagreeing with them, expressly decided that corporations were authorized by the state law to perform the functions in question and that the mere fact that national banks were federal corporations did not render them unfit to assume and perform such duties under the state law because the mere difference existing between the general administrative rules governing national banks and state corporations afforded no ground for saying that it would be contrary to state law for national banks to exert the powers under consideration. The authority conferred by the act of Congress and the rights arising from the certificate from such point of view were therefore upheld. Looking at the subject, however, from a consideration of the legislative power of Congress in the light of the decisions in *McCulloch* v. *Maryland* and *Osborn* v. *Bank* and recognizing that it had been settled beyond dispute that Congress had power to organize banks and endow them with functions both of a public and private character, and in the assumed further light of the rule that every reasonable intendment must be indulged in in favor of the constitutionality of a legislative power exercised, it was yet decided that Congress had no

authority to confer the powers embraced in the section of the act under consideration and hence that the section was void. The court following its reference to *McCulloch* v. *Maryland* and *Osborn* v. *Bank* and to passages in the opinions in those cases upholding the rightful possession by the bank of both public functions and private banking attributes, stated the grounds which led it to conclude that the rulings in the decided cases were distinguishable and therefore not controlling. It said:

"But in the reasoning of the judges, in the opinions to which I have referred, I find, I think, a conclusive argument supporting the proposition that congress has exceeded its constitutional powers in granting to banks the right to act as trustees, executors and administrators. If for mere profit it can clothe this agency with the powers enumerated, it can give it the rights of a trading corporation, or a transportation company, or both. There is, as Judge Marshall points out, a natural connection between the business of banking and the carrying on of federal fiscal operations. There is none, apparently, between such operations and the business of settling estates, or acting as the trustee of bondholders. This being so, there is in the legislation a direct invasion of the sovereignty of the State which controls not only the devolution of estates of deceased persons and the conducting of private business within the State, but as well the creation of corporations and the qualifications and duties of such as may engage in the business of acting as trustees, executors and administrators. Such an invasion I think the court may declare and may prevent by its order operating upon the offending agency."

But we are of opinion that the doctrine thus announced not only was wholly inadequate to distinguish the case before us from the rulings in *McCulloch* v. *Maryland* and *Osborn* v. *Bank*, but on the contrary directly conflicted with what was decided in those cases, that is to say, dis-

regarded their authority so as to cause it to be our duty to reverse for the following reasons:

1. Because the opinion of the court instead of testing the existence of the implied power to grant the particular functions in question by considering the bank as created by Congress as an entity with all the functions and attributes conferred upon it, rested the determination as to such power upon a separation of the particular functions from the other attributes and functions of the bank and ascertained the existence of the implied authority to confer them by considering them as segregated, that is, by disregarding their relation to the bank as component parts of its operations,—a doctrine which, as we have seen, was in the most express terms held to be unsound in both of the cases.

2. Because while in the premise to the reasoning the right of Congress was fully recognized to exercise its legislative judgment as to the necessity for creating the bank including the scope and character of the public and private powers which should be given to it, in application the discretion of Congress was disregarded or set aside by exercising judicial discretion for the purpose of determining whether it was relevant or appropriate to give the bank the particular functions in question.

3. Because even under this mistaken view the conclusion that there was no ground for implying the power in Congress was erroneous because it was based on a mistaken standard, since for the purpose of testing how far the functions in question which were conferred by the act of Congress on the bank were relevant to its business or had any relation to discrimination by state legislation against banks created by Congress it considered not the actual situation, that is, the condition of the state legislation, but an imaginary or non-existing condition, that is, the assumption that so far as the state power was concerned the particular functions were in the State enjoyed

only by individuals or corporations not coming at all, actually or potentially, in competition with national banks. And the far-reaching effect of this error becomes manifest when it is borne in mind that plainly the particular functions enumerated in the statute were conferred upon national banks because of the fact that they were enjoyed as the result of state legislation by state corporations, rivals in a greater or less degree of national banks.

4. In view of the express ruling that the enjoyment of the powers in question by the national bank would not be in contravention of the state law, it follows that the reference of the court below to the state authority over the particular subjects which the statute deals with must have proceeded upon the erroneous assumption that because a particular function was subject to be regulated by the state law, therefore Congress was without power to give a national bank the right to carry on such functions. But if this be what the statement signifies, the conflict between it and the rule settled in *McCulloch* v. *Maryland* and *Osborn* v. *Bank*, is manifest. What those cases established was that although a business was of a private nature and subject to state regulation, if it was of such a character as to cause it to be incidental to the successful discharge by a bank chartered by Congress of its public functions, it was competent for Congress to give the bank the power to exercise such private business in coöperation with or as part of its public authority. Manifestly this excluded the power of the State in such case, although it might possess in a general sense authority to regulate such business, to use that authority to prohibit such business from being united by Congress with the banking function, since to do so would be but the exertion of state authority to prohibit Congress from exerting a power which under the Constitution it had a right to exercise. From this it must also follow that even although a business be of such a character that it is not inherently considered susceptible of

being included by Congress in the powers conferred on national banks, that rule would cease to apply if by state law state banking corporations, trust companies, or others which by reason of their business are rivals or *quasi*-rivals of national banks are permitted to carry on such business. This must be since the State may not by legislation create a condition as to a particular business which would bring about actual or potential competition with the business of national banks and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency. Of course as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers. And these considerations clearly were in the legislative mind when it enacted the statute in question. This result would seem to be plain when it is observed (a) that the statute authorizes the exertion of the particular functions by national banks when not in contravention of the state law, that is, where the right to perform them is expressly given by the state law or what is equivalent is deducible from the state law because that law has given the functions to state banks or corporations whose business in a greater or less degree rivals that of national banks, thus engendering from the state law itself an implication of authority in Congress to do as to national banks that which the state law has done as to other corporations; and (b) that the statute subjects the right to exert the particular functions which it confers on national banks to the administrative authority of the Reserve Board, giving besides to that Board power to

adopt rules regulating the exercise of the functions conferred, thus affording the means of coördinating the functions when permitted to be discharged by national banks with the reasonable and non-discriminating provisions of state law regulating their exercise as to state corporations, —the whole to the end that harmony and the concordant exercise of the national and state power might result.

Before passing to the question of procedure we think it necessary to do no more than say that a contention which was pressed in argument and which it may be was indirectly referred to in the opinion of the court below that the authority given by the section to the Reserve Board was void because conferring legislative power on that board, is so plainly adversely disposed of by many previous adjudications as to cause it to be necessary only to refer to them. *Field* v. *Clark*, 143 U. S. 649; *Buttfield* v. *Stranahan*, 192 U. S. 470; *United States* v. *Grimaud*, 220 U. S. 506; *Monongahela Bridge Company* v. *United States*, 216 U. S. 177; *Intermountain Rate Cases*, 234 U. S. 476.

The question of the competency of the procedure and the right to administer the remedy sought, then remains. It involves a challenge of the right of the State Attorney General to resort in a state court to proceedings in the nature of *quo warranto* to test the power of the corporation to exert the particular functions given by the act of Congress because they were inherently federal in character, enjoyed by a federal corporation and susceptible only of being directly tested in a federal court. Support for the challenge in argument is rested upon *Ableman* v. *Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397; *Van Reed* v. *People's National Bank*, 198 U. S. 554, 557; *State ex rel. Wilcox* v. *Curtis*, 35 Connecticut, 374. But without inquiring into the merits of the doctrine upon which the proposition rests we think when the contention is tested by a consideration of the subject-matter of this particular controversy it cannot be sustained. In other words, we

are of opinion that as the particular functions in question by the express terms of the act of Congress were given only "when not in contravention of State or local law," the state court was, if not expressly, at least impliedly authorized by Congress to consider and pass upon the question whether the particular power was or was not in contravention of the state law, and we place our conclusion on that ground. We find no ambiguity in the text, but if it be that ambiguity is latent in the provision, a consideration of its purpose would dispel doubt especially in view of the interpretation which we have given the statute and the contrast between the clause governing the subject by the state law and the provision conferring administrative power on the Reserve Board. The nature of the subject dealt with adds cogency to this view since that subject involves the action of state courts of probate in a universal sense, implying from its very nature the duty of such courts to pass upon the question and the power of the court below within the limits of state jurisdiction to settle so far as the State was concerned the question for all such courts by one suit, thus avoiding the confusion which might arise in the entire system of state probate proceedings and the very serious injury to many classes of society which also might be occasioned. And our conclusion on this subject is fortified by the terms of § 57, c. 106, 13 Stat. 116, making controversies concerning national banks cognizable in state courts because of their intimate relation to many state laws and regulations, although without the grant of the act of Congress such controversies would have been federal in character.

As it follows from what we have said that the court below erred in declaring the section of the act of Congress to be unconstitutional, the judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

MR. JUSTICE VAN DEVANTER, dissenting.

I dissent from the conclusion that this proceeding could be brought and maintained in the state court. It is an information in the nature of a *quo warranto* against a federal corporation, a national bank. It calls in question the bank's right to exercise a privilege claimed under an act of Congress, the privilege, under the terms of the act, being conferred only when "not in contravention of State or local law." The information was brought by the Attorney General of the State in his own name, and charges that the bank's exercise of the privilege is "in contempt of the people of the State," by which it is meant, as the record discloses, first, that the exercise of the privilege by the bank is in contravention of the law of the State, and, second, that the act of Congress under which the privilege is claimed transcends the power of Congress and is void. The state court dealt with both grounds. The first was overruled and the second sustained. The judgment rendered enjoins and excludes the bank from exercising the privilege.

The writ of *quo warranto* was a prerogative writ and the modern proceeding by information is not different in that respect. When it is brought to exclude the exercise of a franchise, privilege or power claimed under the United States it can only be brought in the name of the United States and by its representative, or in such other mode as it may have sanctioned. *Wallace* v. *Anderson*, 5 Wheat. 291; *Territory* v. *Lockwood*, 3 Wall. 236; *Newman* v. *Frizzell*, 238 U. S. 537. As is said in the *Lockwood Case*, "the right to institute such proceedings is inherently in the Government of the nation." This is particularly true of national banks, for they not only derive all their powers from the United States, but are instrumentalities created by it for a public purpose, and "are not to be interfered with by state legislative or judicial action, except so far

as the law making power of the Government may permit." *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283; *Van Reed* v. *People's National Bank*, 198 U. S. 554, 557. Indeed, they are upon much the same plane as are officers of the United States, because their conduct can only be controlled by the power that created them. *McClung* v. *Silliman*, 6 Wheat. 598, 605. If it were otherwise the supremacy of the United States and of its Constitution and laws would be seriously imperiled. *Ableman* v. *Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397; *Tennessee* v. *Davis*, 100 U. S. 257; *State ex rel. Wilcox* v. *Curtis*, 35 Conn. 374.

Thus much, as I understand it, is conceded in this court's opinion, the conclusion that the state court could entertain the information and proceed to judgment thereon, as was done, being rested upon an implied authorization by Congress. This authorization is thought to be found in the provision stating that the privilege claimed is given only "when not in contravention of State or local law" and in the provision in the Act of June 3, 1864, c. 106, § 57, 13 Stat. 116, now in Rev. Stats., § 5198, which makes suits against national banks cognizable in certain state courts. I do not find any such authorization in either provision.

The first does no more than to withhold the privilege in question from national banks located in States whose laws are opposed to or not in harmony with the possession and exercise of such a privilege on the part of the banks. It says nothing about judicial proceedings—nothing about who shall bring them or where they shall be brought. There is in it no suggestion that *quo warranto* proceedings were in the mind of Congress. Had there been a purpose to do anything so unusual as to authorize a state officer to institute and conduct such a proceeding in a state court against a federal corporation, is it not reasonable to believe that Congress would have given expression to that pur-

pose? As before indicated, it said nothing upon the point,—just as it would have done had no such purpose been in mind. But if the words "when not in contravention of State or local law" could be regarded as giving any warrant for a *quo warranto* proceeding by a state officer in a state court, I should say they would do no more than to permit such a proceeding to determine whether the privilege was in contravention of the state law. There is nothing in them which points even remotely to a purpose to sanction a proceeding to determine the power of Congress under the Constitution to clothe a national bank with the privilege indicated. That would be without any precedent in the legislation relating to federal corporations, and I submit that it is most improbable that Congress either did or would entertain such a purpose.

The provision cited from the Act of 1864 has been in the statutes for fifty-three years and no one seems ever to have thought until now that it was intended to authorize a proceeding such as this against a national bank. I think its words do not fairly lend themselves to that purpose. They have hitherto been regarded, and in practice treated, as referring to ordinary suits such as may be conveniently prosecuted against a bank in its home town and county. Besides, the terms of the provision show that it can have no application here. After providing for suing a national bank in the federal or territorial court of the district in which it is established, the provision adds, "or in any state, county, or municipal court in the county or city in which said association is located." This bank, as the record discloses, is located in Bay City, Bay County. The proceeding was begun and had in the Supreme Court of the State at the capital, which is Lansing, Ingham County. Therefore the provision can give no support to the proceeding.

For these reasons I think the judgment should be re-

versed with a direction to dismiss the information for want of jurisdiction.

MR. JUSTICE DAY authorizes me to say that he concurs in this dissent.

VALDEZ *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 361. Argued April 23, 24, 1917.—Decided June 11, 1917.

The testimony of an accomplice who turns State's evidence in a murder case is not to be discarded because of his base character, or his oscillating retraction and reiteration of the charge, but must be accorded such weight as is due it when judged by confirming or opposing circumstances, by his character and the influences which invested him.

In this case the court, considering evidence on which was based a conviction of murder, concurred in by the court of first instance and the Supreme Court of the Philippine Islands, holds that the doubts aroused by the character and vacillation of the government's chief witness (who testified that he was hired by the defendant and did the killing under his direction), are not such as to justify a reversal in view of the corroborating evidence, including evidence of a motive on the part of the defendant, and the absence of any doubt that murder was actually done.

A view of the scene of the murder by the trial judge does not deprive the accused of his constitutional right, carried to him by the Philippine Code, to "meet the witnesses face to face," where the view is conducted in the presence and with the consent of his counsel, and no testimony is taken, and no improper remarks are addressed to the judge.

The right of the accused to be present during the inspection may be waived by his counsel; but, even when the right is not waived, his absence will not warrant a reversal if no prejudice resulted.

30 Phil. Rep. 293, affirmed.

THE case is stated in the opinion.

Mr. Timothy T. Ansberry, with whom *Mr. Challen B. Ellis* was on the briefs, for plaintiff in error:

The argument of Mr. Ansberry for the defendant was devoted to the facts and to the proposition that the absence of the accused during the view taken by the judge of first instance was fatal error. The accused, he said, was in jail at the time and had not consented. Section 5 of the Philippine Civil Government Act secures in all criminal prosecutions the right of the accused to be heard by himself and his counsel. Section 3270 of the Philippine Laws, Comp. Stats. 1907, declares: "In all criminal prosecutions the defendant shall be entitled to appear and defend in person and by counsel at every stage of the proceeding." It is unnecessary to argue at length the interpretation of these provisions, or the question of the rights of an accused in a felony case and the circumstances under which they may and may not be waived, for these questions are now settled by the recent decision in *Diaz* v. *United States*, 223 U. S. 442.

There this court laid down the rule of interpretation of Philippine Laws to be that the prevailing course of decision in the United States should be accepted as determining the nature and measure of the rights provided, and held that, by the prevailing course of decision in the United States, an accused who is on trial charged with a capital offense is incapable of waiving the right to be present.

There is only one subject remaining, and that is whether the rule is different when the proceeding was a view of the premises, and not the taking of testimony in the court room, instructions to the jury, etc. There is some authority for the proposition that a view of the premises is not "a part of the trial" on the ground that it does not involve the obtaining of evidence. Decisions to this effect

are mainly those dealing with the question as to whether a review on appeal is prevented by lack of a complete record when it appears that the jury viewed the premises; and the solution of the difficulty in some of the cases is that review may be had because a view of the premises is not a part of the trial. Some authorities have carried this suggestion into criminal cases where the question arose as to the necessity for the presence of the accused at a view of the premises. But without attempting to analyze these authorities, or the cases the other way, it is sufficient to say that both sound reason and the weight of authority support the proposition that a view of the premises in a criminal case is a part of the trial. 3 Wharton Criminal Law, 7th ed., § 3160; 22 Encyc. Pl. & Pr. 1059; *Tully* v. *Railroad Co.*, 134 Massachusetts, 499; *Wall* v. *United States Mining Co.*, 232 Fed. Rep. 613; *People* v. *Milner*, 122 California, 171; *Benton* v. *State*, 30 Arkansas, 328.

The whole theory upon which the accused is given a right to be present at the trial applies with equal force to his presence at a view of the premises. The right to be present, "scarcely less important to the accused than the right of trial itself" (*Diaz* v. *United States*, *supra*), was clearly not intended to be limited to any particular occasion, or any particular kind of proceeding in the trial, but extends to "any steps taken" (*Hopt* v. *Utah*, 110 U. S. 574) "from the empanelling of the jury to the reception of the verdict," and during this time "nothing shall be done in the absence of the prisoner" (*Lewis* v. *United States*, 146 U. S. 371, 372).

And what is true of a criminal trial before a jury is equally true of a criminal trial had, as in the Philippines, before a judge only. *Diaz* v. *United States*, *supra*.

The right of the accused to be present is given him, undoubtedly, that he may have the opportunity to observe, and be observed, at every step taken so that he may make the best use of his own knowledge of the facts,

and use that knowledge either in his testimony or in his conferences with counsel. At any moment of the trial something may arise which needs supplementing by facts of which the accused knows, or something may appear, either by observation of the jury or in oral evidence, which can be easily explained by the knowledge which the accused has. To say that the accused must be present when testimony, already transcribed, is read, or when the court instructs the jury, but that he need not be present when the jury is making an examination of objects and places about which the testimony centers and confirming or testing the testimony by actual view, ignores the real reason for the right.

But whatever may be the contention as to the proper function of a view of the premises, there can be no doubt that in the case at bar there was the "taking of evidence" at the view of the premises. *People* v. *Hull*, 86 Michigan, 446; *People* v. *Green*, 53 California, 60; *State* v. *Bertin*, 24 La. Ann. 46.

If any doubt could remain as to the right of the accused to be present at the view, because of any technical definition of the word "trial," it is disposed of by the broad language of the Philippine Code, which refers specifically to "every stage of the proceedings." See *Hopt* v. *Utah*, *supra*.

The Solicitor General and *Mr. Assistant Attorney General Warren* for the United States, submitted:

The plaintiff in error bases his right to be personally present at the view taken by the single judge trying the case without a jury upon § 5 of the Philippine Organic Act and § 3270 of the Philippine Compiled Statutes, which embody the provisions of the Fifth and Sixth Amendments to the Constitution of the United States conferring three distinct and separable rights: (a) The right of confrontation with the witnesses against him; (b) the right to be heard

by himself and counsel; (c) the right to be present at every stage of the trial.

The alleged right of a defendant to be present at a view cannot be derived from the right of confrontation with witnesses given by the Sixth Amendment. Such right applies only to testimonial evidence. *Mattox* v. *United States*, 156 U. S. 237, 242; *Dowdell* v. *United States*, 221 U. S. 325, 330; *Kirby* v. *United States*, 174 U. S. 47, 54, 55. See also *Mattox* v. *United States*, 146 U. S. 140; *Holt* v. *United States*, 218 U. S. 245, 252, 253; *Reynolds* v. *United States*, 98 U. S. 145. .

The plaintiff in error claims that the right to be present at every stage of the trial is derived from the constitutional right to have the assistance of counsel for his defense. The right to have the assistance of counsel originated at a later period than the right to be present at every stage of the trial. As to the abuses which led to the adoption of this clause of the Sixth Amendment, see 2 Story on Constitution, §§ 1793, 1794. And see also 4 Black. Comm. 355; Foster's Crown Cases, 231, 232; 1 Bishop's New Criminal Procedure, §§ 14–22, 120.

The right of a defendant in a criminal case to be present at all stages of the trial, on the other hand, is a right which had long been secured to him at common law before the right to have counsel was granted to him and, therefore, is clearly not derived from the Sixth Amendment to the Constitution. Its derivation from the early English common law is well stated in *Ball* v. *United States*, 140 U. S. 118, 131. For further authorities from the common law, see Statute of 28 Edward III, c. 3, 1354; 4 Black. Comm. 318; and the following cases: *Rex* v. *Bacon* (1664), 1 Keble, 809; 1 Levinz, 146; *Rex* v. *Vipont* (1761), 2 Burr, 1163; *Rex* v. *Aiken* (1765), 3 Burr, 1785; *Rex* v. *Crowther* (1786), 1 T. R. 125, 127; *Rex* v. *Baker* (1745), 2 Strange, 1239; *Rex* v. *Nicolls* (1745), 2 Strange, 1227; *Rex* v. *Legingham* (1670), 2 Keble, 687; T. Taym. 193; *Rex* v. *Harris*

and Duke (1689), 1 Ld. Raym. 267, 482; Skinner, 683; Comberbach, 447; Holt, 399; 1 Salkeld, 400; 12 Mod. 156; Lofft, 400; *Regina* v. *Templeman* (1700), 1 Salk. 56; *Rex* v. *Hayes* (1730), 2 Strange, 843; *Rex* v. *Gibson* (1734), 2 Strange, 968; Sessions Cas. 123; 2 Barnardiston, 412; Cunningham, 29; *Commonwealth* v. *Cody* (1896), 165 Massachusetts, 133; *Frey* v. *Calhoun* (1895), 107 Michigan, 130.

The right to be present at every stage of the trial must be derived from the "due process" clause contained in the Fifth Amendment to the Constitution. The dicta in *Diaz* v. *United States*, 223 U. S. 442, 452, which assumed that this right is derived from the Sixth Amendment, cannot be supported by authority.

Assuming, therefore, that the right to be present at all stages of the trial is a necessary part of the "due process" guaranteed by the Fifth Amendment, two questions arise in this case: (1) Is a view actually, in law, a "part of the trial" at which the common law required the defendant to be present? (2) Was the right to be present at a view such an "essential" right as public policy forbids to be waived, under the doctrine of *Hopt* v. *Utah*, 110 U. S. 574, as explained in *Lewis* v. *United States*, 146 U. S. 370, 372, and *Trono* v. *United States*, 199 U. S. 521, 533?

The weight of authority and of reason is to the effect that a view is not such a "part of the trial" as requires the defendant's presence. *People* v. *Thorn*, 156 N. Y. 286; *Price* v. *United States*, 14 App. D. C. 391, 405; 3 Wigmore on Evidence, § 1803; Supp., vol. 5, § 1803. See *State* v. *Ah Lee*, 8 Oregon, 214.

That the right to be present at a view is not such an "essential" right as public policy forbids to be waived is to be seen from the fact that, at the early common law, it was optional with the defendant whether he would give his consent to be present at a view or not; and no view could be taken without the defendant's consent in a

criminal case, and such consent could be given by the defendant with or without conditions. It is clear that, at common law, if he consented to a view in his absence, a view could be had in his absence. *Sir Edward Duncomb's Case* (1635), Croke's Charles, 366; *King* v. *Staughton* (1671), 2 Keble, 665; 1 Sid. 464; 2 Saunders, 160; *King* v. *Kingsmill* (1714), 1 Sess. Cas. 87; *Anonymous* (1728), 1 Barnardiston, 144; *King* v. *Hatchley Tradgeley* (1732), 1 Sess. Cas. 180 (repeated as *Anonymous*, 2 Barnardiston, 214); *King* v. *Redman* (1756), Ld. Kenyon, 384; 5 Bacon's Abridgment, 375; Thompson's Trials, § 879; *Commonwealth* v. *Chance* (1899), 174 Massachusetts, 245; *Commonwealth* v. *Knapp* (1830), 26 Massachusetts, 496; *Commonwealth* v. *Webster* (1850), 59 Massachusetts, 295.

It would be contrary to public policy to hold that defendant's presence at a view is legally necessary and non-waivable. In the first place, at no properly regulated inspection can a jury (or as in this case, a single justice) do more than observe the lay of the land and the disposition of the objects of interest connected with the crime. No evidence can be taken and no criticism or opinion offered by either side. There is, therefore, in spite of remarks in the cases, no valid reason necessitating the presence of the defendant. That is obviously the reason why defendants have so often waived the privilege of attendance. In the second place, in many parts of the United States, especially in Alaska and the Philippines, views may be taken of places hundreds or even thousands of miles away from the place of trial. In our Southern and Western States, also, views may be taken in distant places and sparsely settled regions. Facilities for travel may be limited; means of conveyance insecure. A requirement of the presence of the defendant, non-waivable by him, presents a real danger or added facility for the escape, or rescue, of the prisoner.

A conclusion, therefore, which would extend to a crim-

inal defendant a comparatively valueless privilege at the expense of the safe and effective execution of justice should be avoided if possible.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Valdez was proceeded against by complaint under the procedure of the Philippine Islands for the crime of murder. It was circumstantially described as having been committed by Valdez and one Francisco Amante and one Juan Gatmaitan, the latter having been induced by Valdez "by reason of a promise of reward" (900 pesos) to shoot one Eusebio Yuson with a shotgun furnished by Amante, inflicting nine mortal wounds, instantly killing Yuson.

There was a demurrer filed to the complaint which need not be noticed. Upon the trial of Valdez and Amante, after pleas of not guilty, the court in an opinion circumstantially reviewed the evidence and found Amante not guilty "for insufficiency of evidence." Valdez was found guilty "beyond reasonable doubt." He was sentenced to the penalty of death and to indemnification of the family of the deceased.

At a separate trial Gatmaitan was also found guilty and sentenced to imprisonment for life.

There was a motion for rehearing which was denied.

Valdez and Gatmaitan took separate appeals to the Supreme Court of the Islands, but, according to the statement of the court, at the request of counsel, the appeals were "heard and considered together, in order to give counsel for the defense an opportunity to develop any inconsistencies or contradictions which might appear as a result of a critical analysis and comparison of the evidence of record in both cases."

The judgment against Valdez was affirmed; that against Gatmaitan was modified by the substitution of death for

life imprisonment. Two of the judges dissented, one thinking that the "accused," not designating him (presumably Valdez), was entitled "to an acquittal under the facts presented"; the other being of opinion that the prosecution had "not proved the guilt of the appellants of the crime of which they were convicted."

The case is here upon a writ of error sued out by Valdez and the questions presented are, to quote counsel: (1) Whether the absence of the accused during a part of the proceedings in the trial constitutes an error requiring reversal, and (2) whether there was any evidence adequate to warrant the conviction.

The second question may be disposed of first. A negative answer is urged upon a consideration of the credibility of the witnesses, the relative probative strength of their testimonies, their mental and moral defects, the various statements of Gatmaitan, being a witness for the prosecution, first testifying to the guilt of Valdez and by subsequent statement retracting the accusation, and later retracting the retraction, and an asserted absence of motive for the crime.

The elements of these contentions were passed upon by the lower courts and the guilt of Valdez and Gatmaitan determined. It ordinarily would be enough to say that there was justification for the determination; but lest it may be supposed that the guilt of Valdez depended alone upon the testimony of Gatmaitan, he having been an active accomplice in the homicide, some comment becomes necessary and at least a characterization of the evidence.

Gatmaitan's testimony was, of course, an important factor, but it had substantial corroboration. He was shown, it is true, to be a low type of man. One who becomes for hire as he did the criminal executor of another's malice is usually such. No other would accept the shameful service. But it is not reserved for this case to make a

novel contribution to the criminal experience of the country or to demonstrate that there are such hirers and hirelings, and when the hireling turns state's evidence, as he sometimes does, or his weakness, awed by the penalties of his crime, breaks down and confesses, as it sometimes does, or he changes or qualifies or retracts, as he sometimes does, as hope or interest or fear sways him, his testimony or confession is not to be summarily discarded but to be judged of by confirming or opposing circumstances as well as by his character and the influences that may invest him. And it was such judgment the two lower courts exercised; it is such judgment in our turn that we are required to exercise. This record, indeed, shows that the character and characteristics of Gatmaitan, his mental and social inferiority to Valdez, made him facile to Valdez' solicitation and a purchasable agent for Valdez' purpose. And Valdez was shown, independently of Gatmaitan's testimony, to have had a purpose—a fixed enmity to Yuson, engendered in a controversy over certain water rights. In gratification of it he carefully planned the crime, set its time and place, procured its weapon, gave the weapon to Gatmaitan, and hired a scout to observe the movements of Yuson and report his approach. The service was exactly performed, and upon his approach occurred the tragedy.

Yuson was shot in the back and instantly killed as he was entering his home, and the crowning horror of it was that it was done in the hearing and almost in the presence of his wife, even as she was speaking to him and moving to meet him.

Such is the outline of the crime. And crime it was. There is no dispute about that or the manner of execution. Valdez as a witness in his own behalf denied participation in it or precedent knowledge and attempted to prove an alibi. His denial was not believed, his alibi decided not to have been established. It cannot be held, therefore,

that his conviction was not sustained by the evidence and the sentence imposed upon him not justified, even though its doom be death.

Upon the other question the record shows this: Gatmaitan was a witness for the prosecution. He related that he was employed by Valdez to kill Yuson for 900 pesos, given him, Gatmaitan, for that purpose, and that he shot Yuson as Yuson was approaching his (Yuson's) house—Valdez assisting him, Gatmaitan. Indeed, Gatmaitan testified that Valdez ordered him to shoot but that the gun would not go off, and Valdez showed him how to shoot—"and right at that moment the gun went off." Gatmaitan further testified that he and Valdez located themselves "in a fence near the staircase" of Yuson's house, and from that location fired the shot.

There was other testimony, as we have indicated, and distances of objects from one another were testified to.

At the close of the testimony the prosecuting attorney asked the court to visit "the place of the occurrence in order to make there an inspection so that the court may judge of the distances." One of the counsel for the defense assented, saying, "Yes; we do not object, so that the court may see." Another counsel for the defense called for the "motive" of the prosecution in asking "for the ocular inspection." It was replied that its object was to enable the court to obtain a correct idea "of all the distances in connection with the assassination of the deceased, as well also of the places where the witnesses for the prosecution found themselves and where they talked together." And further, "We want that done in order that everything may be clear." To which counsel for the defense replied that he had on occasions been present at ocular inspections and that testimony was taken which produced confusion, and, further: "What I wish, with the consent of the prosecuting attorney, is that an inspection be made there, but that no testimony be taken

because it produces great confusion when one tries to examine witnesses at the place of the occurrence."

The prosecuting attorney, however, thought it advisable not to dispense with such testimony or take from the court its discretion, "so that when the court arrives there it may ask of unknown persons where the deceased fell, where the wad was found, where Gatmaitan was, and where Mateo Arcilla was." All of which opposing counsel thought had been already proved.

The court expressed its willingness to make the inspection, as the result would be evidence for both parties after the defense had produced its rebuttal testimony, and upon the defense announcing that it had no rebuttal testimony, the case was closed.

The court made the inspection; Valdez was not present, but his counsel were. There is an opposition of affidavits submitted upon a motion for new trial. Those submitted by defendant (three of which were in almost exactly the same words) averred that the persons making them were present at the inspection by the court and saw the judge examine the various points at the scene of the crime and the point where Gatmaitan stood when he fired the murderous shot. That they also saw the widow of the deceased show the manner in which her husband fell—she illustrating—and that she also told the judge "certain facts which happened at the time of the murder." That they also saw Captain Crockett, of the constabulary, point out to the judge the places in the stairway and in the house where the shot had penetrated, and saw him walk with the judge and point out to him certain streets and houses connected with the case, and also saw the judge and such officer and the attorneys in the case and other persons examine other places.

One of the counsel for the defense also filed an affidavit. It averred that the judge went to the scene of the killing, accompanied by the attorneys for both sides, but that

neither Valdez nor his attorneys were consulted by the judge as to whether or not Valdez desired to accompany the court. That the widow of the deceased "explained to the judge many occurrences which she claimed had taken place on the night of the killing, . . . what she claimed to have said to the deceased just prior to the killing, and illustrated how and where the deceased had fallen, and discussed many other matters in connection with the case, during all of which time she was crying and wringing her hands in grief." That Captain Crockett was charged by at least one witness as being an official "of a body which had forced and intimidated" the witness to give false testimony against Valdez. That Captain Crockett pointed out bullet marks to the judge, pointed out where the shot was fired as indicated by Gatmaitan, and made other statements to the judge that Gatmaitan had made to him "as to other circumstances of the case." That Captain Crockett walked through the streets with the judge and pointed out to him various objects which had been referred to during the trial, part of the time being alone with the judge. That Captain Crockett discussed distances between objects, giving his opinion of the same, and particularly the distance from the house of the deceased to the house of Valdez, and told the judge in that connection that he had measured such distance with a "'speedometer' on his motorcycle." That during the inspection the affiant made objections as attorney for Valdez as to the conduct of the widow and Crockett but they were allowed to continue their conversations with the judge.

These affidavits were distinctly and circumstantially contradicted by affidavits accompanied by photographs of the positions of the judge and the persons involved. One of the affidavits was by Captain Crockett and two of them were by the attorneys who prosecuted the case, both of whom were present at the inspection and in such relation to it as to know what occurred.

The Supreme Court, in passing upon the motion, said: "A careful examination of these affidavits and the counter-affidavits filed by the appellee satisfies us that nothing more than inspection of the scene of the murder was made by the trial judge, and that no evidence whatever was taken on that occasion; and we are of opinion that under all the circumstances there was no violation of the constitutional right of the prisoner to be confronted with the witnesses. *People* v. *Thorn*, 156 N. Y. 286, 42 L. R. A. 368, and the cases cited in the extended note in the annotated report."

Such being the record, we must assume that the judge in his inspection of the scene of the homicide was not improperly addressed by any one and, in the presence of counsel, did no more than visualize the testimony of the witnesses—giving it a certain picturesqueness, it may be, but not adding to or changing it. It would be going a great way to say that the requirement of the Philippine Code, carrying the constitutional guaranty to an accused to "meet the witnesses face to face," was violated and could not be waived. And we think practically Valdez' presence was waived.

But, aside from any question of waiver, it would be pressing the right of an accused too far and *Diaz* v. *United States*, 223 U. S. 442, beyond its principle to so hold. As well might it be said that an accused is entitled to be with the judge in his meditations and that he could entertain no conception nor form any judgment without such personal presence.

The judgment should not be reversed upon a mere abstraction. It is difficult to divine how the inspection, even if the affidavits of the defendants should be taken at their face value, added to or took from the case as presented.

It follows that the judgment of the Supreme Court must be and it is *Affirmed.*

MR. JUSTICE CLARKE, dissenting.

I greatly regret that I cannot concur in the opinion of the court in this case and the fact that the decision must cost two men their lives impels me to state as briefly as I may my reasons for dissenting from it.

We have before us the record only in the case of Emilio Valdez.

Valdez is described in the opinion of the trial judge as "a highly educated man and very prominent both on account of his social standing and his wealth," and by the Supreme Court as "a recognized leader of an active political faction and a member of one of the richest, most powerful and influential families in the community."

He was convicted of lying concealed with another and of shooting, in the early evening, one Eusebio Yuson, also a man of prominence, as he was mounting an outside stairway to the second story of his village home. Pursuant to the practice of the Philippine Islands, the case was tried by a judge without the aid of a jury.

The guilt or innocence of Valdez turns upon the testimony of one Juan Gatmaitan, who was found by the trial court to be so "densely ignorant a man, of so low an order of intelligence and so lacking in instruction both mental and moral" that upon finding him guilty of participating in the murder, the court on this account, reduced his sentence from death to life imprisonment. The Supreme Court says of him that he "is a convicted cattle thief"; that "his testimony in his own behalf is wholly unworthy of credit" and that in his own case he repudiated all of his testimony in the Valdez case and testified in a manner "so incoherent, irrational and incredible as to cast doubt on all that he said in his own behalf."

To this we must add that this witness Gatmaitan first confessed to having murdered Yuson, without mentioning

Valdez. That afterwards, but two months before the trial of Valdez, he made affidavit that he and one Mateo Arcilla went to Valdez' house during the early evening of the day of the murder, that Valdez there gave them a shotgun in the village street, and that then the two, without Valdez, went and concealed themselves on the lot of Yuson and when he came home "I [Gatmaitan] discharged both barrels of the shotgun at him at the same time and then ran to Valdez' house and delivered the shotgun to him."

Next he gave testimony, such as we shall see, on the trial of Valdez and eight days later made oath in prison that the local constables had tortured him for three weeks, not allowing him to sleep day or night, and thereby had forced him to confess that he and Valdez had committed the murder, when the truth was he did not know who killed Yuson.

Nine days after this, again under oath, he denied all torture and persecution and says that his testimony on the trial of Valdez was true.

And finally the Supreme Court says that on his own trial he repudiated his testimony in the trial of Valdez, denied all knowledge of the crime and attempted to establish an alibi for himself.

Such is the witness who tells the following amazing story on which Valdez is sentenced to death:

I can neither read nor write. I never talked with Valdez but three times in my life. The first time I was looking for sugar cane seed and he said to me that "he wished to win my friendship,"—nothing else and we parted. The second time we met in Valdez' seed field and he offered me a business, which, according to his own statement, was an easy one. *I asked him what kind of a business it was and he said to me "that I should kill Eusebio Yuson and that he would pay me 900 pesos" ($450). I told him I could not please him because I was very busy with my work*

and no one could relieve me in said work. And he told me to say nothing about it to any one and thus we parted. The third time I met Valdez he came to my hut in my sugar cane fields about five o'clock of a Sunday evening (the evening of the murder) and he invited me to return to town and I rode with him in his calesa (carriage) to his home. During this drive of about an hour he said nothing to me. When we arrived at his house he left me in the street and went into the house. When the bell struck the time of evening prayer as he did not come down from the house I thought that he was praying and when he did come down from the house he said nothing to me but handed me a shotgun.

"Q. And what did you do when you received the gun?

A. He still invited me to go to Loasan.

Q. *What did he do?*

A. *He followed me.*

Q. Where did you go?

A. To the house of Lieutenant Eusebio Yuson."

He says that on the way to Yuson's house he and Valdez stopped at a store and one Figueroa came and told them that Yuson was already there and they then approached Yuson's house and located themselves in the fence near the staircase (outside the house leading to the second story) and when Yuson arrived Valdez ordered the witness to shoot.

"Q. And what did you do?

A. I tried to shoot but the gun would not go off.

Q. And then?

A. He approached me and said 'Son of a Whore, he was able to go up and you won't shoot' and he showed me how to shoot and right at that moment the gun went off."

On cross-examination he says he pulled the two triggers and that the gun would not go off and that then Valdez showed him how to shoot. "I was holding the shotgun this way [indicating] and he was showing me how to shoot,

saying, 'This way,' and without more ado the shot came out, the shot gun fell and I was frightened and ran away from the place and I know nothing more." He says he had never handled fire arms before, and did not know how to shoot a gun and that he did not tell Valdez that he did not know how to shoot. The shot thus fired was the one fatal to Yuson.

I shall not go into the testimony of the corroborating witnesses for the prosecution, Mateo Arcilla, who is described by the Supreme Court as "a convicted wife murderer, sentenced to life imprisonment for that crime since he appeared as a witness at the trial of Valdez," and Figueroa who with Gatmaitan and Arcilla the trial judge says pleaded guilty before a justice of the peace to murdering Yuson, without implicating Valdez.

The only motive suggested on the part of Valdez for murdering Yuson is a difference between him or his mother (it is not clear which) and Yuson about some boundary and water rights, which had been amicably settled four years before the murder, and an indefinite business rivalry, which is only remotely alluded to by the widow of the deceased.

A careful reading of this entire record convinces me, and the opinions of the lower courts throughout proceed upon the assumption, that the conviction of Valdez could not be thought of except this story of Gatmaitan which I have thus detailed from the record is believed to be true. Under the authority of the decisions of this court in *Wiborg* v. *United States*, 163 U. S. 632, 658; *Clyatt* v. *United States*, 197 U. S. 207, and in *Diaz* v. *United States*, 223 U. S. 454; I have thus examined this record for the purpose of determining whether there is any substantial evidence to be found in it to warrant the conviction of the defendant, and my conclusion is that there is no such evidence, because after making full allowance for differences of habit, of life and of character of the persons in-

volved and of the witnesses, I cannot conceive it possible that a man such as Valdez is described to be, even if he desired the death of an enemy or a rival (as to which there is no evidence) would bribe to shoot him an entire stranger of the most ignorant type obtainable, who had never used fire arms; should promise him money to commit the murder; should deliberately hand him, in the early evening, in a village street, the gun with which to shoot the victim; *and then should go with the murderer to the scene and participate in the assassination by pulling the trigger which fired the fatal shot.*

Comment would be superfluous. The mere narration of the story makes it impossible for me to consent to making it the legal basis for depriving a man of his life, for the testimony of Gatmaitan is not merely mistaken testimony due to faulty recollection or statement, but one of his series of stories is necessarily, consciously and corruptly false, and therefore the other should not be relied upon, especially not in a capital case. It is not uncommon for ignorant and corrupt men to falsely charge others with doing what they imagine that they themselves, in their narrow minds and experience, would have done under the circumstances of a given case, and the surest check, often the only check, on such perjury, is to recognize the impossibility that men of larger instruction and resources and experience could have been guilty of such conduct. It is, of course, possible that Valdez committed or inspired this crime but it is impossible to believe that he would have committed it in the crude, certain to be detected, manner described by Gatmaitan.

This conclusion is arrived at putting wholly aside the defense of the accused, in which he took the witness stand and, so far as the record shows, sustained himself through a searching cross-examination, in a categorical denial of the, to me, utterly incredible stories of the prosecuting witnesses.

But even if the evidence in the case were deemed by me credible I still should conclude that the judgment should be reversed for the purely legal reason which I shall now state.

When the state closed its evidence in rebuttal the prosecuting attorney requested the court (there was no jury) to view the scene of the murder. To this counsel for the accused assented but with the request that "no testimony be taken because it produced great confusion when trying to examine witnesses at the place of the occurrence." To this request the prosecuting attorney replied: "What Mr. Southworth says would be very advisable, but I believe it would be very advisable also not to dispense with the task in which the court may exercise its discretion, so that when said court arrives there *it may ask of unknown persons where the deceased fell, where the wad was found, where Gatmaitan was, and where Mateo Arcilla was.*"

Then this follows:

"The Court: The court has no objection to making that inspection after the defense has produced its rebuttal evidence, *not showing in the record the result of said inspection.*

Mr. Southworth: We have no rebuttal evidence.

The Court: So that we may close the case?

Mr. Chicote: Yes, sir.

The Court: Good, tomorrow you may present your arguments. The session of the court is closed."

The record further shows that the judge visited the scene of the murder, that Valdez was confined in prison several miles away at the time of the visit and that he was neither required nor invited to be present at the view.

The visit to the scene by the judge without the presence of the accused is assigned as one of the reasons why a new trial should be granted, on the ground that such action violated § 5 of the Act of Congress of July 1st, 1902,

known as the "Philippine Bill," and also Article VI of the Amendments to the Constitution of the United States, providing that the accused "shall enjoy the right to be confronted with the witnesses against him."

What was done by the judge at this view is the subject of much dispute and conflict of statement made in affidavits on motion for a new trial. A typical statement in the interest of the accused of what occurred is made by his attorney, who is described in the record as a reputable member of the bar, who stated that the widow of the deceased explained to the judge what she claimed had taken place on the night of the murder, pointing out where the deceased had fallen, and discussing many other matters in connection with the case, she weeping and wringing her hands all of the time that such interview was in progress, and that one Crockett, a constable, was active in indicating to the court various points and circumstances connected with the murder, all of this against objections made by counsel as to the conduct of the widow and Crockett.

A typical affidavit introduced by the State was by the private prosecutor Buencamino, who stated that he was present at the view, that the judge "neither received any evidence nor admitted any testimony referring to the case then being prosecuted against Valdez, and according to my best recollection I did not see the widow crying, but I saw her at a place distant from the judge. I also state that Captain Crockett did not give any evidence before the judge."

An assistant attorney for the Government made affidavit that at no time did he see the widow crying or talking to the judge, or illustrating how her husband had fallen.

However, a photograph of the scene at the time of the view indicates that it must have been a very unusual local event for a large crowd was present, and in this photograph the widow is shown in a position which must have been

very close to the judge and it is very significant that there is no statement from the judge as to just what he did and as to what occurred at the view.

It has long been familiar, textbook, law, that a viewing of the premises where the crime is alleged to have been committed is part of the trial. Thus, in Wharton's Criminal Pl. & Pr., 9th ed., § 707, it is said: "The visit [of the jury] must be made . . . in the presence of the accused, who is entitled to have all evidence received by the jury taken in his presence." And in Enc. of Pl. & Pr., vol. XXII, p. 1059, it is said: "In criminal cases the accused is entitled to be present if the jury is sent to view the *locus* of the crime, as a view in the absence of the accused would violate his constitutional right to appear in person and be confronted with the witnesses against him."

But the law upon this subject has been recently summed up by this court (*Diaz* v. *United States*, 223 U. S. 442, 454) in an admirable statement, which in my judgment rules the case before us, and is as follows:

"We are thus brought to the question whether the provision in § 5 of the Philippine Civil Government Act, securing to the accused in all criminal prosecutions 'the right to be heard by himself and counsel,' makes his presence indispensable at every stage of the trial, or invests him with a right which he is always free to assert but which he also may waive by his voluntary act. Of course if that provision makes his presence thus indispensable, it is of no moment that the Philippine laws do not go so far, for they cannot lessen its force or effect. *An identical or similar provision* is found in the constitutions of the several States, and its substantial equivalent *is embodied in the Sixth Amendment to the Constitution of the United States.* It is the right which these constitutional provisions secure to persons accused of crime in this country *that was carried to the Philippines by the congressional enactment, and, therefore, according to a familiar rule,*

the prevailing course of decision here may and should be accepted as determinative of the nature and measure of the right there. Kepner v. *United States*, 195 U. S. 100, 124.

". . . In cases of felony our courts, with substantial accord, have regarded it as extending to every stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict, and as being *scarcely less important to the accused than the right of trial itself. And with like accord they have regarded an accused who is in custody and one who is charged with a capital offense as incapable of waiving the right;* the one, because his presence or absence is not within his own control, and the other because, in addition to being usually in custody, he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction. . . .

"The reasoning upon which this rule of decision rests is clearly indicated in *Barton* v. *State*, *supra*, [67 Georgia, 653] where it is said by the Supreme Court of Georgia:

"'It is the right of the defendant in cases of felony . . . to be present at all stages of the trial—especially at the rendition of the verdict, and if he be in such custody and confinement . . . as not to be present unless sent for and relieved by the court, the reception of the verdict during such compulsory absence is so illegal as to necessitate the setting it aside. . . . The principle thus ruled is good sense and sound law; because he cannot exercise the right to be present at the rendition of the verdict when in jail, unless the officer of the court brings him into the court by its order.'"

It is difficult to imagine a case which would show the value of this rule more strongly than the case we are considering. If the description of what occurred as given by counsel for the defendant is even approximately true it is not improbable that even the most stoical judge might have been influenced by it, and the presence of the defendant might very well have had a counterbalancing

influence, and in addition to this he was entitled to the benefit of any suggestion which he might have been able to make through his counsel.

It is very clear to my mind that *Diaz* v. *United States*, *supra*, in principle rules this case and that the viewing of the scene of the murder by the judge without the presence of the accused requires that it be reversed and a new trial granted.

That the conclusion I have reached in this case is not idiosyncratic or the result of an undue regard for a man's life when it is adequately proved to have been forfeited under the law is, I think, sufficiently shown by the fact that two of the members of the Supreme Court of the Philippine Islands expressed their estimate of the case made against Valdez by this record in these terms:

Moreland, J., dissenting: "I dissent. I think that the least the accused is entitled to under the facts and the law is a new trial. I believe, however, that he is entitled to an acquittal upon the facts as presented." And

Grant T. Trent, J.: "I dissent on the ground that . . . the prosecution has not proved the guilt of the appellants of the crime of which they were convicted."

For the reasons thus stated, I am of opinion that this record does not show any credible testimony supporting the judgment, that upon the authorities cited it rests upon error of law gravely prejudicial to the accused and that it therefore should be reversed and a new trial granted.

I am authorized to say that the CHIEF JUSTICE concurs in this opinion.

EX PARTE INDIANA TRANSPORTATION COMPANY, PETITIONER.

ON PETITION FOR WRIT OF PROHIBITION.

No. 25, Original. Argued May 21, 1917.—Decided June 11, 1917.

The foundation of jurisdiction is physical power.

Appearance in answer to a citation issued upon a libel *in personam* does not empower the court to introduce new claims of new claimants into the suit without service on the defendant and against his will.

After defendant had appeared in a suit against it for causing the death of one person, the court allowed to be filed an amended libel introducing 373 new libellants, each alleging a distinct cause of action based on as many other deaths due to the same accident. Defendant excepted to the amended libel upon the ground that it was contrary to law (1) because it joined 373 new libellants who had separate causes of action, and (2) because it could not "in law, in this case, be called upon to answer the said amended libel as to 373 additional libellants." *Held* that this was not a general appearance and that want of service upon the defendant was sufficiently set up by the second ground of exception.

Quære: Whether the principles of waiver and appearance are not modified in a case where the defendant is already in court and the objection to jurisdiction relates to the introduction of new complainants?

When objections to the jurisdiction have been overruled, the defendant does not waive them by pleading to the merits.

Prohibition granted.

THE case is stated in the opinion.

Mr. Charles E. Kremer and *Mr. Russell Mott* for petitioner.

Mr. Harry W. Standidge (by special leave) in support of return of respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

The suit in which this writ of prohibition is sought was originally a libel *in personam* against the petitioner, an Indiana corporation, and others, for causing the death of one Dawson through the capsizing of the steamer Eastland in the Chicago River. The libel was filed on August 21, 1915. A citation was served upon an agent of the petitioner within the district and the petitioner filed exceptions to the libel. On July 24, 1916, leave was granted "to certain parties" to intervene as libellants, and a citation to respondents not served was ordered, returnable the first Monday in September. At this time the petitioner was not subject to service in the district and was not served with process. The "certain parties" mentioned in the order seem to have been 373 other libellants each alleging a distinct cause of action for death due to the same accident. The petitioner excepted that the amended libel was contrary to law because it joined 373 other libellants who had separate causes of action, and also because the petitioner could not in law be called on to answer the amended libel as to 373 additional libellants. The exceptions were overruled and the petitioner directed to answer in twenty days from the date of the order, September 18, 1916. Thereupon the petitioner, not waiving its previous exceptions, on October 7 again excepted that the court had not jurisdiction over it in respect of the additional libellants and that the libel did not state a cause of action against it. On October 25 this petition was filed.

The foundation of jurisdiction is physical power. If a defendant's body were in custody by arrest, or a vessel were held by proceedings *in rem*, it well might be that new claims would be entertained against the person or against the ship, in addition to those upon which the arrest was made. *The Oregon*, 158 U. S. 186, 210. But appearance in answer to a citation does not bring a defendant under

the general physical power of the court. He is not supposed even by fiction to be in prison. Conventional effect is given to a decree after an appearance because when power once has been manifested it is to the advantage of all not to insist upon its being maintained to the end. *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346, 353. That, however, is the limit of the court's authority. Not having any power in fact over the defendant unless it can seize him again, it cannot introduce new claims of new claimants into an existing suit simply because the defendant has appeared in that suit. The new claimants are strangers and must begin their action by service just as if no one had sued the defendant before. *The Oregon*, 158 U. S. 186, 205, 210. We may repeat with more force concerning defendants what was said *alio intuitu* in a New Jersey case cited in *Reynolds* v. *Stockton*, 140 U. S. 254, 268. "Persons by becoming suitors do not place themselves for all purposes under the control of the court."

The only question is whether the petitioner lost its rights by its mode of asserting them; the argument for the respondent being that the exceptions above mentioned amounted to an appearance and plea to the merits, and that thus the absence of service was cured. But it is to be remembered that the motion for leave to intervene was a motion in the cause in which petitioner already had appeared. We should not be astute to treat recognition that it was in court as the case stood before the motion to let in upon it an avalanche of new claims, as waiving what it was the prime and only purpose of the exceptions to prevent. The language of the first exceptions was not as explicit as it might have been but the absence of service seems to us sufficiently covered by the words, "Because the above-named respondent cannot in law, in this case, be called upon to answer the said amended libel as to 373 additional libellants."

The second exception, still insisting on the petitioner's

denial that the court had jurisdiction of it in respect of the new claims set up, pleaded further, upon the rule to answer, that the amended libel did not state a cause of action. But if the principles of waiver and appearance by pleading to the merits are not modified in a case where the defendant already is in court, it is true at least that when objections to the jurisdiction have been overruled the defendant does not lose its rights by pleading to the merits. *Harkness* v. *Hyde*, 98 U. S. 476. The District Court attempted to exceed its jurisdiction and the writ of prohibition should be granted.

Rule absolute.

PAINE LUMBER COMPANY, LIMITED, ET AL. *v.* NEAL, INDIVIDUALLY AND AS SECRETARY AND TREASURER OF THE JOINT DISTRICT COUNCIL OF NEW YORK AND VICINITY OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS OF AMERICA, ET AL.

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

No. 24. Argued May 3, 4, 1915; restored to docket for reargument June 12, 1916; reargued October 24, 25, 1916.—Decided June 11, 1917.

A private party cannot maintain a suit for an injunction under § 4 of the Sherman Anti-Trust Law.

Such action upon the part of a labor union as is involved in this case is not subject to be enjoined under the laws of New York in a private suit.

214 Fed. Rep. 82, affirmed.

THE case is stated in the opinion.

Mr. Walter Gordon Merritt and *Mr. Daniel Davenport* for appellants:

The combination falls within that class of restraints of trade intended to coerce third parties and strangers from engaging in interstate trade except on conditions that the combination imposes, and therefore violates the Federal Anti-Trust Law.

The object is to control conditions of manufacture by preventing the sale and use of manufactured articles unless they come from mills operated and exclusively manned by members of the combination. It is a combination between the sources of production and those who control distribution and consumption, to limit the market to producers joining such combination. According to the defendants' contention, they must protect the union mills from the competition of non-union mills because, under the natural law of trade and competition, the union mills cannot survive with their increased cost of production. The rule against using or working on open shop "trim" was therefore adopted to destroy open shop competition. The Master Carpenters' Association also take active steps to enforce this régime in order to protect themselves from the competition of independent contractors using such material.

The conceded purpose is to increase profits and wages in the union mill and to do this by the only possible method by which men working on buildings could accomplish such a purpose, viz: restraining trade or commerce by making open shop products unsalable. There is no relation between the buildings and the factories except commerce, so that the only way in which the conditions in the mills can be affected by the conduct of the men at the buildings is by controlling commerce.

The union manufacturers and their employees have an undoubted interest in extending the sale and use of any merchandise which is produced by their joint efforts,

and may, therefore, justify and excuse any injury which they inflict upon their competitors by the ordinary methods of legitimate competition. They cannot, however, by association or combination with journeymen who have no such interest, but exercise a despotic control over the use and installation of such products, destroy the competition of business rivals and monopolize the market. This is no ordinary labor case, but an instance where the defendants are seeking to project their influence into trade and commerce for the purpose of preventing the sale and distribution of completed articles of common use produced by their competitors. It is an attempt to drive open shop products out of commerce.

The distinction between a combination where parties subject themselves to a self-imposed restraint, and a combination which has also the objective purpose of interfering with outsiders, has been recognized by this court, which holds that the latter combination implies a wrongful purpose. *United States* v. *Patten*, 226 U. S. 525; *Loewe* v. *Lawlor*, 208 U. S. 274; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *Thomsen* v. *Union Castle Mail S. S. Co.*, 166 Fed. Rep. 251; *State* v. *Duluth Board of Trade* (Minn.), 121 N. W. Rep. 395; *Brown & Allen* v. *Jacobs Pharmacy* (Ga.), 41 S. E. Rep. 553.

If the object of the combination be the illegal one described, it is immaterial that the means are otherwise innocent and lawful. There is nothing talismanic about the right to strike which excepts it from this universal and wholesome rule of law. *Aikens* v. *Wisconsin*, 195 U. S. 204; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *Reading Co.*, 226 U. S. 324; *Loewe* v. *Lawlor*, *supra*.

This doctrine that an act otherwise legal may become illegal when exercised in furtherance of an illegal con-

spiracy has been frequently applied in the case of strikes. [Citing numerous authorities.]

If the means employed are calculated and intended to restrain interstate trade, it is immaterial that they are to be performed or operate entirely within the limits of one State. *Loewe* v. *Lawlor, supra; United States* v. *Reading Co., supra; Swift & Co.* v. *United States,* 196 U. S. 375; *Northern Securities Co.* v. *United States,* 193 U. S. 197; *United States* v. *Terminal R. R. Assn.,* 227 U. S. 683.

The case at bar is undistinguishable in principle from the cases of *Montague* v. *Lowry,* 193 U. S. 38; *Loewe* v. *Lawlor, supra; Eastern States Retail Lumber Dealers' Assn.* v. *United States,* 234 U. S. 600, and *Lawlor* v. *Loewe,* 235 U. S. 522. The judges in the lower court entertained no doubt as to the applicability of the Anti-Trust Law. *Irving* v. *Neal,* 209 Fed. Rep. 471; *Paine* v. *Neal,* 212 Fed. Rep. 259 (case at bar).

The complainants, being irreparably injured in their property rights by acts in violation of the Anti-Trust Law, are entitled to an injunction. The jurisdiction of the District Court was invoked both on account of diversity of citizenship and the Anti-Trust Law. The complainants appealed to its general equitable powers to protect them from irreparable injury to their property rights by unlawful and criminal acts. To deny the power and duty of the chancellor to protect property rights from irreparable injury due to criminal acts, involves an overthrow of fundamental principles and unfortunate consequences which would be far-reaching. If the Federal Anti-Trust Law supersedes all other law relative to combinations which restrain interstate trade and is to be construed as denying the right of an injunction to a private party, then persons irreparably injured in their property rights by such criminal acts, which were exclusively in restraint of interstate trade, would be deprived of their property without due process of law. The federal statute is only

declaratory of the common law without adding to or subtracting from the substantive offense; it specifies the remedies of treble damages, confiscation, and injunction by the government, which were not available under the common law, and, by making restraints which were purely subjective in their nature affirmatively unlawful, entitles a private party suffering damage therefrom to all available civil remedies. Since the law does not lay down any new rule as to combinations which are legal or illegal, the remedies which it prescribes are cumulative and do not exclude common-law remedies.

The law should be construed with a view to suppressing the mischief and advancing the remedy for which it is obviously designed, and to carry with it all the incidents and available remedies which usually accompany such statutes. Upon this question, however, the lower courts are in disagreement.

The cases holding that parties injured by acts in violation of this law are entitled to an injunction under general equitable principles are as follows: *Bigelow* v. *Calumet & Hecla Mining Co.*, 155 Fed. Rep. 877; affd. 167 Fed. Rep. 721; *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. Rep. 279; *Mannington* v. *Hocking Valley Ry. Co.*, 183 Fed. Rep. 140; *De Koven* v. *Lake Shore & Michigan Southern Ry. Co.*, 216 Fed. Rep. 955; *Hitchman Coal & Coke Co.* v. *Mitchell*, 202 Fed. Rep. 512; *Walsh* v. *Association of Plumbers* (Mo.), 71 S. W. Rep. 455. [Counsel then cited contrary decisions of the lower federal courts, a number of which are mentioned in the dissenting opinion.]

It is our contention that under general principles any person specially injured in his property rights by criminal or unlawful acts is entitled to the usual and appropriate civil remedies to protect him therefrom, and that there is nothing in the Sherman Act which deprives him of that right or contracts the power of the District Court to grant

him injunctive relief. *Hayes* v. *Michigan Central R. R. Co.*, 111 U. S. 228; *Willy* v. *Mulledy*, 78 N. Y. 314; *Mairs* v. *Baltimore & Ohio R. R. Co.*, 175 N. Y. 413; *Huda* v. *American Glucose Co.*, 154 N. Y. 481; *Angle* v. *Chicago & St. Paul Co.*, 151 U. S. 2; *Bitterman* v. *Louisville & Nashville R. R. Co.*, 207 U. S. 206; 1 Rev. Swift's Dig., side page 553; *In re Debs*, 158 U. S. 593, 594; *Cooper* v. *Whittingham*, 15 Ch. Div. 501; *Parker* v. *Barnard*, 135 Massachusetts, 120; *Hayes* v. *Porter*, 22 Maine, 371; *Toledo A. A. & N. M. Ry. Co.* v. *Penn Co.*, 54 Fed. Rep. 730; *Hardie-Tynes Mfg. Co.* v. *Cruse* (Ala.), 66 So. Rep. 657; *Thomas* v. *N. O. & T. P. Ry. Co.*, 62 Fed. Rep. 821.

The fact that Congress has since given a private individual the right to an injunction, by the Clayton Act, seems to indicate what was its intention under the original act.

The complainants have suffered special damages entitling them to injunctive relief.

The defendants' combination violates §§ 340 and 341 of Article 22 of the General Business Law of New York, and complainants, being irreparably injured in their property rights by such unlawful acts, are entitled to an injunction.

If the acts of the defendants constitute a misdemeanor under the terms of this state statute, then the plaintiffs are entitled to all the appropriate and usual civil remedies, even though those remedies are not prescribed by the statute. It is the settled law of New York that one who is specially injured by an act forbidden by the criminal law is entitled to civil relief. *Kellogg* v. *Sowerby*, 190 N. Y. 370; *Rourke* v. *Elk Drug Co.*, 77 N. Y. Supp. 374; *Dueber Co.* v. *Howard Co.*, 24 N. Y. Supp. 647; *Straus* v. *American Publishers' Assn.*, 177 N. Y. 473; 193 N. Y. 496; 199 N. Y. 548; 231 U. S. 222; 85 App. Div. 446; *Park & Sons* v. *National Druggists' Assn.*, 175 N. Y. 1; *Locker* v. *American Tobacco Co.*, 195 N. Y. 565. The statute is little more

than a codification of the common law. *Matter of Davies*, 168 N. Y. 89; *People* v. *American Ice Co.*, 120 N. Y. Supp. 443. The commodities produced by plaintiffs are included. The motive which actuates the members of the combination is immaterial, but the purpose and object of the combination is material. *Kellogg* v. *Sowerby*, 190 N. Y. 370; *People* v. *American Ice Co.*, 120 N. Y. Supp. 443; *Schwarcz* v. *International Union*, 124 N. Y. Supp. 968; *State* v. *Minneapolis Milk Co.* (Minn.), 144 N. W. Rep. 417. If the plaintiffs are to prevail under this statute, it is because the acts of the defendants constitute a public offense forbidden by the statute and have resulted in injury to the plaintiffs. The character of the participants is immaterial. The fact that the defendants are endeavoring to suppress competition in the supply and price of completed articles in common use removes their combination and conduct from the case of *National Protective Assn.* v. *Cumming*, 170 N. Y. 315, and brings them within the purview of the Anti-Trust Law. *Rourke* v. *Elk Drug Co.*, 77 N. Y. Supp. 375; *Loewe* v. *Lawlor*, 208 U. S. 274.

If the combination of the defendants is illegal, then every act in furtherance thereof, though otherwise innocent and constitutionally protected, becomes illegal because done in furtherance of the illegal purpose. Acts which might be innocent when done by one person may become illegal when done by a number in combination in violation of the statute. *Rourke* v. *Elk Drug Co.*, 77 N. Y. Supp. 375; *Locker* v. *American Tobacco Co.*, 195 N. Y. 565; *Locker* v. *American Tobacco Co.*, 106 N. Y. Supp. 118 (Judge Gaynor's opinion); *Walsh* v. *Dwight*, 58 N. Y. Supp. 91.

Generally as to the application of this law to cases like the present, see *People* v. *McFarlin*, 89 N. Y. Supp. 527; *Irving* v. *Neal*, 209 Fed. Rep. 471; *Paine* v. *Neal*, 212 Fed. Rep. 259; *Gill Engraving Co.* v. *Doerr*, 214 Fed. Rep. 111. Within the meaning of this act defendants' combination

(a) seeks to create and maintain a monopoly in the manufacture, production and sale of the articles in question. Their own reports show that they have already acquired a complete monopoly at higher prices of trade in wood trim on the Island of Manhattan, thereby terminating all trade in that borough with any open shops, *People* v. *American Ice Co.*, 120 N. Y. Supp. 443. (b) It attempts to restrain or prevent competition in the supply and price of these articles. (c) It seeks to restrain or prevent the free pursuit of a lawful trade or business, in order thereby to create or maintain a monopoly in the production and sale of these articles. *Straus* v. *American Publishers' Assn., supra; People* v. *McFarlin*, 89 N. Y. Supp. 527; *Cummings* v. *Union Blue Stone Co.*, 164 N. Y. 401; *Arnot* v. *Pittston Coal Co.*, 68 N. Y. 558.

The restraint is not incidental to any legitimate end which the defendants seek, but is the direct purpose of the combination. The benefits sought by the defendants are the result of the restraint of trade, and the restraint of trade is not the result of the benefits or incidental to them.

The defendants' combination violates subdivision 6 of § 580 of Article 54 of the Penal Law of New York; also subdivision 5 of § 580 of that law; also § 530 of Article 48 of that law.

Section 582 of the Penal Law of New York is declaratory of the common law and does not legalize the defendants' acts.

A combination of traders, to promote their own interests by suppressing the competition of rivals, is illegal at common law and it is immaterial whether the combination aims at one rival or a class of rivals. If the complainants are being irreparably injured in their property rights by unlawful acts committed within the State, they would be entitled to relief regardless of the existing federal law, whether those acts were unlawful at common law or because of some state statute.

The facts establish a combination to cause strikes against customers of complainants for the purpose of preventing the sale of their products as long as they operate an open shop, and is, in effect, a secondary boycott of the complainants, which is unlawful. [Citing many authorities].

The combination of defendants to bring about the employment of members of their organization exclusively in their industry throughout an entire community is unlawful. [Counsel here went into an analysis of the means employed and the rights affected and dangers involved, referring to numerous authorities.]

The relief prayed for will not interfere with the legal provisions of any of the arbitration agreements.

Complainants are entitled to an injunction under § 16 of the Clayton Act, of October 15, 1914. This section is declaratory of ancient common-law principles and is highly remedial, and should be construed so as to advance the remedy. It was meant to remove doubt arising from divergent federal decisions, and is to be taken as a legislative construction of the prior law, of retrospective operation, applicable to pending suits like this. *Bailey* v. *Clark*, 21 Wall. 284; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Missouri Pacific Ry. Co.* v. *United States*, 189 U. S. 274; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115; *Sampeyreac* v. *United States*, 7 Pet. 222; *United States* v. *The Schooner Peggy*, 1 Cranch, 105.

It was not the intention by § 6 of the Clayton Act to change in any respect the Sherman Anti-Trust Act as it had been construed and applied by this court in any case. The history of the legislation, shown by the committee reports and even the debates in Congress, establishes this. Moreover, the act in § 4 re-enacts, word for word, § 7 of the Sherman Anti-Trust Act, under which the *Loewe Case* was brought to and decided by this court, without excepting that or any other case from its provisions,

which action, upon established principles of construction, is an adoption by Congress of the doctrines of that case.

The presence of § 6 in the act is due to the fact that it was thought desirable to put at rest the contentions of some, that the existence of labor unions for legitimate purposes was forbidden by the Sherman Anti-Trust Act.

Section 20 of the Clayton Act has obviously no application since here the relation of employer and employee does not exist actually or prospectively between the contending parties.

It is further obvious that the various acts mentioned in § 20, against which injunctions shall not issue in this limited class of cases, are most of them acts which in and of themselves are ordinarily lawful, and that this section accomplishes no other purpose than to declare the previously existing law on this subject. The recognition of a right by a statute, such as the Clayton Act, will not justify the exercise of that right in furtherance of a criminal conspiracy, which is expressly defined by the same statute. *Aikens* v. *Wisconsin*, 195 U. S. 194; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 439.

Otherwise construed, the Clayton law would be unconstitutional as class legislation, and depriving persons of property without due process of law. *Cleland* v. *Anderson*, 66 Nebraska, 252; *Connolly* v. *Union Pipe Co.*, 184 U. S. 540.

It is proper for the complainants to unite as co-plaintiffs since they were all similarly affected by the same combination.

Mr. Charles Maitland Beattie for the labor union appellees.

Mr. Frederick Hulse for appellees.

Mr. Anthony Gref, *Mr. Charles J. Hardy* and *Mr. Fred-*

erick P. Whitaker filed a brief in behalf of appellee James Elgar, Inc.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by corporations, of States other than New York, engaged in the manufacture of doors, sash, etc., in open shops, against officers and agents of the United Brotherhood of Carpenters and Joiners of America and of the New York branch of the same, certain union manufacturers of doors, sash, etc., members of the Manufacturing Wood Workers' Association, and many master carpenters, members of the Master Carpenters' Association, whose business is to install such products in buildings. The bill was dismissed by the District Court, 212 Fed. Rep. 259, and the decree was affirmed by the Circuit Court of Appeals. 214 Fed. Rep. 82; 130 C. C. A. 522.

The bill alleges a conspiracy of the members of the Brotherhood and the New York branch to prevent the exercise of the trade of carpenters by any one not a member of the Brotherhood, and to prevent the plaintiffs and all other employers of carpenters not such members from engaging in interstate commerce and selling their goods outside of the State where the goods are manufactured, and it sets out the usual devices of labor unions as exercised to that end. In 1909 the Master Carpenters, coerced by the practical necessities of the case, made an agreement with the New York branch, accepting a previously established joint arbitration plan to avoid strikes and lockouts. This agreement provides that "there shall be no restriction against the use of any manufactured material except non-union or prison made"; the arbitration plan is confined to shops that use union labor and the employers agree to employ union labor only. The unions will not erect material made by non-union mechanics.

Another agreement between the Manufacturing Wood Workers' Association, the Brotherhood and the New York branch also adopts the plan of arbitration; the labor unions agree that "none of their members will erect or install non-union or prison made material," and the Wood Workers undertake that members of the Brotherhood shall "be employed exclusively in the mills of the Manufacturing Wood Workers' Association." It is found that most of the journeymen carpenters in Manhattan and part of Brooklyn belong to the Brotherhood, and that owing to their refusal to work with non-union men and to employers finding it wise to employ union men, it is very generally impracticable to erect carpenter work in those places except by union labor. It also is found that owing to the above provisions as to non-union material the sale of the plaintiffs' goods in those places has been made less. The workmen have adopted the policy complained of without malice toward the plaintiffs, as part of a plan to bring about "a nation-wide unionization in their trade."

An injunction is asked against the defendants' (other than the Master Carpenters) conspiring to refuse to work upon material made by the plaintiffs, because not made by union labor; or enforcing by-laws intended to prevent working with or upon what is called unfair material; or inducing persons to refuse to work for persons purchasing such material, or taking other enumerated steps to the same general end; or conspiring to restrain the plaintiffs' interstate business in order to compel them to refuse to employ carpenters not members of the Brotherhood. It is prayed further that the provision quoted above from the Master Carpenters' agreement and another ancillary one be declared void and the parties enjoined from carrying them out. No other or alternative relief is prayed. The ground on which the injunction was refused by the District Court was that, although it appeared that the agreements above mentioned were parts of a comprehen-

sive plan to restrain commerce among the States, the conspiracy was not directed specially against the plaintiffs and had caused them no special damage, different from that inflicted on the public at large. The Circuit Court of Appeals, reserving its opinion as to whether any agreement or combination contrary to law was made out, agreed with the judge below on the ground that no acts directed against the plaintiffs personally were shown.

In the opinion of a majority of the court if the facts show any violation of the Act of July 2, 1890, c. 647, 26 Stat. 209, a private person cannot maintain a suit for an injunction under § 4 of the same, *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 70, 71, and especially such an injunction as is sought; even if we should go behind what seems to have been the view of both courts below, that no special damage was shown, and reverse their conclusion of fact. No one would maintain that the injunction should be granted to parties not showing special injury to themselves. Personally, I lay those questions on one side because, while the Act of October 15, 1914, c. 323, § 16, 38 Stat. 730, 737, establishes the right of private parties to an injunction in proper cases, in my opinion it also establishes a policy inconsistent with the granting of one here. I do not go into the reasoning that satisfies me, because upon this point I am in a minority.

As this court is not the final authority concerning the laws of New York we say but a word about them. We shall not believe that the ordinary action of a labor union can be made the ground of an injunction under those laws until we are so instructed by the New York Court of Appeals. *National Protective Association of Steam Fitters & Helpers* v. *Cumming*, 170 N. Y. 315. Certainly the conduct complained of has no tendency to produce a monopoly of manufacture or building since the more successful it is the more competitors are introduced into the trade. Cases like *Kellogg* v. *Sowerby*, 190 N. Y. 370,

concerning conspiracies between railroads and elevator companies to prevent competition, seem to us very clearly not to have been intended to overrule the authority that we cite, and not to have any bearing on the present point.

Decree affirmed.

MR. JUSTICE PITNEY, with whom concurred MR. JUSTICE MCKENNA and MR. JUSTICE VAN DEVANTER, dissenting.

Appellants, who were complainants below, filed their bill in the United States Circuit Court (afterwards District Court) in the month of February, 1911, to obtain an injunction against the prosecution of a conspiracy to restrain interstate trade and commerce in the products of complainants' woodworking mills and destroy their interstate business by means of a boycott. The federal jurisdiction was invoked both on the ground of diverse citizenship and on the ground that the action arose under the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209. Upon the merits, the laws of the State of New York were relied upon, as well as the federal act. (General Business Law of N. Y., § 340; Penal Law of N. Y., § 580, subd. 6.)

It was found by the District Court (212 Fed. Rep. 259, 263, 266) that the defendants were engaged in a combination directly restraining competition between manufacturers and operating to restrain interstate commerce, in violation of both federal and state acts. The Circuit Court of Appeals assumed this to be so (214 Fed. Rep. 82), and there is no serious dispute about it here. The District Court dismissed the bill, upon the ground that injunctive relief under either statute could be had only at the instance of the United States, or the State of New York, as the case might be, and therefore complainants could not have relief in this suit; citing *National Fireproofing*

Co. v. *Mason Builders' Association*, 169 Fed. Rep. 259, 263. The Circuit Court of Appeals affirmed the decree upon the ground that defendants' acts were not malicious and not directed against the individual complainants personally, and hence relief by injunction could not be granted, irrespective of whether the particular combination in question was obnoxious either to the common law or to the statutes. This decision was rendered on April 7, 1914.

In this court, the prevailing opinion is that, although the facts show a violation of the Sherman Act, a private person cannot maintain a suit for an injunction under its fourth section. I dissent from the view that complainants cannot maintain a suit for an injunction, and I do so not because of any express provision in the act authorizing such a suit, but because, in the absence of some provision to the contrary, the right to relief by injunction, where irreparable injury is threatened through a violation of property rights and there is no adequate remedy at law, rests upon settled principles of equity that were recognized in the constitutional grant of jurisdiction to the courts of the United States. I think complainants were entitled to an injunction also upon grounds of state law; but will confine what I have to say to the federal question.

The proofs render it clear that defendants are engaged in a boycotting combination in restraint of interstate commerce prohibited by and actionable under the Sherman Law, on the authority of *Montague & Co.* v. *Lowry*, 193 U. S. 38, 44–48; *Loewe* v. *Lawlor*, 208 U. S. 274, 292, *et seq.*; *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600, 614; *Lawlor* v. *Loewe*, 235 U. S. 522, 534. The proof is clear also that the conspiracy is aimed at the property rights of complainants in particular; certainly that it is designed to injure directly and drive out of business a limited class of traders—the so-called "non-union" woodworking mills—to which complainants belong; that complainants are sustaining direct

and serious injury through the closing of the channels of interstate trade to their products, an injury quite different from that suffered by the public in general; and that it is a continuing injury not adequately remediable by the ordinary action at law or the action for treble damages under the Sherman Act, and hence is an irreparable injury in the sight of equity. That there is no particular animosity towards complainants as individuals—assuming it to be true—is, in my view, a matter of no consequence. If evidence of malice be necessary (and I do not think it is), this is only in the sense that malice consists in the intentional doing of an unlawful act, to the direct damage of another, without just cause or excuse. *Brennan* v. *United Hatters*, 73 N. J. L. 729, 744.

Free access to the markets through unobstructed channels of commerce is the very breath of the life of such manufacturing establishments; and to say that complainants are not specially injured by the conduct of defendants seems to me to require that the eyes be closed to the evidence in the case and to the familiar facts of commerce. I do not understand either of the courts below to have held as matter of fact that complainants were not specially injured; but that the District Court (212 Fed. Rep. 267), while finding in fact that complainants were directly injured, reasoned (erroneously, as I think,) that it was not such special injury as was contemplated by certain New York decisions cited.

Section 1 of the Sherman Act declares that every combination or conspiracy in restraint of trade or commerce among the several States or with foreign nations is illegal, and imposes a punishment of fine or imprisonment upon the guilty parties. It clearly recognizes, what is well known, that injury to other traders and competitors is the primary effect of such a combination. A right of action for damages by a party specially aggrieved would have followed by implication (*Texas & Pacific Ry. Co.*

v. *Rigsby*, 241 U. S. 33, 39); and it was doubtless because treble damages were to be allowed that an express authorization of suit at law was included in the act. Section 7.

The fourth section provides: "The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations," etc. The act was designed to be highly remedial, so far as *preventing* restraints of trade and commerce is concerned, and the semi-colon in the sentence just quoted indicates, as I think, that the grant of jurisdiction was intended to be general, and that the following clause was intended to impose a special duty upon the district attorneys to resort to that jurisdiction whenever, in the discretion of the Attorney General, a public prosecution should seem to be called for.

Nor is the omission of an express declaration that persons threatened with special injury through violations of the act may have relief by injunction, of particular significance. Declarations of that character are rarely met with in the legislation of Congress.[1] The reason is not far to seek. By § 2 of Article III of the Constitution, the judicial power is made to extend to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States," etc. This had the effect of adopting equitable remedies in all cases arising under the Consti-

[1] Section 16 of the so-called Clayton Act of October 15, 1914, c. 323, 38 Stat. 730, 737, contains such a provision; but this was inserted only because some of the federal courts had held—erroneously, as I think—that private parties could have no relief by injunction against threatened violations of the Sherman Act. These decisions will be discussed below.

tution and laws of the United States where such remedies are appropriate. The federal courts, in exercising their jurisdiction, are not limited to the remedies existing in the courts of the respective States, but are to grant relief in equity according to the principles and practice of the equity jurisdiction as established in England. *Robinson* v. *Campbell*, 3 Wheat. 212, 221, 223; *United States* v. *Howland*, 4 Wheat. 108, 115; *Irvine* v. *Marshall*, 20 How. 558, 565. In *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 339, the court, by Mr. Justice Brewer, declared: "It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress. The principles of equity exist independently of and anterior to all Congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases."

To speak accurately, it is not the statute that gives a right to relief in equity, but the fact that in the particular case the threatened effects of a continuing violation of the statute are such as only equitable process can prevent. The right to equitable relief does not depend upon the nature or source of the substantive right whose violation is threatened, but upon the consequences that will flow from its violation. As the court, by Mr. Justice Field, declared in *Holland* v. *Challen*, 110 U. S. 15, 25: "If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."

To take a familiar example: The Constitution of the United States does not declare in terms that infringements of the rights thereby secured may be prevented by injunction. Ordinarily they may not be. It is only where a threatened infringement will produce injury and damage for which the law can afford no remedy—such, for instance, as irreparable and continuing damage, or a

multiplicity of suits—that resort may be had to equity; and when this does appear, the right to an injunction arises because that is the only appropriate relief. *Osborn* v. *United States Bank*, 9 Wheat. 738, 838–845; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 12, 18; *Fargo* v. *Hart*, 193 U. S. 490, 503.

So, tax laws rarely, if ever, contain express authorization of an injunction to restrain illegal taxes. And a suit in equity will not lie on the mere ground that a tax is illegal. But if, in addition, enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or if the property taxed is real estate and the tax throws a cloud upon the title, equity will interfere by injunction. *Dows* v. *City of Chicago*, 11 Wall. 108, 112; *Hannewinkle* v. *Georgetown*, 15 Wall. 547; *Union Pacific Ry. Co.* v. *Cheyenne*, 113 U. S. 516, 525; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 348; *Ogden City* v. *Armstrong*, 168 U. S. 224, 237; *Ohio Tax Cases*, 232 U. S. 576, 587.

The fact that the threatened invasion of plaintiffs' rights will amount at the same time to an offense against the criminal laws is no bar to relief by injunction at the instance of a private party. *In re Debs*, 158 U. S. 564, 593.

I find nothing in the letter or policy of the Sherman Act to exclude the application of the ordinary principles of equity, recognized in the constitutional grant of jurisdiction. Applying them to the facts of the present case, appellants are entitled to an injunction to restrain the threatened, continuing, and irreparable injury and damage that otherwise will result from defendants' violation of the act.

The special duty imposed upon the Attorney General and the district attorneys is not inconsistent with this view. The field to be covered by such public prosecutions, and the objects sought thereby, are quite different from the scope and effect of an injunction granted to a private party threatened with special and irreparable injury to

his property rights through a violation of the act. The proceeding by the district attorney is a kind of equitable *quo warranto*, calculated to bring the entire combination to an end, whether it be in the form of a corporation or otherwise. But there may be and are cases of direct and irreparable injury to private parties resulting from violations of the act, not capable of being redressed through actions at law under § 7; and justice to the parties aggrieved requires that the act be construed, if the language admits of such a construction (and I think it does), so as to allow an injunction to prevent irreparable injury to a private party, otherwise remediless, without going to the extent of dissolving the combination altogether, which in some cases might not be a matter of public interest or importance. Unless so construed, the act must operate in many instances to deprive parties of a right of injunction that they would have had without it. So far at least as boycotting combinations are concerned—and this case is of that character—the act creates no new offense and gives no new right of action. *Temperton* v. *Russell*, 1893, 1 Q. B. Div. 715; *Quinn* v. *Leathem*, 1901, A. C. 495; *Barr* v. *Essex Trades Council*, 53 N. J. Eq. 101, 112–121; *Jonas Glass Co.* v. *Glass Bottle Blowers' Assn.*, 77 N. J. Eq. 219, 225.

I find no controlling decision in this court. *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 71, is not an authority against the right of complainants to an injunction to prevent special and irreparable damage to their property rights through a violation of the Sherman Act; the effect of that decision being merely to deny relief by injunction to individuals not directly and specially injured. There the State of Minnesota sued in one of its own courts under certain statutes of its own, as well as under the Sherman Act, and the case was removed to the United States Circuit Court as being one arising under the Constitution and laws of the United States. The purpose of

the suit was to annul an agreement and suppress a combination alleged to exist between the defendant railroad corporations; and the only threatened injury because of which an injunction was prayed was that the State, being the owner of large tracts of land whose value depended upon free and open competition over the lines of railway involved in the combination, and being the owner of certain public institutions whose supplies must of necessity be shipped over the same railways, it was alleged that the successful maintenance of these institutions as well as the performance by the State of its governmental functions depended largely upon the value of real and personal property situate within the State and the general prosperity and business success of its citizens, and that these in turn depended upon maintaining free and unrestricted competition between the railway lines involved. The court, by Mr. Justice Harlan, said (p. 70) that the threatened injury was at most only remote and indirect, and such as would come alike, although in different degrees, to every individual owner of property in a State by reason of the suppression of free competition between interstate carriers, and was "not such a direct, actual injury as that provided for in the seventh section of the statute"; and that upon the view contended for, "every individual owner of property in a State may, upon like general grounds, by an original suit, *irrespective of any direct or special injury to him* [italics mine], invoke the original jurisdiction of a Circuit Court of the United States, to restrain and prevent violations of the Anti-trust Act of Congress." It was said further (p. 71): "Taking all the sections of that act together, we think that its intention was to limit direct proceedings in equity to prevent and restrain *such violations* of the Anti-trust Act *as cause injury to the general public, or to all alike, merely from the suppression of competition* in trade and commerce among the several States and with foreign nations, *to those instituted*

in the name of the United States. . . . Possibly the thought of Congress was that by such a limitation upon suits in equity of a general nature to restrain violations of the act, *irrespective of any direct injury sustained by particular persons or corporations*, interstate and international trade and commerce and those carrying on such trade and commerce, as well as the general business of the country, would not be needlessly disturbed by suits brought, on all sides and in every direction, to accomplish improper or speculative purposes." [Italics mine.] The reasoning manifestly proceeds upon the assumption that individuals sustaining direct and irreparable injury through a continuing violation of the act would be entitled to an injunction.

Wilder Mfg. Co. v. *Corn Products Refining Co.*, 236 U. S. 165, 174, 175, is not in point. There plaintiff in error, which had purchased, received, and consumed goods from defendant in error, defended a suit for the price upon the ground that defendant in error was an illegal combination in violation of the Sherman Act, and therefore could not sue to recover for goods sold with direct reference to and in execution of agreements that had for their object and effect the accomplishment of the illegal purposes of the combination. The court held that an individual could not defend a suit brought against him on his otherwise legal contract by asserting that the corporation or combination suing had no legal existence because of its violations of the act, the statute having cast upon the Attorney General of the United States the responsibility of enforcing its provisions in that regard.

The question whether private parties threatened with injury through violations of the Sherman Act might (prior to the Clayton Act of October 15, 1914, c. 323, § 16, 38 Stat. 730, 737) have relief by injunction is one upon which the lower federal courts are not in accord. In the present case, the District Court, in dismissing the bill upon the

ground that relief by injunction might be had only at the instance of the United States (212 Fed. Rep. 259, 266), merely cited and relied upon *National Fireproofing Co.* v. *Mason Builders' Association*, 169 Fed. Rep. 259, 263. That case was decided upon the authority of *Greer* v. *Stoller*, 77 Fed. Rep. 1, 3, and *Southern Indiana Exp. Co.* v. *United States Exp. Co.*, 88 Fed. Rep. 659, 663. Reference was made also to *Bement* v. *National Harrow Co.*, 186 U. S. 70, 87, 88, where the point was assumed *arguendo; Post* v. *Railroad*, 103 Tennessee, 184, 228, where it was ruled on the authority of 86 Fed. Rep. 407 and 88 Fed. Rep. 659, 663; and the following cases in the federal courts: *Blindell* v. *Hagan* (C. C.), 54 Fed. Rep. 40, 41; *Hagan* v. *Blindell* (C. C. A.), 56 Fed. Rep. 696; *Pidcock* v. *Harrington* (C. C.), 64 Fed. Rep. 821; *Gulf &c. R. Co.* v. *Miami Steamship Co.* (C. C. A.), 86 Fed. Rep. 407, 420; *Block* v. *Standard Distilling &c. Co.* (C. C.), 95 Fed. Rep. 978; and *Metcalf* v. *American School-Furniture Co.* (C. C.), 108 Fed. Rep. 909. An examination of these cases (including *Greer* v. *Stoller* and *Southern Indiana Exp. Co.* v. *United States Exp. Co.*, *supra*) discloses that *Blindell* v. *Hagan*, 54 Fed. Rep. 40, 41, is the source from which all the others derive the only authority they have for the doctrine that under the Sherman Act the remedy by injunction was available to the Government only. But one or two of the cases contain any reasoning upon the question, and that is meager and unsatisfactory.

Moreover, so far as these cases have held that private parties could have no injunction for a violation of the Sherman Act (some of them have not so held), the real ground of decision in *Blindell* v. *Hagan* was misunderstood. In that case the jurisdiction of the federal court was invoked upon the ground of the alienage of complainants, defendants being citizens of the State of Louisiana, and also upon the ground that defendants were engaged in a combination in restraint of trade between New Orleans

and Liverpool, contrary to the prohibition of the Sherman Act. The Circuit Court, in declining to allow an injunction under the act, said: "This act makes all combinations in restraint of trade or commerce unlawful, and punishes them by fine or imprisonment, and authorizes suits at law for triple damages for its violation, but it gives no new right to bring a suit in equity, and a careful study of the act has brought me to the conclusion that suits in equity or injunction suits by any other than the government of the United States are not authorized by it." Evidently this was intended to be confined to the question of an express authorization of an injunction for a mere violation of the act, for the court proceeded to grant preventive relief on the ground that there was jurisdiction because of the citizenship of the parties, and that under the ordinary equity jurisdiction an injunction should issue because of the threatened irreparable injury and the inadequacy of pecuniary compensation, and in order to prevent a multiplicity of suits. Upon appeal the decree was affirmed, upon the grounds expressed by the court below, 56 Fed. Rep. 696. Since there was no infringement of complainants' rights except through a combination in restraint of foreign trade, as to which manifestly the Sherman Act furnished the exclusive rule of law, the effect of the decision is to allow an injunction to one injured through a violation of that act if he show in addition the ordinary grounds for resorting to equity, such as the probability of irreparable mischief, the inadequacy of a pecuniary compensation, or the necessity of preventing a multitude of suits.

So, in *Bigelow* v. *Calumet & Hecla Mining Co.* (C. C.), 155 Fed. Rep. 869, 876, the court, after reviewing the previous decisions, declared (p. 877): "They do not commend themselves to my judgment so far as they deny the right of a private party, who has sustained special injury by a violation of the Anti-trust Act, to relief by

injunction under the general equity jurisdiction of the court. As already seen, the cases referred to do not generally announce such rule."

Aside from their rights under the Act of 1890, I think appellants are now entitled to an injunction under § 16 of the Clayton Act—the case clearly being within the terms of the section—notwithstanding the act took effect after the final decree in the District Court. In an equity suit for injunction the reviewing court should decide the case according to the law as it exists at the time of its decision. This is not giving a retrospective effect to the new statute, for the relief granted operates only *in futuro*.

The suggestion, in behalf of defendants, that § 6 of the Clayton Act [1] establishes a policy inconsistent with relief by injunction in such a case as the present, by making legitimate any acts or practices of labor organizations or their members that were unlawful before, is wholly inadmissible. The section prohibits restraining members of such organizations from "*lawfully* carrying out the *legitimate* objects thereof." What these are is indicated by the qualifying words: "instituted for the purposes of mutual help, and not having capital stock or conducted for profit." But these are protected only when "lawfully carried out." The section safeguards these organizations while pursuing their *legitimate* objects by *lawful* means, and prevents them from being considered, merely because organized, to be illegal combinations or conspiracies in restraint of trade. The section, fairly construed, has

[1] "Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

no other or further intent or meaning. A reference to the legislative history of the measure confirms this view. House Rep. No. 627, 63d Cong., 2d sess., pp. 2, 14–16; Senate Rep. No. 698, 63d Cong., 2d sess., pp. 1, 10, 46. Neither in the language of the section, nor in the committee reports, is there any indication of a purpose to render lawful or legitimate anything that before the act was unlawful, whether in the objects of such an organization or its members or in the measures adopted for accomplishing them.

It is altogether fallacious, I think, to say that what is being done by the present defendants is done only for the purpose of strengthening the union. Conceding this purpose to be lawful, it does not justify or excuse the resort to unlawful measures for its accomplishment. A member of a labor union may refuse to work with non-union men, but this does not entitle him to threaten manufacturers for whom he is not working, and with whom he has no concern, with loss of trade and a closing of the channels of interstate commerce against their products if they do not conduct their business in a manner satisfactory to him.

And the suggestion that, before the Clayton Act, unlawful practices of this kind were usually and notoriously resorted to by labor unions, and that for this reason Congress must have intended to describe them as "legitimate objects," and thus render lawful what before was unlawful, is a libel upon the labor organizations and a serious impeachment of Congress.

Nor can I find in § 20 of the Clayton Act anything interfering with the right of complainants to an injunction. It refers only to cases "between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment."

These words evidently relate to suits arising from strikes and similar controversies, and the committee reports upon the bill bear out this view of the scope of the section. But this is not such a suit. There is no relation of employer and employee, either present or prospective, between the parties in this case. Defendants who are employees are in one branch of industry in New York City; complainants are employers of labor in another branch of industry in distant States. Nor is there any dispute between them concerning terms or conditions of employment. Section 20 prohibits an injunction restraining any person "from ceasing to patronize or to employ any party to *such dispute*, or from recommending, advising, or persuading others by *peaceful and lawful* means so to do; . . . or from peaceably assembling *in a lawful manner, and for lawful purposes;* or from doing any act or thing *which might lawfully be done in the absence of such dispute* by any party thereto."

Clearly, this provision is limited to the participants in a dispute of the character just indicated. And, quite as clearly, only "lawful" measures are sanctioned—that is, of course, measures that were lawful before the act. There is no grant, in terms or by necessary inference, of immunity in favor of a boycott of traders in interstate commerce, violative of the provisions of the Sherman Act, to which the Clayton Act is supplemental.

MR. JUSTICE MCREYNOLDS also dissents.

HOPKINS ET AL. *v.* WALKER ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

No. 234. Submitted October 18, 1915.—Decided June 11, 1917.

A case arises under the laws of the United States where an appropriate statement of the plaintiff's cause of action, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a controversy respecting the validity, construction or effect of a law of Congress.

A substantial controversy respecting the construction and effect of the mining laws is presented by a case in which the plaintiff sets up title under a placer patent, alleging that the *locus in quo* was not known to contain lodes when the patent was applied for and was so adjudged against strangers to the suit who adversed the application, and in which the defendants, notwithstanding such judgments, claim the same ground under other lode locations made after the patent and embracing claims of the width of 600 feet, while plaintiff contends 25 feet would be the maximum if the ground remained subject to lode location.

In a suit to remove a particular cloud from the plaintiff's title, the facts showing that title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud are essential parts of the plaintiff's cause of action and must be alleged in the bill.

The rule is the same in respect of suits to remove clouds under § 6115 of the Montana Codes of 1907, as distinguished from suits to quiet title under § 6870.

Recorded certificates of location are the first muniment of the locator's paper title and, when verified, are, in Montana, made *prima facie* evidence of all facts properly recited in them (Codes 1907, §§ 2284, 2285); and so, when apparently valid but actually, under the mining laws, invalid, they may becloud the title injuriously.

Reversed.

THE case is stated in the opinion.

Mr. L. O. Evans, Mr. W. B. Rodgers, Mr. D. Gay Stivers,

Mr. D. M. Kelly, Mr. J. L. Templeman, Mr. John A. Shelton and *Mr. H. C. Hopkins* for appellants.

Mr. Thomas J. Walsh for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a direct appeal under § 238, Jud. Code, from a decree dismissing a suit in equity for want of jurisdiction, the question for decision now being whether the case presented by the bill is one arising under the laws of the United States.

With considerable detail the bill alleges that the plaintiffs are the owners of a placer mining claim in Montana for which a United States patent was issued to their predecessors in interest in 1895; that they and their predecessors have been the owners and in actual possession for more than twenty years; that at the time of the application for the patent no mineral-bearing vein or lode was known to exist within the boundaries of this placer claim; that prior to its location two lode locations were made or attempted to be made covering part of it, and while the application for the patent was pending the lode claimants conformed to the mining laws of the United States by filing adverse claims in the local land office and bringing suits to establish them in a court of competent jurisdiction; that the placer claimants prevailed in those suits and certified copies of the judgments were duly filed in the local land office; that further proceedings were then had in the Land Department resulting in the issue of a patent to the placer claimants according to those judgments; and that under the mining laws this passed to the plaintiffs' predecessors a full title to all land and all minerals within the boundaries of the placer claim.

The bill further alleges that notwithstanding the

absence of any known vein or lode within the boundaries of the placer claim at the time of the application for the patent, notwithstanding the judgments in favor of the placer claimants in the two adverse suits and notwithstanding the issue of the patent, several persons claim to have made lode locations at different times from 1900 to 1913 upon part of the placer claim—the part covered by the two earlier lode locations which were unsuccessfully asserted in the adverse suits—and have caused certificates of the location of these later lode claims to be recorded in the office of the clerk of the county wherein the land lies; that these certificates contain declarations and recitals tending to support the lode claims to which they refer—there are nine—and give the length of each claim as 1500 feet and its width as 600 feet; that these lode claims and the certificates were made upon the mistaken theory that under the mining laws the placer patent is wholly invalid as to the ground covered by the two earlier lode claims, and, if this be not so, that the ground in controversy was known at the time of the application for the patent to contain valuable mineral-bearing veins or lodes and therefore, under the mining laws, was excepted from the patent and remained subject to location as lode claims; that, even if there were known mineral-bearing veins or lodes within the placer claim at the time of the application for the patent, no subsequent location of any such vein or lode could be made, under the mining laws, to embrace more than twenty-five feet of the surface on each side of it; that the defendants are claiming the ground in controversy under the later lode claims and the certificates before described; that for the reasons indicated these locations and certificates are invalid and the certificates, as recorded, constitute clouds upon the plaintiffs' title and reduce its market value; and that the determination of the plaintiffs' rights requires a construction of the mining laws under which the proceedings resulting in the patent were had

and a decision of what, according to those laws, passed by the patent and what, if anything, was excepted and remained open to location.

There is also an allegation that the suit is one arising under the laws of the United States and the matter in dispute exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, but there is no allegation of diverse citizenship. The prayer is that the cloud caused by the recording of the certificates of location be removed and the title of the plaintiffs quieted.

It is conceded that the plaintiffs, being in possession, have no remedy at law and that their remedy, if any, is in equity. Our concern is not with this, but with the question whether the case is one arising under the laws of the United States. A case does so arise where an appropriate statement of the plaintiff's cause of action, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of a law of Congress. *Boston &c. Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632; *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Denver* v. *New York Trust Co.*, 229 U. S. 123, 133; *Taylor* v. *Anderson*, 234 U. S. 74. Assuming that the allegations of the bill concerning the nature and validity of the plaintiffs' title and the existence, invalidity and recording of the defendants' certificates of location constitute a part of the plaintiffs' cause of action, it is plain that a controversy respecting the construction and effect of the mining laws is involved and is sufficiently real and substantial to bring the case within the jurisdiction of the District Court. This is practically conceded in the brief for the defendants which says: "The controversy arises by reason of the peculiar provisions of the law [Rev. Stats., § 2333] under which one is permitted to enter upon lands patented as a placer claim and to locate within such claim a lode or lodes known to exist at the time of filing the

application for the placer patent." But it is insisted that the allegations concerning the existence, invalidity and recording of the defendants' certificates of location form no part of the plaintiffs' cause of action and so, for present purposes, must be disregarded. To this we cannot assent.

In both form and substance the bill is one to remove a particular cloud from the plaintiffs' title, as much so as if the purpose were to have a tax deed, a lease or a mortgage adjudged invalid and cancelled. It hardly requires statement that in such cases the facts showing the plaintiff's title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title are essential parts of the plaintiff's cause of action. Full recognition of this is found in the decisions of this and other courts. *Wilson Cypress Co.* v. *Del Pozo*, 236 U. S. 635, 643–644; *Lancaster* v. *Kathleen Oil Co.*, 241 U. S. 551, 554–555; *Walton* v. *Perkins*, 28 Minnesota, 413; *Wals* v. *Grosvenor*, 31 Wisconsin, 681; *Teal* v. *Collins*, 9 Oregon, 89; *Sheets* v. *Prosser*, 16 N. Dak. 180, 183.

If we turn to the statutes and decisions in Montana relating to the right to maintain such suits, we find that the same rule is recognized there. Two statutes may be noticed. Both were copied from the laws of California and are found in the Montana Codes of 1907. One, § 6115, provides for the cancellation of an instrument, apparently valid but actually invalid, where there is reason to apprehend that, if not cancelled, it may prove injurious to the plaintiff. The other, § 6870, permits a suit to quiet title against an adverse claimant in the absence of conditions which formerly were deemed essential. In California suits under the former are referred to as suits to remove clouds from title while those under the latter are called suits to quiet title. The two sections are there regarded as different in both substance and purpose—the former as putting in statutory form and preserving "an old and well settled rule of equity" and the latter as greatly

liberalizing and enlarging another old rule. Of the former, it is said that it "is aimed at a particular instrument, or piece of evidence, which is dangerous to the plaintiff's rights," and that "there can be no question but that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated." *Castro* v. *Barry*, 79 California, 443; *Hibernia Society* v. *Ordway*, 38 California, 679. The Supreme Court of Montana follows the California decisions, quotes approvingly from them and holds in respect of suits to remove clouds from title that "the complaint must disclose the facts necessary to show that, but for the interposition of the court, the plaintiff may suffer injury." *Hicks* v. *Rupp*, 49 Montana, 40, 44–45; *Merk* v. *Bowery Mining Co.*, 31 Montana, 298, 309.

Thus whether we apply the general rule or the Montana rule, it is manifest that the allegations of the bill which it is insisted must be disregarded are material parts of the plaintiffs' cause of action, that is to say, they are important elements of the asserted right to have the recording of the certificates cancelled as a cloud upon the title.

Recorded certificates of location constitute the first muniment of the locator's paper title, Lindley on Mines, 3rd ed., § 379, and when verified, as in the case here, are, in Montana, made *prima facie* evidence of all facts properly recited in them. Codes 1907, §§ 2284, 2285. So, when they are apparently valid, but under the mining laws are actually invalid, as is asserted here, they may becloud the title injuriously.

We are accordingly of opinion that the bill states a case arising under the mining laws of the United States and of which the District Court is given jurisdiction.

Decree reversed.

SANTA FE PACIFIC RAILROAD COMPANY *v.* LANE, SECRETARY OF THE INTERIOR.

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

No. 170. Argued April 18, 1917.—Decided June 11, 1917.

In view of the power reserved to add to, alter, amend or repeal the act granting land to the Atlantic and Pacific Railroad Company (July 27, 1866, c. 278, 14 Stat. 292), and of the grantee's failure to comply with the conditions as to construction, Congress, without violating any vested right and consistently with the Fifth Amendment, could lay upon the grantee the cost of surveying the lands granted and require payment thereof as a condition to the issuance of patents, as was in fact done, in respect of said company, by the general provision in the Act of July 31, 1876, c. 246, 19 Stat. 121.

The construction placed by the Land Department upon the Act of 1876, *supra*, to the effect that it required the grantee to pay only a share of the cost of surveying and sectionizing a township proportional to the area of its granted lands (odd sections) within that township, was not only reasonable but, being undoubtedly known to Congress, must be deemed to have been approved by and in effect incorporated in the Act of June 25, 1910, c. 406, 36 Stat. 834, which makes no change in the grantee's obligation beyond advancing the time of payment.

This view is corroborated by the Senate and House committee reports preceding and explaining the Act of 1910.

As a demand by the Secretary of the Interior based on the Act of 1910, *supra*, that the railroad grantee make a deposit to cover the entire cost of surveying a township, in which only part of the lands belongs to such grantee, is clearly unwarranted by those acts, its effectuation may be enjoined if the other elements requisite to such relief are present.

The claim evidenced by such a demand casts a serious cloud on the large areas of other unsurveyed land in the railroad grants and therein threatens the grantee with serious embarrassment; and the provision in the Act of 1910 for forfeiture if the demand be not complied with, to be followed by proceedings by the Attorney General, is also to be considered as a reason for equitable relief.

The grantee is not required, in order to test the validity of such a demand, to adopt the hazardous and embarrassing course of ignoring it and defending such suit as the Attorney General may institute under the Act of 1910.

The Secretary of the Interior having demanded under the Act of 1910, *supra*, an amount equal to the entire cost of surveying certain townships of which the railroad grantee could not lay claim to more than half, a tender of one-half the amount demanded was adequate.

43 App. D. C. 497, reversed.

THE case is stated in the opinion.

Mr. Alexander Britton, with whom *Mr. Evans Browne* and *Mr. Francis W. Clements* were on the brief, for appellant.

Mr. Assistant Attorney General Kearful for appellee.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to enjoin the Secretary of the Interior from insisting upon or giving effect to a demand heretofore made by him on the plaintiff to the effect that the latter make an advance deposit, under the Act of June 25, 1910, c. 406, 36 Stat. 834, of $5,500 to cover the cost of surveying certain lands within the primary limits of the land grant made by the Act of July 27, 1866, c. 278, 14 Stat. 292, to the Atlantic and Pacific Railroad Company, to whose rights the plaintiff has succeeded. The court of first instance refused the injunction and dismissed the bill, and its action was affirmed. 43 App. D. C. 497.

The land grant was made in aid of the construction of a proposed railroad from Missouri through Arizona to the Pacific Ocean, and included, subject to exceptions not here material, every alternate odd-numbered section of public land within defined limits on either side of the road.

The lands along the proposed road had not been surveyed at the date of the grant, but the President was to cause them to be surveyed as the construction proceeded; and as each twenty-five miles of road was completed patents were to be issued for the granted lands lying opposite that section. The grant was made upon condition that construction be commenced within two years and that not less than fifty miles of road be completed during each year thereafter; and the granting act was declared to be subject to addition, alteration, amendment or repeal by Congress, due regard being had for the rights of the grantee. Although expressly contemplating that the granted lands should be surveyed along with the other lands on each side of the road, the granting act said nothing about who should bear the cost of the survey. At first the grantee did not proceed with the construction at the rate prescribed (*Atlantic & Pacific R. R. Co.* v. *Mingus*, 165 U. S. 413, 442; House Report No. 193, 49th Cong., 1st sess.), and during the continuance of this default Congress incorporated in the appropriation act of July 31, 1876, c. 246, 19 Stat. 121, a provision requiring the grantee, as also other similar grantees, to pay for the survey of the granted lands and directing that this be done in advance of the issue of the patents. This provision, it is contended, infringed upon the vested rights of the grantee and therefore was repugnant to the due process of law clause of the Fifth Amendment to the Constitution. But in view of the grantee's default and the reserved power to add to, alter, amend or repeal the granting act, the contention must be held untenable. This necessarily follows from the decisions in *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600, and *New Orleans Pacific Ry. Co.* v. *United States*, 124 U. S. 124.

Under the rectangular system of surveying the public lands, which long has been in force, they are divided into townships and sections bounded by north and south and

east and west lines. A township consists of thirty-six sections—each approximately one mile square—arranged in six rows and progressively numbered by starting with the northeasterly one and proceeding west through the upper row, then east through the second row and then alternately west and east through the others. Rev. Stats., § 2395. A township has the same number of odd-numbered sections that it has of even-numbered ones and the two are so arranged that they alternate just as do the different colored squares on a checker board. The only lines run in the course of the survey are the township lines and the exterior section lines and the only monuments erected or placed are those which mark these lines. Every section line is a boundary between two sections, one having an odd and the other an even number. A township cannot be divided until its exterior lines are established, and the lines of the alternate odd-numbered sections cannot be established without at the same time and by the same acts establishing the lines of the even-numbered sections. In short, the system is such that a township is surveyed as a unit.

With this surveying system in mind, the officers of the Land Department construed the provision of 1876 as intended to charge the grantee with the cost of surveying the granted lands, and not with the cost of surveying the township. A plan for dividing the cost on an acreage basis between the granted and the ungranted lands was accordingly adopted. By it, if the granted lands constituted half the total area, as they would where all the odd-numbered sections passed under the grant, the grantee was charged with half the total cost. This plan was followed uniformly as to all the land grants coming within the purview of that provision up to the passage of the Act of June 25, 1910, *supra*. Of the terms of this act it suffices to say in this connection that it requires the cost of surveying the "lands granted" to be deposited within ninety

days after a demand by the Secretary of the Interior specifying the amount required and the lands to be surveyed. It makes no other change in the duty or obligation of the grantee. In other words, what is to be paid remains the same as before, but the time for payment is advanced. Following this act the officers of the Land Department adhered to the view that the cost to be paid was that of surveying the granted lands and continued to divide the cost of surveying the township according to the plan previously adopted, save as a different course was pursued in this and possibly a few other instances.

The demand by the Secretary out of which this suit arose relates to the survey of four townships in Arizona the odd-numbered sections of which are claimed by the plaintiff under the grant of 1866. The amount specified in the demand is the estimated cost of surveying these townships and not a proportional part of the total cost corresponding to the acreage of the granted lands. The townships lie opposite the constructed portion of the road and, speaking generally, the plaintiff's right to the odd-numbered sections is not questioned; indeed, it is the basis of the Secretary's demand. The townships also lie within the limits of a forest reserve, but this does not affect the plaintiff's rights under the grant, for the reserve was established long after the road was constructed.

The construction which the officers of the Land Department placed upon the provision of 1876, if not the only permissible one, was obviously both reasonable and equitable. Their uniform adherence to it for over thirty years prior to the Act of 1910 gave it additional force, and when Congress, with undoubted knowledge of what had been done, chose, as it did in passing that act, to leave the terms of the former provision undisturbed, save as the time for payment was advanced, the departmental construction received a further sanction which, in effect, incorporated it into the statute. Convincing evidence

that Congress took the same view of the matter as did the officers of the Land Department, is afforded by the committee reports on the Act of 1910 wherein the grantees in the land grants were spoken of as under an existing duty "to pay *one-half* the cost of surveying the lands within their granted limits" and the Secretary of the Interior was encouraged to call upon Congress "for a sufficient appropriation, from time to time, to cover the Government's *share* of the cost of the work of surveying as it progressed." See Senate Report No. 609, 61st Cong., 2d sess., which includes the House Report. One of the reports, in evident explanation of provisions in the act intended to hasten such surveys, said:

"It is deemed wise and important that these lands be surveyed as promptly as possible for various reasons—first, that they may become taxable by the States and communities; second, that the Government may dispose of its lands which join the railroad lands, and in order that where the railroad lands occur within forest reserves—about 3,000,000 acres of the unsurveyed lands being in reserves—the government officials may be able to determine the boundaries of the public lands for the purpose of regulating and controlling the same, selling the timber, etc."

We conclude that the provision of 1876, as supplemented by the Act of 1910, gives no warrant for demanding of the grantee in a land grant a deposit covering the entire cost of surveying a township wherein the grantee is entitled to only a part of the lands, and that in making such a demand of the plaintiff the defendant plainly exceeded his authority. Thus, the demand was an unauthorized act done under color of office, and the defendant properly may be enjoined from insisting upon or giving effect to it, unless it be that there is an absence of other elements essential to granting such relief.

We think the other elements are not wanting. There

are millions of acres of unsurveyed lands within the primary limits of the unforfeited portion of the grant of 1866. (See Senate Report, *supra.*) The plaintiff is entitled to many of the odd-numbered sections within the unsurveyed areas. A claim such as is evidenced by the demand made by the defendant, unless and until it is adjudged unauthorized, will cast a serious cloud upon the plaintiff's rights in the granted lands remaining unsurveyed and be a source of serious embarrassment. Besides, the Act of 1910 contemplates that when a demand thereunder is not complied with the rights of the grantee in the granted lands specified in the demand "shall cease and forfeit" to the United States and the Secretary shall notify the Attorney General in order that the latter may begin "proceedings to declare the forfeiture" and to restore the lands to the public domain. The plaintiff was not required in order to test the validity of the demand to permit the ninety days to pass and to rely entirely upon defending such suit as might be brought by the Attorney General. On the contrary, if the demand was unlawful, as we hold it was, the plaintiff was entitled to sue in equity to have the defendant enjoined from insisting upon or giving any effect to it. The hazard and embarrassment incident to any other course were such as to entitle it to act promptly and affirmatively, and of course there was no remedy at law that would be as plain, adequate and complete as a suit such as this against the defendant.

The plaintiff promptly tendered a deposit of half the amount demanded, but the tender was rejected. As the granted lands could not at most be more than half the acreage in the townships and the amount demanded was what was required to survey the entire acreage, the tender was adequate.

Decree reversed.

GREENE, AUDITOR, ET AL., CONSTITUTING THE BOARD OF VALUATION AND ASSESSMENT FOR THE STATE OF KENTUCKY, ET AL. *v.* LOUISVILLE & INTERURBAN RAILROAD COMPANY.

SAME *v.* LOUISVILLE RAILWAY COMPANY.

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

Nos. 617, 618. Argued January 16, 17, 18, 1917.—Decided June 11, 1917.

Equity has jurisdiction to enjoin unlawful tax proceedings, which cloud the plaintiff's title and threaten irreparable injury and a multiplicity of suits.

The principle settled in *Ex parte Young*, 209 U. S. 123, to the effect that a suit to restrain state officials from enforcing an unconstitutional state statute in violation of plaintiff's rights and to his irreparable damage is not a suit against the State, applies also when the statute itself is constitutional but the attempted administration of it is not.

In a case in which the jurisdiction of the District Court is properly invoked upon a substantial controversy arising under the Constitution of the United States, the jurisdiction of that court, and of this court on appeal, extends to the determination of all questions involved, including questions of state law, irrespective of the disposition that may be made of the federal question and of whether it be found necessary to decide it at all.

Where the relief to which plaintiff might be entitled under the Fourteenth Amendment is the same as that allowed him by the federal court upon a proper construction and application of the state constitution and laws, the question whether the acts complained of violate the Amendment need not be decided.

Under the so-called franchise tax provisions of Kentucky (Ky. Stats., §§ 4077–4079) relating to railroad and other corporations exercising special or exclusive privileges or franchises, what is termed the "capital stock of the corporation" (§ 4079) includes its entire property,

tangible and intangible, and what is termed a "franchise tax" is nothing else than a tax upon the intangible property of the corporation in Kentucky.

Semble, that no provision is made by the Kentucky statutes for taxing franchises under §§ 174 and 181 of the state constitution.

The provision in § 182 of the Kentucky Constitution, permitting the General Assembly to provide by law "how railroads and railroad property shall be assessed, and how taxes thereon shall be collected," relates only to the mode of assessment and collection and does not authorize a departure from the uniformity in valuation and rate required by §§ 171 and 174.

Discrimination resulting from an assessment of the intangible property of a railroad corporation by the Board of Valuation and Assessment at 75 per cent. of its actual value while the property of individuals and other classes of corporations, taxed at the same rate, is generally and systematically assessed by other and independent taxing authorities of the State at not more than 60 per cent. of actual value, is violative of the provisions of the Kentucky Constitution requiring uniform taxation in proportion to value and an identical rate as between corporate and individual property (§§ 171, 174); and this has been recognized by the Supreme Court of the State.

A decision of the state Supreme Court holding that such discrimination is not subject to correction in the courts of the State, and that the equality and uniformity provisions of the state constitution may be enforced only by selection of proper assessing officers, is not binding upon the federal courts.

The courts of the United States, their jurisdiction being properly invoked, may afford relief against discriminatory state taxation, contravening the state constitution, when the discrimination results from divergent action of different assessing boards whose assessments are not subject to any process of equalization established by the State, and where the diverse results are the outcome, not of express agreement, but of intentional, systematic and persistent undervaluation by one body of officials, presumably known to and ignored by the other body, so that, in effect, the two bodies act in concert.

Sections 171 and 174 of the Constitution of Kentucky require uniform taxation according to value, and an identical rate as between corporate and individual property; and the provision of § 174 that "all corporate property shall pay the same rate of taxation paid by individual property" means that not only the percentage of the rate, but the basis of the valuation, shall be the same.

Uniformity in taxing implies equality in the burden of taxation; and this equality cannot exist without uniformity in the basis of assessment, as well as in the rate of taxation.

The principal if not the sole reason for adopting "fair cash value" as the standard for valuations is as a convenient means of securing equal taxation, and, since, when the standard is systematically departed from in respect of certain classes of property, its observance in respect of others (the tax rate being uniform) would serve to frustrate its very object, it follows that, in such cases, the duty to assess at full value is not supreme but yields to the duty to avoid discrimination.

Section 162, Kentucky Statutes, does not afford an adequate legal remedy against discriminatory assessments for both state and local taxes, because, as construed by the Kentucky Court of Appeals, it does not authorize correction of erroneous assessments, and also because it applies only to state, and not to local, taxes. *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, distinguished.

When the bill seeks relief as to state and local taxes based on the same assessment, and an adequate legal remedy exists as to the former class only, equity will retain and dispose of the entire case, doing justice completely and avoiding multiplicity of suits.

A railroad company whose intangible property is assessed by the Board of Valuation and Assessment, and which is subjected to discrimination through undervaluation of other property by county assessors, is not afforded an adequate remedy through §§ 4115–4120, 4123, Ky. Stats., providing for readjustment of the latter class of assessments through the County Board of Supervisors.

Affirmed.

THE cases are stated in the opinion.

Mr. Charles Carroll, *Mr. Marvel M. Logan*, Attorney General of the State of Kentucky, and *Mr. John L. Rich* for appellants.

Mr. Alexander Pope Humphrey, with whom *Mr. Edward P. Humphrey* was on the brief, for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

These are companion cases involving similar questions, were argued together, and may be disposed of in a single

opinion. Appellees are corporations organized under the laws of the State of Kentucky, one of which (the Louisville & Interurban Railroad Company) operates, as a common carrier, passenger and freight lines of railroad in three of the counties of that State and in various municipalities and taxing districts in those counties; while the other (the Louisville Railway Company) operates, as a common carrier, passenger and freight lines of street railway in the City of Louisville and in Jefferson County outside of that city. They filed their several bills of complaint in the District Court against Henry M. Bosworth and others, then constituting the Board of Valuation and Assessment of the State of Kentucky (Bosworth being also Auditor of Public Accounts), and against the Attorney General of the State and his assistants, suing them all both individually and in their official capacities, for an injunction to restrain steps looking to the certification and enforcement of what are called "franchise taxes" attempted to be assessed upon the respective complainants for the year 1915 under § 4077 and succeeding sections of the Kentucky Statutes, upon the ground of discrimination in the valuation of the franchises; they having been assessed, as alleged, on the basis of 75 per cent. of actual values, while taxable property in general was assessed systematically and intentionally at not more than 52 per cent. of actual values. There being no diversity of citizenship, the jurisdiction of the District Court was invoked, under the first paragraph of § 24, Jud. Code, upon the ground that the suits arose under the "due process" and "equal protection" clauses of the Fourteenth Amendment of the Constitution of the United States and that the matter in dispute in each case was in excess of the jurisdictional amount. Plaintiffs also relied upon certain provisions of the constitution of the State that require uniform taxation of property according to value and at the same rate for corporate as for individual property. By supplemental bills

the successors in office of the original defendants were made parties, in both their individual and official capacities. In each case there was a motion to dismiss, equivalent to a general demurrer to the bill, upon the following grounds: (1) That there was no federal question involved, and therefore the court was without jurisdiction; (2) that the bills stated no cause of action under the laws of the State or of the United States; (3) that the plaintiffs had an adequate remedy at law; (4) that the bills showed no equity on their face; and (5) that the suits were suits against the State of Kentucky. After a hearing, the court overruled these motions, defendants declined to plead further and made no objection to the submission of the cases for final decrees, the allegations of the bills not being denied were taken as true, and final decrees were made granting relief against the enforcement of the disputed assessments, and restraining the imposition of franchise taxes upon plaintiffs for the year 1915 based on assessments of their franchises at greater values than those conceded in the respective bills of complaint, which were 60 per cent. of actual values. The court, in reaching this conclusion, followed its own previous decisions in *Louisville & N. R. Co.* v. *Bosworth*, 209 Fed. Rep. 380; 230 Fed. Rep. 191. Defendants appealed directly to this court, under § 238, Jud. Code.

The cases were submitted here at the same time with cognate cases this day decided, viz.: Nos. 778 and 779, *Louisville & Nashville R. R. Co.* v. *Greene*, *post*, 522, and Nos. 642–645, *Illinois Central R. R. Co.* v. *Greene*, *post*, 555.

In the present cases, the assignments of error and the argument for appellants are based upon the refusal to dismiss the bills of complaint, no criticism being made as to the particular relief granted by the final decrees.

The bills are substantially identical in form, and an outline of the one filed by the Louisville & Interurban Railroad Company (No. 617) will suffice. Following a prefatory statement of jurisdictional matters and a de-

scription of the parties, it avers in substance that the State Board of Valuation and Assessment, having ascertained by a process not here criticised what, in their judgment, was the fair cash value of plaintiff's "capital stock," took 75 per cent. of the result, and thus fixed the valuation of the capital stock for the purposes of the assessment for the year 1915 at $2,250,000; deducted therefrom the amount of plaintiff's tangible property assessed for state taxes—$813,619—thus fixing the value of the "franchise" at $1,436,381; and ascertained the state taxes thereon as follows: state tax, generally, at 50 cents, $7,181.90; state road tax, at 5 cents, $718.19; a total of $7,900.09. That plaintiff protested, but to no avail. That the assessment subjects plaintiff to state taxes upon the whole of its capital stock, and to county taxes in the three counties on proportionate parts of it, and to additional taxes in the cities and other municipalities and taxing districts through which its railroad runs. Plaintiff avers that for many years past, including the taxing year 1914–1915, the taxes for which are here in controversy, the local assessors and other assessing officers of the State of Kentucky have habitually, intentionally, systematically, and generally assessed the property of individuals and of corporations within their sphere of duty, comprising 80 per cent. of the total taxable property, at not exceeding 52 per cent. of its fair cash value, estimated at the price which it would bring at a fair and voluntary sale; that the fact of such systematic assessment upon that basis annually for many years past has been a matter of public notoriety in the State; "whereas the said Bosworth, Rhea and Crecilius, acting as the State Board of Valuation and Assessment, after ascertaining what, in their judgment, was the fair cash value of plaintiff's capital stock, reduced said value only to the extent of taking 75 per cent. thereof, instead of taking 52 per cent., the average rate applied by assessing officers to the vast body of property in this State." It is

averred that Bosworth, Rhea and Crecilius have denied to plaintiff the benefit of equalization, and that thereby plaintiff has been deprived of its property without due process of law, and denied the equal protection of the laws, in violation of the Fourteenth Amendment and the constitution and laws of the State; that plaintiff has paid the state and county taxes upon its tangible property for the year in controversy so far as they have been demanded, and also has paid the state taxes upon its franchise as arrived at by taking the value of its capital stock and taking 60 per cent. of such valuation and deducting therefrom the valuation of plaintiff's tangible property; that Bosworth, Rhea, and Crecilius, unless enjoined, will certify to the county clerks of the three counties mentioned the amounts claimed to be due to said counties and the taxing districts thereof by reason of the valuation they have assumed to make as above stated; the county clerks will thereupon certify said assessments respectively to the tax collectors for the said counties and the taxing districts therein for collection; and said collecting officers will proceed to make collections and to institute unwarranted, vexatious, and multitudinous suits and proceedings at law against plaintiff; that unless enjoined the said Bosworth or his deputy will enter in account with the Treasurer of the State the amount of taxes based upon the valuation aforesaid, and the said Attorney General and his assistants will institute civil or penal actions or procure indictments against plaintiff based upon its supposed delinquency in the payment of taxes; and that the unauthorized and illegal valuation constitutes a cloud and, as claimed by defendants, constitutes a lien upon plaintiff's property in the Commonwealth, and unless defendants are enjoined numerous and vexatious suits will be instituted to enforce or foreclose such lien. There is an appropriate prayer for injunction and for general relief.

It does not appear, from any express averment in the

bills, that other property-owners have been subjected to discrimination precisely like that of which plaintiffs complain; but the entire argument for defendants, in these cases and others argued with them, proceeds upon the theory that the Board of Valuation and Assessment treated all taxpayers alike over whom they had jurisdiction; hence, it is fair to assume that plaintiffs' franchises were assessed on the same basis of valuation applied by the Board to other property generally that came within the range of their official duty.

(1) It is convenient to state at this point what, indeed, is not controverted, that, if the suits be otherwise maintainable, the last-mentioned averments of the bills show sufficient special grounds for invoking the equity jurisdiction, under the rule established by repeated decisions of this court. *Dows* v. *City of Chicago*, 11 Wall. 108, 110, 112; *Hannewinkle* v. *Georgetown*, 15 Wall. 547; *Union Pacific Railway* v. *Cheyenne*, 113 U. S. 516, 525, 526; *Ohio Tax Cases*, 232 U. S. 576, 587.

(2) A fundamental contention of appellants is that the present actions, brought to restrain them in respect of the performance of duties they are exercising under the authority of the State of Kentucky, are in effect suits against the State. Questions of this sort have arisen many times in this court, but the matter was set at rest in *Ex parte Young*, 209 U. S. 123, 150, 155, where it was held that a suit to restrain a state officer from executing an unconstitutional statute, in violation of plaintiff's rights and to his irreparable damage, is not a suit against the State, and that "individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

In repeated decisions since *Ex parte Young*, that case has been recognized as setting these questions at rest. *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165, 166; *Herndon* v. *Chicago, Rock Island & Pac. Ry. Co.*, 218 U. S. 135, 155; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 621; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278, 293; *Truax* v. *Raich*, 239 U. S. 33, 37. And see *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636, 642–644.

The principle is not confined to the maintenance of suits for restraining the enforcement of statutes which as enacted by the state legislature are in themselves unconstitutional. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 390, was a case not of an unconstitutional statute, but of confiscatory, and therefore unconstitutional, action taken by a state commission under a constitutional statute. The court, by Mr. Justice Brewer, said: "Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal court of jurisdiction. A valid law may be wrongfully administered by officers of the State, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual." In *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 38, the court upheld the right of action in a federal court to restrain the collection of taxes that had been assessed at a different rate and by a different method from that employed with respect to other tax-payers of the same class, in defiance of the provisions of a constitutional statute that required equalization, and also in denial of the equal protection of the laws within the meaning of the Fourteenth Amendment.

(3) The contention of plaintiffs, set forth in their respective bills of complaint, that the action of the Board of Valuation and Assessment in making the assessments under consideration and the threatened action of defendants in respect of carrying those assessments into effect constituted action by the State, and if carried out would violate the equal protection provision of the Fourteenth Amendment, presents, without question, a real and substantial controversy under the Constitution of the United States, which (there being involved a sum and value in excess of the jurisdictional amount) conferred jurisdiction upon the federal court, irrespective of the citizenship of the parties. This being so, the jurisdiction of that court extended, and ours on appeal extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all. *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, 191; *Ohio Tax Cases*, 232 U. S. 576, 586.

(4) Taking up first the question of state law, we should at the outset briefly consider the pertinent provisions of the constitution and laws of the State. By § 171 of the constitution it is prescribed: "The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws." By § 172: "All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit

any willful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished, as may be provided by law." By § 174: "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises." Section 181 provides as follows: "The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax;" etc. And § 182 declares: "Nothing in this Constitution shall be construed to prevent the General Assembly from providing, by law, how railroads and railroad property shall be assessed and how taxes thereon shall be collected."

Under statutory provisions, property is valued for purposes of taxation, both state and local, in the following manner: All property in the State, real and personal, tangible and intangible, except the property of railroads, the franchises of certain corporations, shares of stock in banks, and distilled spirits, is assessed by county assessors, subject to the review of county boards of supervisors and a State Board of Equalization. Tangible railroad property is assessed by the State Railroad Commission. Bank shares and distilled spirits are assessed by the Board of Valuation and Assessment, composed of the Auditor of Public Accounts, the Treasurer of State, and the Secretary of State. And, by § 4077, Ky. Stats., it is provided: "Every railway company or corporation . . . also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any

public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district, where its franchise may be exercised." The values of such franchises (except as to turnpike companies, otherwise provided for), are to be fixed by the Board of Valuation and Assessment. By § 4078, verified statements are to be delivered annually to the Auditor showing certain facts respecting the company, including the amount of capital stock, with its par and real value, and the highest price at which it was sold within twelve months preceding, the amount of surplus funds and undivided profits, the value of all other assets, the amount of indebtedness, the gross or net earnings or income, the amount and kind of tangible property in the State, the fair cash value thereof estimated at the price it would bring at a fair voluntary sale, and such other facts as the Auditor may require. Section 4079 provides that "where the line or lines of any such corporation, company or association extend beyond the limits of the State or county," the statement shall, in addition to other facts, show the length of entire lines operated, owned, leased or controlled in the State and in each county, incorporated city, town, or taxing district, and the entire line operated, etc., elsewhere. There is a proviso that the Board, from the statement furnished to it by the corporation, and from such other evidence as it may have, is to "fix the value of the capital stock of the corporation . . . and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid." [1] It has been held by the Kentucky Court of Ap-

[1] The particular method of fixing the value of "capital stock" and of "corporate franchise" is not in issue in the present cases. The District Court, in *Louisville & N. R. Co.* v. *Bosworth*, 209 Fed. Rep. 380,

peals, and by this court, that the "capital stock of the corporation," here referred to, includes its entire property, of every kind and description, tangible and intangible, and that what is called a "franchise tax" is nothing else than a tax upon the intangible property of the company in Kentucky. *Henderson Bridge Co.* v. *Commonwealth*, 99 Kentucky, 623, 639, 641; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, 154; *Adams Express Co.* v. *Kentucky*, 166 U. S. 171, 180; *Louisville Tobacco Warehouse Co.* v. *Commonwealth*, 106 Kentucky, 165, 167; *Marion National Bank* v. *Burton*, 121 Kentucky, 876, 888. In view of these decisions, no serious attempt is made to sustain the assessments in question as a taxation of franchises, under § 174 or 181 of the constitution. There seems to be no provision of law for taxing franchises under either of those sections. *Marion National Bank* v. *Burton*, 121 Kentucky, 876, 885.

To recapitulate: Real estate and personal property of individuals and of non-franchise corporations are assessed by the county assessors, both for state and county purposes; tangible railroad property by the Railroad Commission; bank shares, distilled spirits, and corporate franchises by the Board of Valuation and Assessment. It is important to be observed that the latter board has no authority or control over the actions of the county assessors, the county boards of supervisors, or the State Board of Equalization; and, on the other hand, these officials have no authority or control over the actions of the Board of Valuation and Assessment. Nor is there any statutory

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409–411, reading §§ 4077–4079 together, seems to have considered that the method prescribed by the proviso in § 4079 was applicable to all public service corporations organized in Kentucky, including those which operate and conduct their business and have their property wholly in that State. And this appears to have been the view of the Kentucky Court of Appeals in *Louisville Railway Co.* v. *Commonwealth*, 105 Kentucky, 710, 714.

provision for equalizing assessments, as between the property which is assessed by the county assessors and that which is assessed by the Railroad Commission and the Board of Valuation and Assessment.

It hardly is open to serious dispute that if the legislature had confided to a single body the determination of the basis of assessment of the real estate and personal property of individuals and non-franchise corporations, on the one hand, and of the tangible and intangible property of public service corporations, on the other, a valuation of property of the latter class on the basis of 75 per cent. of its actual value, while property of the former class was assessed systematically at 52 per cent., or not more than 60 per cent., of its actual value, would be inconsistent with the sections we have quoted from the Kentucky Constitution. For the provision of § 182, permitting the General Assembly to provide by law "how railroads and railroad property shall be assessed, and how taxes thereon shall be collected," relates merely to the *mode* of assessment and collection, and manifestly does not permit a departure from the requirements of uniform taxation in proportion to value and an identical rate as between corporate and individual property, contained in §§ 171 and 174. The latter section permits the General Assembly to provide for taxation based on income, licenses, or franchises. But, as already stated, at least at the time these suits arose, there was no provision of law for a taxation of franchises in any other sense than that already explained. *Marion National Bank* v. *Burton*, 121 Kentucky, 876, 885.

The fact should be emphasized that the Kentucky court of last resort, far from holding that discrimination such as is here complained of is in accord with the constitution and laws of the State, has recognized distinctly that it is not; but has felt constrained to hold that, under circumstances similar to those of the present cases, there is no redress in the courts of the State; and that the constitu-

tional provisions for equality and uniformity are capable of being put into execution only through the selection of proper assessing officers. *Louisville Railway Co.* v. *Commonwealth*, 105 Kentucky, 710, 719. This, while admitting the wrong, merely denies judicial relief, and is not binding upon the federal courts.

In *Cummings* v. *National Bank*, 101 U. S. 153, the bank brought its bill in equity in a circuit court of the United States to enjoin the collection of a tax assessed against the shares of its stockholders, not because of inconsistency with the act of Congress relating to the taxation of such shares (§ 5219, Rev. Stats.), but upon the ground of a violation of the constitution and laws of the State of Ohio, which required the taxation of all moneys, credits, and investments, and also all real and personal property, to be by a uniform rule and according to its true value in money. The Supreme Court of the State (*Exchange Bank of Columbus* v. *Hines*, 3 Ohio St. 1, 15) had held that they required uniformity not only in the rate of taxation but also in the mode of the assessment upon the taxable valuation. But the legislature had adopted a system of valuation under which there were different bodies acting independently of one another in regard to different classes of property in the process of estimating values for taxation, with one board of equalization having charge of the valuation of the real estate of the whole State once in every ten years, another having charge of the valuation of railroad property every year, a third of the valuation of shares of incorporated banks every year, but with no common superior to secure equalization as between the different classes of property. The evidence showed that in the county where complainant's bank was situate the assessors of real property, the assessors of personal property, and the county auditor (who was the assessing officer for bank shares) concurred in establishing a rule of valuation by which real and personal property, except money, were

assessed at one-third of actual values, and money or invested capital at six-tenths of its value; that this rule was followed; and that for the year in question the state board of equalization increased the assessment upon the bank shares to their full cash value. This court held (p. 157) that "when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the (state) constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, [that] equity may properly interfere to restrain the operation of this unconstitutional exercise of power"; and that this being the case made by the bill, and being supported by the evidence, while the statute could not be declared unconstitutional, the discriminatory rule must be held void and the injustice produced under it remedied so far as the judicial power could give remedy.

(5) Is discriminatory taxation, contravening the express requirements of the state constitution, beyond redress in the courts of the United States, their jurisdiction being properly invoked, when the discrimination results from divergent action by different assessing boards whose assessments are not subject to any process of equalization established by the State, and where the diverse results are the outcome, not, indeed, of any express agreement among the officials concerned, but of intentional, systematic, and persistent undervaluation by one body of officials, presumably known to and ignored by the other body, so that in effect the two bodies act in concert? In our opinion, the answer must be in the negative.

Appellants' contention that there is no remedy by injunction against the assessments imposed by the Board of Valuation and Assessment places undue emphasis upon the requirement contained in § 172 of the constitution, that all property shall be assessed for taxation at its fair

cash value, estimated at the price it would bring at a fair voluntary sale,—a provision that is repeated in § 4020, Ky. Stats., which deals with the duties of assessing officers. The averments of the bills of complaint, admitted on this record, are that the Board did not assess the property of plaintiffs at fair cash value, but at 75 per cent. thereof, and that this resulted in unequal taxation only because the county assessments were at a still lower percentage. But, laying this aside, and assuming for the moment that the Board performed its duty strictly in accordance with § 172, by assessing plaintiffs' properties at fair cash value, what is the effect of that action, in view of the systematic undervaluations by the assessing officers charged with valuing other classes of property? This question cannot be answered without considering the relation of § 172 to §§ 171 and 174, which require uniform taxation according to value, and an identical rate as between corporate and individual property. The operation and effect of such a taxing system, both in respect to raising the necessary moneys and in distributing the burden among the taxpayers, depend upon two considerations: first, the rate of taxation, and, secondly, the basis of valuation of the property to be taxed. Plainly, the provision of § 174 that "all corporate property shall pay the same rate of taxation paid by individual property" means that not only the percentage of the rate, but the basis of the valuation shall be the same. "Taxing by a uniform rule requires uniformity not only in the *rate* of taxation, but also uniformity in the *mode of the assessment* upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation." *Exchange Bank of Columbus* v. *Hines*, 3 Ohio St. 1, 15, quoted in *Cummings* v. *National Bank*, 101 U. S. 153, 158.

It is equally plain that it makes no difference what basis

of valuation—that is, what percentage of full value—may be adopted, *provided it be applied to all alike.* The adoption of full value has no different effect in distributing the burden than would be gained by adopting 75 per cent., or 50 per cent., or even 10 per cent., as the basis—so long as either was applied uniformly.[1] The only difference would be that, supposing the requirements of the treasury remained constant, the rate of taxation would have to be increased as the percentage of valuation was reduced. (Under § 171 of the constitution, the rate of taxation may be varied by the General Assembly from year to year, according to requirements.) Therefore, the principal if not the sole reason for adopting "fair cash value" as the standard for valuations, is as a convenient means to an end—the end being equal taxation. But if the standard be systematically departed from with respect to certain classes of property, while applied as to other property, it does not serve but frustrates the very object it was designed to accomplish. It follows that the duty to assess at full value cannot be supreme in all cases, but must yield where necessary to avoid defeating its own purpose.

A substantially identical question was presented to the Circuit Court of Appeals for the Sixth Circuit in *Taylor* v. *Louisville & Nashville R. R. Co.*, 88 Fed. Rep. 350, where the Constitution of Tennessee declared that all property should be taxed according to its value, to be ascertained as the legislature should direct, "so that taxes shall be equal and uniform throughout the State," and the statutes required that the real value of the property be adopted, and where, as here, railroad property and

[1] A few of the States have enacted laws adopting percentages of full value as bases of taxation: Iowa, 25 per cent. (Code Supp. 1907, § 1305); Illinois, 20 per cent. (Hurd's Stat. 1898, p. 1365, e), afterwards $33\frac{1}{3}$ per cent. (Hurd's Stat. 1909, p. 1882, § 312; Hurd's Stat. 1912, p. 1963, § 312); Nebraska, 20 per cent. (Rev. Stats. 1913, § 6300); Alabama, 60 per cent. (Gen. Acts 1915, p. 393, § 9).

some other kinds were valued by one set of officials, and property in general by another, without provision for equalization as between the two classes. The court, by Circuit Judge Taft, said (p. 364): "The sole and manifest purpose of the constitution was to secure uniformity and equality of burden upon all the property in the State. As a means of doing so (conceding that defendant's construction is the correct one), it provided that the assessment should be according to its true value. It emphasized the object of the section by expressly providing that no species of property should be taxed higher than any other species. We have before us a case in which the complaining taxpayer, and other taxpayers owning the same species of property, are taxed at a higher rate than the owners of other species of property. This does not come about by legislative discrimination, but by the intentional and systematic disregard of the law by those charged with the duty of assessing all other species of property than that owned by complainant and its fellows of the same class. . . . [p. 365] The question presented is, then, whether, when the sole object of an article of the constitution is being flagrantly defeated, to the gross pecuniary injury of a class of litigants, and one of them appeals to a court of equity for relief, it must be withheld because the only mode of granting it will involve an apparent departure from the method marked out by the constitution and the law for attaining its sole object. We say 'apparent' departure from the constitutional method, because that instrument contemplated a system in which all property should be assessed at its real value. . . . The court is placed in a dilemma, from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the constitution. To hold otherwise is to make the restrictions of the constitu-

tion instruments for defeating the very purpose they were intended to subserve. It is to stick in the bark, and to be blind to the substance of things. It is to sacrifice justice to its incident."

After pointing out the similarity of the case to *Cummings* v. *National Bank, supra,* and declaring (p. 372): "An intentional undervaluation of a large class of property, when the law enjoins assessment at true value, is necessarily designed to operate unequally upon other classes of property to be assessed by other taxing tribunals, who, it may be presumed, will conform to the law," the court further said (p. 374): "The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully-assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fault of fraud or intentional discrimination."

The justice of this view has been recognized by the state courts of last resort in many cases. *Bureau County* v. *Chicago &c., R. R. Co.,* 44 Illinois, 229, 239; *Cocheco Co.* v. *Strafford,* 51 N. H. 455, 482; *Manchester Mills* v. *Manchester,* 58 N. H. 38; *Randell* v. *City of Bridgeport,* 63 Connecticut, 321, 324; *C., B. & Q. R. R. Co.* v. *Comm'rs of Atchison Co.,* 54 Kansas, 781, 792; *Ex parte Fort Smith &c. Bridge Co.,* 62 Arkansas, 461, 468; *Burnham* v. *Barber,* 70 Iowa, 87, 90; *Barz* v. *Board of Equalization,* 133 Iowa, 563, 565; *Iowa Cent. Ry. Co.* v. *Board of Review* (Iowa,

1916), 157 N. W. Rep. 731; *Lehigh & Wilkes-Barre Coal Co.* v. *Luzerne Co.*, 225 Pa. St. 267, 271; *People* v. *I. C. R. R. Co.*, 273 Illinois, 220, 244–250. There are declarations to the contrary (*Central R. R. Co.* v. *State Board of Assessors*, 48 N. J. L. 1, 7; *Lowell* v. *County Commissioners*, 152 Massachusetts, 372, 375), but they take little or no account of the rights of aggrieved taxpayers.

(6) The next question in order is whether the assessments have the effect of denying to plaintiffs the equal protection of the laws, within the meaning of the Fourteenth Amendment. It is obvious, however, in view of the result reached upon the questions of state law, just discussed, that the disposition of the cases would not be affected by whatever result we might reach upon the federal question; for no other or greater relief is sought under the "equal protection" clause than plaintiffs are entitled to under the provisions of the constitution and laws of the State to which we have referred. Therefore, we find it unnecessary to express any opinion upon the question raised under the Fourteenth Amendment.

(7) It is objected that appellees had an adequate remedy at law, and *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, is cited as a controlling authority. There the suit was brought to enjoin the collection of taxes levied by the City and County of Denver, in the State of Colorado, and because of the Act of Congress (Rev. Stats., § 723) and familiar decisions applying and enforcing it, since it appeared that a local statute required the board of county commissioners to refund taxes paid and thereafter found to be erroneous or illegal, "whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, to clerical or other errors of omission," with a correlative right on the part of the taxpayer to enforce that duty by action at law, and the decisions of the Supreme Court of the State interpreted the statute so as to give an adequate remedy at law, this court affirmed a decree dismissing the bill.

The statute that is here invoked is § 162, Ky. Stats., which reads as follows: "§ 162. Taxes wrongfully collected refunded. When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. . . ." But, by a line of recent decisions in the Kentucky Court of Appeals, the effect of this section has been confined to cases where the taxes paid either were wholly without warrant in law or were based upon a mistake as to the rate of taxation upon the amount assessed; and it has been held not to authorize the Auditor to correct erroneous assessments, since that official is not entrusted with authority to make assessments. *German Security Bank* v. *Coulter*, 112 Kentucky, 577; *Louisville City National Bank* v. *Coulter*, 112 Kentucky, 584, 587; *Couty* v. *Bosworth*, 160 Kentucky, 312; *Bosworth* v. *Metropolitan Life Ins. Co.*, 162 Kentucky, 344, 348; *Louisville Gas & Electric Co.* v. *Bosworth*, 169 Kentucky, 824, 829, 830.

But, were it otherwise, § 162 clearly applies to state taxes alone, while the bills of complaint herein have to do with both state and local taxes. A remedy at law cannot be considered adequate, so as to prevent equitable relief, unless it covers the entire case made by the bill in equity. Were we to require a dismissal of these bills as to the state taxes, retaining them as to the local taxes, we should multiply suits, instead of preventing a multiplicity of suits. It is a familiar maxim that "a court of equity ought to do justice completely, and not by halves;" and to this end, having properly acquired jurisdiction of a cause for any purpose, it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law. *Camp* v. *Boyd*, 229 U. S. 530, 551, 552; *McGowan* v. *Parish*, 237 U. S. 285, 296.

(8) It is contended that appellees, if aggrieved, had

another and more equitable remedy than a suit for injunction; that the law of the State provides a method by which, instead of lowering the assessments upon the property of appellees, they could by proper procedure compel the assessment of the property of other taxpayers to be increased so as to come within the constitutional requirement as to fair cash value, and hence that it was the duty of appellees to adopt that method. The reference is to §§ 4115–4120, Ky. Stats., which require the county board of supervisors to convene annually and make a careful examination of the assessor's books and each individual list thereof, empowering them to increase or decrease any list; "but the board shall not reduce or raise any assessment unless the evidence be clear and unmistakable that the valuation is not a fair cash value." By § 4123, they may hear complaints, summon and swear witnesses, and require them to testify. There is nothing in these provisions to indicate that parties in the situation of the present appellees, who have no different interest in the undervaluation by the county assessors than that which might be possessed by any other citizens of the State, are entitled to be heard to complain that the county assessments are too low. Nor is any case cited where such a complaint has been entertained. The remedy of reassessment appears to be a public, not a private remedy.

We conclude that the decrees of the District Court must be, and they are

Affirmed.

MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS, and MR. JUSTICE CLARKE dissent.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* GREENE, AUDITOR OF PUBLIC ACCOUNTS, ET AL., INDIVIDUALLY AND AS CONSTITUTING THE BOARD OF VALUATION AND ASSESSMENT OF THE STATE OF KENTUCKY, ET AL.

GREENE, AUDITOR OF PUBLIC ACCOUNTS, ET AL., INDIVIDUALLY AND AS CONSTITUTING THE BOARD OF VALUATION AND ASSESSMENT OF THE STATE OF KENTUCKY, ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY.

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

Nos. 778, 779. Argued January 16, 17, 18, 1917.—Decided June 11, 1917.

Greene v. *Louisville & Interurban R. R. Co., ante,* 499, followed in holding: (1) That the federal court has power to decide all questions, its jurisdiction being properly invoked on federal grounds, (2) that this suit, to restrain subordinate state officers from enforcing an unlawful and discriminatory assessment made under color of a valid state law, is not a suit against the State, (3) that plaintiff has not an adequate remedy at law under § 162, Ky. Stats., (4) that unlawful discrimination in taxation resulting from general, systematic undervaluations of other property is remediable by the courts, and (5) that whether such an assessment violates the "equal protection" clause of the Fourteenth Amendment need not be decided by the federal court when full relief is grantable under the state constitution and laws.

The right to relief by injunction against unlawful discrimination by taxing officials exists in respect of state, as well as local, taxes; if what was said in *Coulter* v. *Louisville & Nashville R. R. Co.*, 196 U. S. 599, 608, imports that an injunction can under no circumstances be awarded with respect to state taxes, it must be deemed to have been overruled by *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20.

Proof comprising a body of official admissions and direct and circumstantial evidence from unimpeached public and private sources, and which fully sustains a finding that the great mass of property in Kentucky, embracing all tangible property except railroad property and distilled spirits—during a period of years—was systematically and notoriously assessed at not exceeding 60 per cent. of its fair cash value, *Held* not overcome by general presumptions arising from the duty of assessors to assess at fair cash value, or by numerous stereotyped affidavits of former assessors asseverating their obedience thereunto.

The findings of an official body such as the Kentucky Board of Valuation and Assessment, made after a hearing and upon notice to the taxpayer, are *quasi*-judicial and, in the absence of fraud, are not to be set aside or disregarded by courts unless it is made to appear that the body proceeded upon an erroneous principle, or adopted an improper mode of estimating value.

Under the Kentucky law respecting the taxation of the intangible property of railroad and other public service corporations (§§ 4077–4081, Ky. Stats.), the particular method to be pursued by the Board of Valuation and Assessment in ascertaining from the evidence the value of the "capital stock" (i. e., the entire tangible and intangible property) of a railroad system, partly within and partly outside of the State, is left to the sound discretion of the Board.

In estimating the value of plaintiff's "capital stock," the Kentucky Board of Valuation and Assessment capitalized the plaintiff's income upon a 6 per cent. basis and, in excluding shares held by plaintiff in other corporations owning and paying taxes on property in Kentucky, it estimated their value in the same way, i. e., by capitalizing on a 6 per cent. basis the income derived therefrom. *Held:* (1) That this method of valuing the shares could not be held fundamentally wrong, although there was evidence that their intrinsic value was much greater than the estimate thus obtained. (2) That the adoption of the 6 per cent. rate instead of a higher, "composite" rate, based on the mileage of plaintiff's railroad in each of thirteen States and the legal rates of interest in those States, respectively, was likewise a matter for the judgment of the Board.

Section 4081, Ky. Stats., as amended by the Act of June 9, 1893, in providing that the ratio of intrastate to total mileage of any interstate railroad "shall be considered" by the Board of Valuation and Assessment in fixing the value of its corporate franchise (intangible property) liable to taxation in the State, does not require the Board to apportion the value of the railroad's property upon a strict mileage

basis, but merely to consider relative mileage, among other pertinent factors, in the process of valuing that proportion of the property which is situate within the State.

Section 4081, *supra*, applies to both foreign and domestic corporations, and is not to be construed as requiring the taxation of tangible assets outside of the State, which, clearly as to foreign corporations, would render it obnoxious to the due process clause of the Fourteenth Amendment.

Under § 4081, *supra*, the apportionment of "capital stock" to Kentucky is first made upon a mileage basis (with such allowances as may be required because of unequal distribution of tangible property within and without the State), and the value of the tangible property in the State is then subtracted and the tax computed on the difference, representing the intangible property in Kentucky.

Total assets, situate partly within and partly without a State, but organically related, may be taken into consideration as a means of reaching the true cash value of the part within the State, and in the case of a railroad, the mileage factor may be given its proper weight.

Section 4081, *supra*, requires the Board to take into consideration not only the mileage operated, but also the mileage controlled, by the railroad company within and without the State.

Under §§ 4079, 4081, *supra*, in determining the percentage apportionable to Kentucky, the whole of the controlled mileage within and without the State is to be treated as part of the aggregate "capital stock," not only in fixing the mileage, but also in fixing the valuation, upon which the apportionment is based.

To avoid double assessments, the value of so much of the controlled mileage as is within Kentucky, and therefore separately assessed in that State, should be deducted (in addition to the value of the tangible property there situate), from the Kentucky apportionment of the "capital stock."

A supplemental bill, filed, after hearing and decision, by permission of the court but apparently disregarded, is not to be taken as confessed by the defendant for want of answer, when no rule to answer was made upon him and his failure to do so is not explained by the record; nor, in the silence of the record, is error to be imputed to the trial court for not paying heed to material allegations thus presented.

A party attacking a tax assessment is not to be held in default for omission to introduce evidence on matters which were not deemed material by the taxing authority or in the litigation until found so by the judge in his decision.

It being shown that the valuation made by a taxing board was the

result of following a method substantially erroneous because not in accordance with the governing statute, it is error for the court to presume that a like valuation would have been reached by following the correct method.

230 Fed. Rep. 191, reversed in part and affirmed in part.

THE case is stated in the opinion.

Mr. Helm Bruce, with whom *Mr. Henry L. Stone, Mr. William A. Colston* and *Mr. Edward S. Jouett* were on the briefs, for the Louisville & Nashville Railroad Company.

Mr. Charles Carroll, Mr. Marvel M. Logan, Attorney General of the State of Kentucky, and *Mr. John L. Rich,* with whom *Mr. Charles H. Morris,* Assistant Attorney General of the State of Kentucky, was on the briefs, for Greene *et al.*

MR. JUSTICE PITNEY delivered the opinion of the court.

These cases are an appeal and a cross-appeal from a final decree of the District Court in a suit that was commenced by the Louisville & Nashville Railroad Company, a Kentucky corporation, against Henry M. Bosworth and others, then constituting the Board of Valuation and Assessment of that State (Bosworth being also Auditor of Public Accounts), and against the Attorney General of the State and his assistants, seeking to restrain the taking of any steps toward enforcing state and local taxes upon the basis of an assessment of the "franchise" of the company for the year 1913 made by the Board of Valuation and Assessment at the sum of $45,658,630, or upon the basis of any greater valuation than $22,899,200; and this upon the ground that the assessment was unlawful and not in accordance with the statute, was the result of an abuse of power by the Board of Valuation and Assessment, and if enforced would result in a taking

of plaintiff's property without due process of law and a denial of the equal protection of the laws, contrary to § 1 of the Fourteenth Amendment. By a supplemental bill, Robert L. Greene and others were brought in as successors in office of the original defendants. There being no diversity of citizenship, the jurisdiction was rested upon the ground that the suits arose under the cited provisions of the Federal Constitution; but plaintiff relied also upon the provisions of the constitution and laws of the State. A chief ground of complaint, based upon the equal protection provision of the Fourteenth Amendment, and also upon the requirement of equal taxation prescribed by §§ 171, 172, and 174 of the state constitution,[1] was that the plaintiff had been subjected to illegal discrimination, in that its property had been assessed at more than its actual value, whereas the property of all other taxpayers in the State was assessed uniformly and intentionally at much less than actual value, in fact at not exceeding 60 per cent. thereof. It was alleged, besides, that the method of assessment followed by the Board of Valuation was inconsistent with the provisions of the statutes of Kentucky, and for that further reason the assessment was illegal.

A previous suit of the same character had been brought by the same plaintiff in the same court for relief against the assessment for the year 1912, in which, after a hearing on motion for preliminary injunction and demurrer to the bill, the court delivered a very elaborate opinion, allowing a temporary injunction upon condition that plaintiff should pay franchise taxes to the State and subordinate taxing districts upon a valuation of $22,899,200. *Louisville & N. R. Co.* v. *Bosworth*, 209 Fed. Rep. 380, 465.

Following this precedent, the court, upon the filing of

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[1] Set forth in full in the opinion in *Greene* v. *Louisville & Interurban R. R. Co.*, *ante*, p. 499.

the bill in the present case, allowed a preliminary injunction upon the payment of taxes based upon the same valuation. The cause proceeded to final hearing, and the court, having found plaintiff to have been subjected to discrimination by the valuing of other property at approximately 60 per cent. of actual values, but having overruled the other grounds of relief asserted, applied an equalizing factor to the valuation of plaintiff's franchise, with the result of finding $25,808,493.60 to be the amount at which it was legally taxable, or $2,909,293.60 in excess of the amount upon which payment was made at the inception of the suit. Therefore a final decree was made enjoining defendants from enforcing the assessment complained of, on condition that plaintiff should pay taxes, state and local, on the excess amount named. 230 Fed. Rep. 191, 232.

Plaintiff appealed to this court upon the ground that it ought not to be required to pay franchise taxes upon any amount in excess of $22,899,200. Defendants took a cross appeal upon the ground that plaintiff was entitled to no relief. The cases were argued together with kindred cases this day decided, viz., Nos. 617 and 618, *Greene* v. *Louisville & Interurban R. R. Co.*, *ante*, 499, and Nos. 642–645, *Illinois Central R. R. Co.* v. *Greene*, *post*, 555.

There are numerous assignments of error by each party, but, without specifying these, the questions raised will be disposed of in the order of convenience. Of course, the federal jurisdiction, having been invoked upon substantial grounds of federal law, extends to the determination of all questions involved in the case, whether resting upon state or federal law. *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, 191; *Ohio Tax Cases*, 232 U. S. 576, 586.

It may be premised that plaintiff owns and operates a great system of railroads extending throughout Kentucky and twelve other States, embracing (in the year in question) roads operated on its own account to the extent of

4,478.61 miles, of which 1,574.47 miles, or 35.15 per cent., were in Kentucky, and an aggregate of roads owned, operated, and controlled, extending to 7,907.83 miles, of which 1,952.45 miles, or 24.69 per cent., were in Kentucky. It is subject to taxation in Kentucky upon its tangible property as assessed by the State Railroad Commission, and, in addition, to taxation state and local upon its intangible property or "franchise" under § 4077, Ky. Stats., and succeeding sections (set forth below in the margin), the valuation to be fixed by the Board of Valuation and Assessment.

(1) Defendants contend that the District Court was without jurisdiction because the suit was in effect a suit against the State of Kentucky. It is said that the sole basis of a suit to enjoin state officers from the performance of duties pursuant to a statute must be that the statute itself is unconstitutional; that, since the statute in question here is constitutional, an action may not be maintained in a court of the United States (there being no diversity of citizenship) for what is done by subordinate officers of the State in executing the statute in an unconstitutional manner; and that for misconduct of this sort there is no remedy except in the state courts. These contentions are disposed of adversely in *Greene* v. *Louisville & Interurban R. R. Co.*, *ante*, 499.

(2) It is contended that the plaintiff has an adequate remedy at law under § 162, Ky. Stats. This likewise is negatived by the case just mentioned.

(3) It is urged that, although it be true that the local assessors in each county assessed other property at less than its cash value, plaintiff is not entitled to relief for this reason if its property was not assessed at more than its fair cash value, even though it was assessed at a higher percentage than other property. To this the same answer may be made. The facts found in this case bring it within the ruling that, in the case last mentioned, was made upon

admitted facts, because of the provisions of the constitution and laws of the State. In this case, as in that, we find it unnecessary to pass upon the merits of the question whether a like result would be reached by the application of the "equal protection" clause of the Fourteenth Amendment.

(4) It is contended that although there be jurisdiction to enjoin the apportioning of the assessment among the counties, cities, and towns for the purpose of local taxation, it was erroneous to enjoin state taxation based upon the same assessment. So far as this is bottomed upon the theory that the suit is a suit against the State, it is disposed of by the decision cited. It is argued, however, that while this court has held that in a proper case a bill may be brought to restrain apportionment and certification to the counties of a tax imposed by a state board in violation of federal rights (*Fargo* v. *Hart*, 193 U. S. 490), yet *Coulter* v. *Weir*, 127 Fed. Rep. 897, 906, 912—a case that arose out of the same provisions of the Kentucky statutes that are here involved—is an authority in opposition to granting relief against the state taxes, and that it was approved by this court in *Coulter* v. *Louisville & Nashville R. R. Co.*, 196 U. S. 599, 608. What was said upon the subject in the case last mentioned was not a part of the matter decided, as a reference to the opinion clearly shows; for the decision in favor of defendants proceeded upon the ground that the evidence was insufficient to sustain the bill. *Coulter* v. *Weir*, *supra*, is easily distinguishable. There, the Auditor of Public Accounts was the sole defendant. The Circuit Court of Appeals, after citing *Poindexter* v. *Greenhow*, 114 U. S. 270, 286–288; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 390; *Scott* v. *Donald*, 165 U. S. 107, 112; *Smyth* v. *Ames*, 169 U. S. 466, 518; *Fitts* v. *McGhee*, 172 U. S. 516, 529; and *Taylor* v. *Louisville & Nashville R. R. Co.*, 88 Fed. Rep. 350, and quoting from the opinion in the *Taylor Case* to the effect

that a suit against individuals seeking to enjoin them from doing certain acts which they assert to be by authority of the State, but which complainants aver to be without lawful authority, is not a suit against the State, and from *Fitts* v. *McGhee* to the effect that a suit against state officers not holding any special relation to the particular statute alleged to be unconstitutional nor charged with its enforcement, is a suit merely to test the constitutionality of a state statute and therefore is a suit against the State, proceeded (p. 906) to sustain the action only so far as it sought to enjoin the defendant from certifying to the county clerks the assessment complained of. The contrary result reached with respect to the tax due to the State went solely upon the ground that as to this tax the Auditor had no act to perform under the statute and no authority to enforce collection; the court proceeding to say further (p. 907): "If the defendant had been about to take some step under color of the law tending to complete the assessment, or if he had been authorized to seize property and was about to do so, then he was, assuming the case to be with the complainants on the merits, about to commit a trespass for which he would be individually liable, and in a proper case equity might enjoin his proposed action upon the ground of his want of legal authority. But this is not the case made in respect to the tax due the state, and the bill, so far as it sought relief against the state tax, must be dismissed without regard to the merits." It would seem that the court overlooked §§ 144, 145, and 152, Ky. Stats., which require the Auditor to keep account of taxes collected, keep a correct list of balances due by individuals to the Commonwealth, audit and enter in account all demands payable at the treasury, report to the Attorney General all public debtors who fail to render their accounts at the proper time or to pay the money in their hands due the Commonwealth into the treasury, and grant written authority to the Treasurer to receive money

from public officers or other persons due to the Commonwealth. However, we need not rest upon this point, since in the present case the Attorney General and his assistants are joined as parties, and the final decree under review restrains all of the defendants from taking any steps to collect the excessive taxes due to the State or to any of its subdivisions, and from instituting or prosecuting any proceedings against the plaintiff, either by indictment or civil action, because of any alleged delinquency or failure of the plaintiff to pay taxes upon its franchise on a valuation above the amount found by the court to be proper. The decree, with respect to the state as well as the local taxes, is clearly within the authority of *Ex parte Young*, 209 U. S. 123, 156, where *Fitts* v. *McGhee*, 172 U. S. 516, 530, was distinguished upon the ground that in that case no state officer who was made a party had to do with the enforcement of the statute alleged to be unconstitutional.

If what was said in *Coulter* v. *Louisville & Nashville R. R. Co.*, 196 U. S. 599, 608, imports that an injunction can under no circumstances be awarded with respect to state taxes, it must be deemed to have been overruled by *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, where the collection of taxes based upon an unconstitutional assessment was enjoined, a part of these being state taxes, as appears by the report, pp. 22, 27.

(5) It is contended by defendants that the evidence was insufficient to warrant the conclusion of the learned District Judge that in fact property in general in the State of Kentucky was systematically undervalued. A similar question of fact was involved in *Coulter* v. *Louisville & Nashville R. R. Co.*, and this court (p. 609) held the evidence to be insufficient. In the present case, besides much to the same effect as that presented in the *Coulter Case*, a mass of additional evidence was introduced, including extracts from the United States Census Report for the year 1910; reports of the State Board of Equaliza-

tion for the years 1910, 1911, 1912, and 1913; report of the State Tax Commission of 1913; testimony of a member of the State Board of Equalization who served in the years 1908 to 1911, inclusive; affidavits of nearly 200 individuals from 47 counties in different parts of the State; and much besides. The evidence is too voluminous to be adequately reviewed within reasonable limits of space, and we content ourselves with saying that it comprises a body of official admissions and direct and circumstantial evidence from private and public sources that are unimpeached, fully sustaining the finding of the trial court that the great mass of property in the State, so far as assessed by the county assessors under the review of the county boards of supervisors and the State Board of Equalization—and this embraces all tangible property except railroad property and distilled spirits—during a period of years prior to and including the year 1913, was intentionally, systematically, and notoriously assessed far below its actual value, and at certainly not exceeding 60 per cent. of its fair cash value. There is little to the contrary except the general presumptions arising from the statutory duty of assessors to assess at fair cash value and from the oath customarily required of individual taxpayers, and a large number of stereotyped affidavits made by former assessors to the effect that they endeavored to follow the law and assess all property at its fair cash value, and if any property was otherwise assessed it was unintentional and not pursuant to any agreement between the assessor and the taxpayer. In our judgment this does not materially detract from the convincing effect of plaintiff's proofs. The evidence is analyzed briefly in the opinion of the District Judge, 230 Fed. Rep. 227–231, and nothing more need be added to his comments upon it.

This disposes of all the points raised by defendants.

(6) It is contended by plaintiff that the Board of Valuation and Assessment, in assessing plaintiff's franchise,

proceeded upon erroneous principles and adopted an improper method, not only in failing to equalize the assessment so as to make it conform to the basis generally adopted by other assessing officers in assessing other kinds of property, but also in failing to follow the course prescribed by the Kentucky statute; and that with respect to its complaint in this regard the decree of the District Court gave inadequate relief.

In order to pass upon this contention, we must consider the nature of the so-called "franchise tax," the method prescribed by the statute for valuing the franchise, the method that was pursued by the Board, and the manner in which the District Court dealt with it.

The statutory provisions are in §§ 4077–4081, Ky. Stats., the material portions of which are set forth in the margin.[1]

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[1] § 4077. (1) Franchise—assessment of. Every railway company or corporation, . . . also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district, where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are hereby constituted a board of valuation and assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in § 1 [4095] of subdivision 4 of this article, . . . The Auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require. It shall be the duty of the Attorney-General, when requested by the board of valuation and assessment, to attend said board at its meetings and advise with same in its proceedings.

§ 4078. (2) Corporations to report to Auditor to determine value of franchise. In order to determine the value of the franchises mentioned in the next preceding section, shall, annually, between the thirtieth day of June and the first day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the Auditor may prescribe, showing the following facts, viz.: the name and principal place of business of the cor-

They originated in the first General Assembly after the new Constitution, being §§ 1 to 5 of Article III of Chap. 103 (November 11, 1892; Acts 1891–1893, p. 299), which were amended by Chap. 217 of the same session (June 9, 1893, p. 990), by Act of March 29, 1902 (c. 128, Acts 1902, pp. 281, 305–309), and by Act of March 15, 1906 (c. 22, Laws 1906, pp. 88, 126–130). One of the amendments, having to do with one of the questions we are to consider, will be mentioned below.

It will be observed that the values of franchises (except as to turnpike companies, otherwise provided for), are to be determined by the Board of Valuation and Assessment, which board, upon a consideration of information furnished to it by the corporation, and from such other

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poration, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the thirtieth day of June of the year in which the statement is required to be made; the amount of surplus funds and undivided profits and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the thirtieth day of June of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the Auditor may require.

§ 4079. (3) Value of franchise—how determined—lines extend beyond State or county. Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county, the statement shall, in addition to the other facts hereinbefore required, show the length of entire lines operated, owned, leased or controlled in this State, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other State or government or organized and incorporated in this State, but operating and conducting its business in

evidence as it may have, is to "fix the value of the capital stock of the corporation . . . and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid." It has been held by the Kentucky Court of Appeals, and by this court, that the "capital stock of the corporation" includes its entire property of every kind and description, tangible and intangible, and that what is called its "corporate franchise" is the intangible property of the company in Kentucky. *Henderson Bridge Co.* v. *Commonwealth*, 99 Kentucky, 623, 639, 641; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, 154; *Adams Express Co.*

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other States as well as in this State, the statement shall show the following facts in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the thirtieth day of June of the year in which the assessment is required to be made. . . . *Provided*, That said board, from said statement, and from such other evidence as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

§ 4080. (4) Foreign corporations—franchise—how determined. If the corporation, company or association be organized under the laws of any other State or government, except as provided in the next section, the board shall fix the capital stock in this State by capitalizing the net income derived in this State, or it shall fix the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company or association in this State and elsewhere, the proportion which the gross receipts of this State, within twelve months next before the thirtieth day of June of the year in which the assessments were made, bears to the entire gross

v. *Kentucky*, 166 U. S. 171, 180; *Louisville Tobacco Warehouse Co.* v. *Commonwealth*, 106 Kentucky, 165, 167; *Marion National Bank* v. *Burton*, 121 Kentucky, 876, 888.

The findings of an official body such as the Board of Valuation and Assessment, made—as was the case here—after a hearing and upon notice to the taxpayer, are *quasi*-judicial in their character, and are not to be set aside or disregarded by the courts unless it is made to appear that the body proceeded upon an erroneous principle or adopted an improper mode of estimating the value of the franchise, or unless fraud appears. *Pittsburgh &c. Railway Co.* v. *Backus*, 154 U. S. 421, 435–436; *Chicago, Burlington & Quincy Ry. Co.* v. *Babcock*, 204 U. S. 585, 596. In this case there is no showing of fraud, the contention being that the Board departed from the mode prescribed by the statute. If they did this, or if they proceeded in disregard of rights secured to the taxpayer by the state or federal Constitution, of course they proceeded upon an

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receipts of the company, the same proportion of the value of the entire capital stock or the capitalizing of the net earnings in this State, less the assessed value of the tangible property assessed, or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this State.

§ 4081. (5) Interstate carrier—franchise—how fixed. If the corporation organized under the laws of this State, or of some other State government, be a railroad . . . company or a corporation performing any other public service, the lines of which extend beyond the limits of the State, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this State, bears to the total length of the lines owned, leased or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through or into which such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in this State; . . .

erroneous principle. *Henderson Bridge Co.* v. *Commonwealth*, 99 Kentucky, 623, 645; *Hager* v. *American Surety Co.*, 121 Kentucky, 791, 800. It appears that the Board, having received a report from the plaintiff, and having made a tentative assessment of its franchise for taxation for the year 1913, had a hearing upon the matter in the presence of counsel for plaintiff, and as a result made up its assessment in a manner summarized by the District Court (230 Fed. Rep. 193) as follows:

"The details of the assessment, showing the manner in which the board arrived at $45,658,630 as the value of the franchise, are these: The board first found the fair cash value of plaintiff's capital stock, hereafter termed its unit, to be $262,252,566. This valuation it arrived at by capitalizing at 6 per cent. what it took to be plaintiff's net income from operations on its own account for the year ending June 30, 1912, as of which date the assessment speaks, less what it took to be its net income from certain property which it took to be nontaxable. Plaintiff's reports to the Kentucky Railroad Commission and to the Interstate Commerce Commission as of that date state plaintiff's net income for that year to have been $18,052,905.12. This included the net income from the operation by plaintiff of three railroads, two in and one out of Kentucky, on account of the owners, which amounted to $1,439,604. The board deducted this sum from the total, leaving a balance of $16,613,301.12 of net income from operations on its own account. It then deducted from this balance the sum of $878,147 on account of its net income from such nontaxable property. This left a balance of $15,735,154, which capitalized at 6 per cent. gave the sum of $262,252,566, at which it valued the unit. The nontaxable property, the income from which was thus deducted, consisted of stocks in other corporations which owned property in this state and which had paid the taxes thereon. The deduction was based on

sections 4085 and 4086, Kentucky Statutes, and the construction thereof by the Court of Appeals in the cases of *Com.* v. *Walsh's Trustee,* 133 Kentucky, 103, 117 S. W. Rep. 398, and *Com.* v. *Fidelity Trust Co.*, 147 Kentucky, 77, 143 S. W. Rep. 1037. It then apportioned $92,181,766 of this sum to Kentucky. The sum so apportioned was 35.15 per cent. thereof. The percentage which it took was the percentage which the mileage operated by plaintiff in Kentucky on its own account was of the entire mileage so operated by it. The entire mileage so operated by it was 4,478.61, of which 1,574.41 was in Kentucky. It then added to the sum so apportioned $2,468,612, the excess in the value which it took that the portion of the unit in Kentucky was over such mileage proportion of the value thereof. It found this excess in value to be in the intangible part of the portion of the unit in Kentucky, and that in this way: The value of the tangible part it took to be $177,038,113, and that of the intangible $85,214,453. The proportion of the gross income derived from Kentucky of the entire gross income it took to be 38 per cent., or 2.85 per cent. in excess of such mileage proportion. It took it that this showed that the value of the portion of the intangible part of the unit in Kentucky was 2.85 per cent. of the value of such part, or the sum of $2,468,612, in excess of such mileage proportion thereof. Adding this sum to such mileage proportion of the value of the unit, to wit, $92,181,766, made the value of the portion of the unit in Kentucky $94,650,388. It then reduced this sum to that of $94,500,000 as the value. This reduction is not to be accounted for, except on the ground that it wanted to place the value of such portion in round numbers. This lessened the addition to such mileage proportion of the value of the unit on account of the excess in value of the portion of the intangible part of the unit in Kentucky over such mileage proportion thereof from the sum of $2,468,612 to $2,318,244, which latter sum was the dif-

ference between $94,500,000 and $92,181,766. But the board had no sooner made this reduction than it made a further reduction from this sum in round numbers to another sum, not in round numbers, to wit $75,139,402, as the value of the portion of the unit in Kentucky, and there it stayed. On the assumption that this sum was reached by reducing from $94,500,000, there is no accounting for how it reached it, rather than any other sum. The only account of it which it gave was that it so did 'to be conservative, and out of an abundance of caution, to the end that no injustice may be done respondent in arriving at the value of the corporate franchise of respondent in this state.' And it noted the fact that this sum was 'less than 80 per cent. of that which it believes to be the fair cash value of Kentucky's proportion of the entire capital stock of respondent.' It then deducted from this last sum the assessed value of the tangible property in Kentucky, to wit, $29,500,772, which left the sum of $45,658,630 as the value of the franchise. Such is what the board did on the face of things."

Plaintiff being an interstate carrier whose lines of railroad extend both within and without the limits of the State, it comes within § 4081, Ky. Stats., which requires that "the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this State, bears to the total length of the lines owned, leased or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State." The only previous provision to satisfy the reference "will fix the value of the capital stock *as hereinbefore provided*," is the provision of § 4079 that the Board shall fix it "from said statement, and from such other evidence as it may have."

Under this system it is obvious that there are three

principal steps in the process of ascertaining the value of the intangible property, taxable in Kentucky, of companies operating lines of railroad extending within and beyond the limits of the State. These are: (1) The fixing of the value of "the capital stock of the corporation"; which, as construed in previous cases, means the total value of all its net assets, tangible and intangible, within and without the State; (2) the apportionment to Kentucky; and (3) the elimination of the value of the tangible assets. Whether the second step shall precede the third, or *vice versa*, is one of the matters in dispute.

No specific method being prescribed by the statute for fixing the value of the "capital stock" of the entire system, except a requirement to the effect that the Board shall have before it, with other evidence, a statement by the corporation setting forth the kind of business engaged in, the amount of capital stock, the number of shares, the par and real value thereof, with the highest price at which it has sold recently, the amount of surplus and undivided profits, the value of all assets, the total amount of indebtedness, the gross and net earnings or income, the amount and kind of tangible property within the State, and its location and fair cash value, it follows that the particular method to be pursued in ascertaining from this and other evidence the aggregate capital value is left to the sound judgment and discretion of the Board. In such cases there are (at least) two recognized methods, known as the stock-and-bond plan and the capitalization-of-income plan. In the present case the latter was followed.

(7) The application of this method by the Board is attacked in two respects, first, in the manner of deducting non-taxable assets, and, second, in the rate of percentage used in capitalizing the income. As to the first point, the insistence is that as the tax under consideration is merely an intangible-property tax, it results that if

among the assets of the corporation going to make up its total capital value there were some that were non-taxable, it was necessary to deduct these before arriving at the taxable capital. It is pointed out that under § 4085, Ky. Stats., the property of all corporations is to be assessed in the name of the corporation, and "so long as said corporation pays the tax on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporation;" the argument being that, to the extent that plaintiff held the stock of other corporations having property in Kentucky and paying taxes thereon in that State, this stock in plaintiff's hands was non-taxable, and its value should have been deducted from the total value of its capital stock previously ascertained; citing *Commonwealth* v. *Fidelity Trust Co.*, 147 Kentucky, 77, 84. As the record shows, the Board of Valuation and Assessment recognized plaintiff's right to deduction upon this account, and for this reason, in applying the capitalization-of-income method, deducted from $16,613,301.12, net income from operated roads, the sum of $878,147, the net income from non-taxable securities as reported by plaintiff to the Auditor and the Railroad Commission, taking the balance only, or $15,735,154, as the income to be capitalized in order to arrive at the value of the entire system. The criticism is that adopting this method had the effect of deducting only such stock in other corporations as paid dividends, whereas plaintiff insists that much of its stock thus held, although paying no dividends, or dividends at a low rate, had large intrinsic value by reason of the control it gave over other lines of railroad and the increment it brought to the aggregate income of the company. There was evidence that these non-taxable securities amounted to upwards of $30,000,000 in value, whereas the capitalization at 6 per cent. of their income of $878,147 produced a value of only $14,469,113. In our opinion, it is a sufficient answer to this contention

to say that the Board merely carried out the capitalization-of-income plan of valuation, perhaps to its logical extreme, but certainly not in a manner that enables this court to say that they pursued a fundamentally wrong method.

(8) The second point, the adoption of a 6 per cent. interest rate as the basis of capitalization, instead of the higher rate, called in the testimony the "composite percentage," reached by taking plaintiff's mileage in each of the thirteen States in which it operates, multiplying this by the legal rate of interest in that State, and dividing the total of the products by the total mileage, is, like the first, a criticism merely of the conclusion of the Board upon a question of fact which is not properly subject to review by the courts.

Therefore we concur in the opinion of the District Judge that, upon this record, the value of the capital stock must be taken to be at least as great as $262,252,566, the amount found by the Board.

(9) The Board's next step was to apportion to Kentucky a certain part of this total value, which of course included both tangible and intangible assets; after which it proceeded to deduct the assessed value of the tangible assets in Kentucky. Plaintiff insists that these steps should have been reversed; that the Board, having valued the total capital stock of the company, including assets tangible and intangible, should first have deducted the entire tangible assets wherever situate, and next have assigned a proper portion of the intangible to Kentucky.

What the statute requires, in this respect, is a question of state law, upon which we must follow the Kentucky Court of Appeals if that court has passed upon it. It is true that the only authority of the Board was to assess intangible property, and, whether it followed the local statute or not, it could not, consistently with the due process provision of the Fourteenth Amendment, include, at least as against any foreign corporation, any part of its

tangible property lying without the State; and it is not to be supposed that the statute intended to prescribe a different rule with respect to Kentucky corporations, since domestic and foreign corporations are dealt with in the same section (§ 4081). That section, according to its terms, first provides that the Board shall "fix the value of the capital stock as hereinbefore provided," there being, as already shown, no provision respecting the method except that the ascertainment shall be based upon the statement of the corporation and such other evidence as the Board may have. The section proceeds to declare that "that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this State bears to the total length of the lines owned, leased, or controlled in this State and elsewhere, shall be *considered* in fixing the value of the corporate franchise of such corporation liable for taxation in this State." Referring now to the mode of procedure, these words evidently contemplate an apportionment, as an aid in reaching the ultimate result (valuation of franchise taxable in Kentucky); but it is an apportionment of "the value of the capital stock," which includes both tangibles and intangibles, within and without the State. This is not to say that any property without the State may be taxed. It requires state mileage valuation to be considered and compared with system mileage valuation, but it does not make this comparison conclusive. As the section was enacted originally, the words "considered in fixing" were not contained in it, so that upon the face of things the mileage pro-rate was conclusive in ascertaining the State's proportion of the value of the corporate franchise,—just as county and district mileage was and still is conclusive as to apportionment between those taxing districts. But by the Act of June 9, 1893, the words "considered in fixing" were inserted, the necessary effect of which was to make the relation of state

mileage to system mileage a factor that must be considered, but not necessarily given conclusive weight. Section 4081 says nothing about deducting the value of tangible property, and the preceding sections speak of deducting only such tangible property as is located within the State. Indeed, there is no provision requiring the corporation to report its tangibles outside of the State. And, if all tangibles were deducted before apportionment, then the deduction of "all tangible property assessed in this State," specifically required by the proviso to § 4079, obviously would result in a double deduction. The sections are inartificially drawn in this as in some other respects. The District Court, upon elaborate consideration in the case of the 1912 assessment (209 Fed. Rep. 418–429), reached the conclusion that by the proper construction the entire value of capital stock should be first apportioned, having regard to the mileage, and that from Kentucky's portion of the whole the assessed value of the tangibles within the State should then be deducted; and that the Kentucky Court of Appeals had so decided in *Commonwealth* v. *Covington & Cincinnati Bridge Co.*, 114 Kentucky, 343.

Plaintiff relies upon two cases, the first being *Adams Express Co.* v. *Kentucky*, 166 U. S. 171, 180, where this court, by Mr. Chief Justice Fuller, after referring to the statutory provisions now under consideration, and the use in the several sections of the words "franchise" and "corporate franchise," said: "But taking the whole act together, and in view of the provisions of sections 4078, 4079, 4080 and 4081, we agree with the Circuit Court that it is evident that the word 'franchise' was not employed in a technical sense, and that the legislative intention is plain that the entire property, tangible and intangible, . . . should be valued as an entirety, the value of the tangible property be deducted, and the value of the intangible property thus ascertained be taxed under these provisions; and as to railroad . . . companies, whose lines ex-

tend beyond the limits of the State, that their intangible property should be assessed on the basis of the mileage of their lines within and without the State. But from the valuation on the mileage basis the value of all tangible property is deducted before the taxation is applied." The matter of apportionment was not there involved, nor what method or order was prescribed by the statute; the question at the moment being whether the tax was a true franchise tax, or merely a property tax upon intangible property. The significant thing was that the value of tangibles was to be deducted; whether before or after apportionment was a matter of no present significance. And the last sentence quoted, in the expression "valuation on the mileage basis," indicates an apportionment of the entire capital stock, mile for mile, prior to the deduction of tangibles.

The second case referred to is *Coulter* v. *Weir*, 127 Fed. Rep. 897, 907–908, where the Circuit Court of Appeals for the Sixth Circuit, in dealing with the question whether the law was repugnant to the commerce clause or the Fourteenth Amendment, used this language: "Neither is the injunction in reference to a deduction of the value of tangible taxable property from the gross value of the whole corporate property limited to such as is situated within the state of Kentucky. If tangible property having a situs outside the state be included in the valuation of the company's intangible property, the purpose of the law, being to tax only intangible property, is defeated. We therefore read the act, as the Supreme Court seems to have read it in *Adams Express Co.* v. *Kentucky*, as requiring the deduction of tangible property from the gross value of all corporate assets, whether such tangible property be within or without the state." The question of apportionment, or of the particular method to be pursued in making the assessment, was not involved in this case, any more than in *Adams Express Co.* v. *Kentucky*, *supra*.

It is true, as the court said, that if tangible property having a situs outside the State were included in the valuation, the purpose of the law to tax only intangible property would be defeated. The same result would follow if tangible property within the State were included in the valuation. But it does not follow that tangibles, within or without the State, are to be included in the valuation because included in the apportionment. Any excess of tangibles, without or within the State, properly may be given its due weight as a factor modifying the tentative result reached by mere mileage apportionment. In the absence of special circumstances, this is not of itself necessarily an unjust method of apportioning such a tax. *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530, 552–553; *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1, 18, 20, 22, 26.

However, the decision of the Kentucky Court of Appeals in the *Covington & Cincinnati Bridge Co. Case, supra*, is directly in point, and, being so, is conclusive upon the question of the proper statutory method. There the company's "capital stock," valued by the stock-and-bond method, amounted to $1,330,000. It owned an interstate bridge, 59 per cent. of the length thereof being in Kentucky, the remainder in Ohio; and it had tangible property in Kentucky assessed at $452,000. The State of Ohio assessed the portion of the bridge lying in that State at $237,984, and the company paid the taxes thereon. The Kentucky Board of Valuation and Assessment fixed the value of its entire property or capital stock at $730,349, and, deducting from this the assessment of tangibles in Kentucky ($452,000), took the difference, or $278,349, as the franchise valuation. The company, insisting that the correct valuation was $180,489, paid to Kentucky the tax on this amount, reserving the question of its liability for a claimed balance of $464.84, and of the method or basis upon which its franchise should be valued for taxa-

tion by the Board, to be determined by the courts. The matter was submitted to the Circuit Court as an agreed case presenting two questions, (1) whether the company owed to the Commonwealth the sum of $464.84, or any part thereof, on account of the tax of its franchise, and (2) what method or basis should be adopted by the State Board of Valuation and Assessment for fixing the value of defendant's franchise for taxation in the Commonwealth of Kentucky. That court held that the Board had adopted an improper method, and that the company, by the payment it had made, had fulfilled its obligation to the State; reaching this conclusion by taking the aggregate market value of its capital stock and bonded indebtedness ($1,330,000), deducting the assessed value of the Ohio tangibles ($237,984), and apportioning the balance of $1,092,016 on the basis of 59 per cent. to Kentucky and 41 per cent. to Ohio. From 59 per cent. of $1,092,016, namely $664,289, it deducted the tangible property assessed in Kentucky, $452,000, which left a balance of $192,289 as the value of the Kentucky franchise. The State appealed to the Court of Appeals, where it insisted that by the method adopted by the Circuit Court the company was not taxed upon its entire property. The report of the case states (pp. 348, 349): "It is insisted for the State that the proper way to arrive at the valuation of the franchise is to take the total value, $1,330,000, and get 59 per cent. of it, which is $782,700, and that this presents the total of the tangible property and of the franchise in Kentucky. Therefore, if we deduct from this total $782,700, the assessment of the tangible property in Kentucky, $452,000, the balance, $330,700, is the value of the franchise. The board fixed the value of the franchise at $278,349, or considerably less than the result thus obtained." It was insisted for the Bridge Company that the Circuit Court had followed *Henderson Bridge Co.* v. *Commonwealth*, 99 Kentucky, 623, but the Court of Ap-

peals pointed out that in that case the Board had followed the method claimed by the Company, that as the action was brought by the State to recover taxes upon the assessment made by the Board, the State was not in a position to question the propriety of the assessment, and that there was nothing in that case, or in any subsequent case approving it, to prevent the Board from adopting a different basis. To a criticism that the Board had adopted an erroneous basis in the instant case, the court conceded the point, *arguendo*, but sustained the assessment upon the ground that it was no more onerous than it would have been had a correct method been adopted; and, in conclusion, declared (pp. 350–351): "We therefore conclude that the basis urged by appellant [the State] is the proper one for the assessment of the property under the agreed facts, and the board having fixed a lower assessment than this would make, the court erred in not enforcing the collection of the tax on the assessment made by the board." This was a precise answer to the equally precise contention urged in behalf of the State affecting each of the two questions that were submitted for decision, and it seems to us that it is binding upon the federal courts as a construction of the statute.

This, we repeat, does not necessarily result in including in the Kentucky franchise valuation tangible or intangible property not located within that State. It does permit the Kentucky officials to take into consideration extra-state tangibles, as well as intangibles, constituting portions of the unit of which they are valuing a part. This is permissible, even in applying the statute to non-resident corporations. It is settled that total stock or total assets, situate partly within and partly without the State but organically related, may be taken into consideration as a means of reaching the true cash value of property within the State, and that the mileage relation may be given its proper weight. *State Railroad Tax Cases*, 92 U. S. 575,

608; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 26; *Pittsburgh &c. Railway Co.* v. *Backus*, 154 U. S. 421, 430–431; *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1, 26, 27; *Fargo* v. *Hart*, 193 U. S. 490, 499.

(10) Plaintiff's next point is that the Board took into consideration a mileage proportion of 35.15 per cent., which was the ratio borne by the roads operated by plaintiff within the State of Kentucky to its total operated mileage; whereas it should have included the controlled mileage within and without the State, which would have yielded to Kentucky a proportion of only 24.69 per cent. In this the District Court yielded to plaintiff's contention, and, we think, rightly so. By § 4079, Ky. Stats., where the company's lines extend beyond the limits of the State, the report to the Auditor shall in addition to other facts show "the length of entire lines operated, owned, leased or controlled in this State, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere." And, by § 4081, "that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this State, bears to the total length of the lines owned, leased or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State." In *Commonwealth* v. *L. & N. R. R. Co.*, 149 Kentucky, 829, 838, the very point was considered by the Court of Appeals, which declared: "If the railroad company owns a majority of the stock of any company, so that it may elect its directors and dictate its policy, there can be no doubt that it controls it within the meaning of the statute, and that such other railroad should be included in the report required to be made to the Auditor. If required to be reported, the Board of Valuation and Assessment may take them into consideration in fixing

the value of the franchise of the controlling company in the State of Kentucky."

(11) The District Court (230 Fed. Rep. 199, *et seq.*) acceded to the contention of the plaintiff that the action of the Board in adding at first $2,468,612, and, finally, $2,318,244, to the Kentucky proportion of the value of the unit, on account of the excess value of the portion of the Kentucky intangibles over the mileage proportion thereof was not warranted; basing this decision upon the ground that the Board did not follow the only possible method that would have determined this excess with any certainty, and did not have before it the data that would have enabled it to do so. The point perhaps is covered by one of defendants' assignments of error; but no argument has been addressed to it, and we express no opinion upon it.

(12) The District Court, having found that the value of plaintiff's entire capital stock must be taken to be at least as much as $262,252,566, the amount found by the Board, and that the apportionment must be upon the basis not of the operated mileage only, but of all mileage operated, owned, leased, and controlled within and without the State, was led to the further conclusion, as a corollary (230 Fed. Rep. 202–204), that the valuation of the total capital stock should include an item that the Board had overlooked, viz., the value of so much of the controlled mileage as was not represented by plaintiff's holdings. (Of course, in adopting the capitalization-of-income method of valuation, no account was taken of the interests of others than plaintiff in the controlled roads.) Plaintiff contends that the statute does not justify this procedure; that it is beyond the power of the State because it results in taxing property not belonging to the plaintiff; and that a more logical and consistent method would be to arrive at the operated, owned, leased, or controlled mileage by treating as controlled mileage not the

total, but only a proportion corresponding to the amount of stock held by plaintiff in the controlled roads. The matter is not free from doubt; but we concur in the view of the District Judge that it was the legislative intent that, in fixing the percentage apportionable to Kentucky and to be taken into consideration in valuing the taxable franchise, the whole of the controlled mileage within and without the State was to be treated as a part of the aggregate "capital stock," not only in fixing the mileage, but also in fixing the valuation, upon which the apportionment is to be based. It is not to be supposed that the legislature intended to require that, in making the mileage apportionment, which as already shown is not conclusive but evidential upon the valuation of the taxable franchise, fractional interests in the controlled roads should be taken into the account, but rather that a controlled road should be treated the same as a road owned.

In order to avoid a double assessment of the franchise of so much of the controlled mileage as was within the State, the court found it necessary to deduct from the Kentucky apportionment of the "capital stock" the value of the Kentucky portion of the controlled mileage (in addition to the assessed value of the tangible property there situate) since these local franchises would be assessed against each of the separate organizations. In this view we concur.

But the court was unable to apply the proper correction to the Board's valuation (p. 232), because of there being nothing in the record to show either the value of the portion of plaintiff's total capital stock not considered by the Board (that is, the value of the outstanding interests in the controlled roads), or the value of that portion of the controlled mileage which was in Kentucky.

After the court delivered its opinion to this effect, and before the entering of the final decree, plaintiff tendered what is called a supplemental bill, which the court allowed to be filed, purporting to show all the facts respecting the

controlled roads, and to demonstrate that the result of adopting the process indicated by the court's opinion would be to reduce the assessment below the amount upon which the company already had paid taxes, and this whether the valuation were made on the stock-and-bond plan or on the capitalization-of-income plan. It appears that defendants never filed any answer to this, and it is urged that because of their failure to do so its allegations must be taken as confessed. But there is nothing to show that defendants were ordered to answer; and inasmuch as this supplemental bill was filed after the hearing and decision of the cause, and the record contains nothing to show why its averments were ignored, we are not able to say either that defendants were in the position of admitting those averments, or that the court erred in failing to give effect to them. But at least it can be said that plaintiff was not in default for omitting to introduce evidence at the hearing respecting these matters, they not having been considered by the Board, nor set up in the original pleadings, nor so far as appears deemed by any of the parties to be material until the court rendered its decision. Yet, as will appear presently, the court in effect decided the case against plaintiff because there was nothing in the record to show the facts concerning the controlled mileage.

(13) In attempting to carry into effect its conclusions upon the facts and the law, the District Court pursued the following process of reasoning (p. 231): Assuming $262,252,566 to be the true cash value of plaintiff's entire capital stock, as the Board found it to be, and 24.6901 (in the opinion this is misprinted as "24.9601") to be the true percentage of the fair cash value apportionable to Kentucky, and that Kentucky's portion was not of greater value than the mileage proportion, the fair cash value of the portion of plaintiff's capital stock attributable to Kentucky would be $64,750,418.79. Sixty per cent. of

this—the factor of equalization—was taken to be $38,850,251.12. Deducting $29,500,772, the assessed value of the tangible property, would leave $11,349,479.27 as the value of the franchise—this being less than half of the amount upon which payment had been made. (There appear to be some additional misprints, or trifling errors of calculation, but not sufficient to affect the result.) But since the Board had omitted to include in the value of the capital stock that interest in the controlled mileage not represented by the stock and bonds owned by plaintiff, and since there was nothing in the record to show the value of this interest, or the value of that portion of the controlled mileage located in Kentucky, the court assumed that the result of considering these two matters might be to make the value of the Kentucky portion of plaintiff's capital stock as much as $92,181,766, the sum at which the Board fixed it, instead of $64,750,418.79, the amount computed by the court. The court proceeded to say (p. 232):

"The board has found the fair cash value of the portion of plaintiff's unit in this state to be $92,181,766, without any excess value. They have not gone at it in the right way. But they have in fact found such to be its value. It is possible that, if they had gone at it in the right way, they would have found such to be the value thereof. . . . I will therefore dispose of the case on the basis that it was that much. This is not such an exactness as I always like to attain, but the case is one where exactness is not, and only approximation is, attainable. Taking 60 per cent. of $92,181,766 would give $55,309,059.60 as the value of the portion of plaintiff's unit in Kentucky. Deducting $29,500,566, the assessed value of the tangible property, leaves $25,808,493.60 as the value of the franchise. And deducting from this balance $22,899,300, the amount on which payment has been made, leaves $2,909,192.60 on which payment should yet be made."

This rough-and-ready reasoning had the effect of depriving plaintiff of the benefit of having controlled mileage taken into consideration in making the apportionment, instead of operated mileage only; and this because of the assumption that the same valuation reached by the Board through an erroneous method possibly might have been reached had they pursued a correct method. We think the court here fell into error. It being shown that the valuation made by the Board was the result of following a method substantially erroneous because not in accordance with the statute, there is no presumption that a like valuation would have been reached by following a correct method. As the difference is so great—more than $27,000,000—there is a strong presumption to the contrary. If any of the facts necessary to enable the court to determine what result would have been reached by the application of a correct method were absent from the record, the court might have opened the proofs, in its discretion; otherwise it should have proceeded to base its judgment upon such proofs as already were in the record. The result of the method adopted in making up the decree was to deprive plaintiff of the relief it was entitled to, upon the basis of the facts as found, because of a surmise that, upon other facts not shown by the record, a conclusion sustaining the Board's action might have been reached.

The decree under review, so far as defendants' assignments of error are concerned, should be affirmed. Upon plaintiff's assignments of error, it should be reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

No. 778, reversed.
No. 779, affirmed.

MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS, and MR. JUSTICE CLARKE dissent.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* GREENE, AUDITOR, ET AL., CONSTITUTING THE BOARD OF VALUATION AND ASSESSMENT FOR THE STATE OF KENTUCKY, ET AL.

GREENE, AUDITOR, ET AL., CONSTITUTING THE BOARD OF VALUATION AND ASSESSMENT FOR THE STATE OF KENTUCKY, ET AL. *v.* ILLINOIS CENTRAL RAILROAD COMPANY.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* GREENE, AUDITOR, ET AL., CONSTITUTING THE BOARD OF VALUATION AND ASSESSMENT FOR THE STATE OF KENTUCKY, ET AL.

GREENE, AUDITOR, ET AL., CONSTITUTING THE BOARD OF VALUATION AND ASSESSMENT FOR THE STATE OF KENTUCKY, ET AL. *v.* ILLINOIS CENTRAL RAILROAD COMPANY.

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

Nos. 642, 643, 644, 645. Argued January 16, 17, 18, 1917.—Decided June 11, 1917.

Greene v. *Louisville & Interurban R. R. Co.*, *ante*, 499, followed in holding: (1) That these are not in effect suits against the State, (2) that plaintiff has not an adequate remedy at law under § 162, Ky. Stats., and (3) that judicial relief may be granted against unlawful discrimination resulting from general and systematic undervaluations by assessors.

Louisville & Nashville R. R. Co. v. *Greene*, *ante*, 522, followed: (1) As to the sufficiency of proof of general, systematic and notorious undervaluation of property by assessors in Kentucky, (2) in holding that the jurisdiction of the courts extends to enjoining the collection of illegal taxes when assessed for state purposes as well as when assessed for local purposes, and (3) in holding that, as applied to an

interstate railroad, the Kentucky statutes require first an apportionment of a proper share of the railroad's total "capital stock" (tangible and intangible property) value to Kentucky, followed by a deduction from Kentucky's portion thereof of the value of the railroad's tangible property in that State.

The evidence here warrants the conclusion that plaintiff's "franchise" (intangible property) in Kentucky was valued by the Board of Valuation and Assessment upon the basis of 80 per cent. of its "capital stock" (tangible and intangible property) apportioned to that State.

In the absence of fraud, the valuations made by an assessing board are not judicially reëxaminable unless resulting from some principle of assessment which is fundamentally wrong.

In this case no fundamentally wrong principle was involved in adopting the capitalization-of-income rather than the stock-and-bond plan for valuing a railroad system; in determining what rate of interest should be selected, or how many years' earnings should be considered, in capitalizing; or in finding what was the net income for a given year.

Although the fact that property is part of a system and has its uses only in connection with other parts of the system may be considered by a State in taxing that portion of the system which is within her borders, yet the idea of organic unity must not be made the means of unlawfully taxing property without the State belonging to persons domiciled elsewhere.

It being contended that in valuing upon a mileage basis that portion of plaintiff's railroad system which was taxable in Kentucky the Board of Valuation and Assessment did not make due allowance for the excess value per mile due to costly terminals in other States, *Held* that, in the absence of contrary proof, the Board must be presumed to have made such allowance.

Plaintiff insisted that certain investment securities held by it in its treasury in another State should not be considered as part of its assets in assessing its intangible property, apportionable to Kentucky, averring in its pleading that they had no connection with its business of transportation and did not represent railroads or other properties operated by it. This contention being rejected for want of evidence upon the character of the securities and their relations to plaintiff's system, plaintiff on rehearing contended that, as they represented a controlling interest in other railroads outside the State, the mileage of such railroads should be taken into account, under Ky. Stats., § 4081, in the apportionment, *Held* that the District Court did not abuse its discretion in ruling that this contention came too late.

209 Fed. Rep. 465, affirmed.

THE cases are stated in the opinion.

Mr. Blewett Lee and *Mr. Edmund F. Trabue*, with whom *Mr. Robert V. Fletcher*, *Mr. John C. Doolan* and *Mr. Attilla Cox, Jr.*, were on the briefs, for the Illinois Central Railroad Co.

Mr. Charles Carroll, *Mr. Marvel M. Logan*, Attorney General of the State of Kentucky, and *Mr. John L. Rich*, with whom *Mr. Charles H. Morris*, Assistant Attorney General of the State of Kentucky, was on the briefs for Greene *et al.*

MR. JUSTICE PITNEY delivered the opinion of the court.

These are appeals and cross-appeals from two final decrees of the District Court enjoining (upon certain conditions) the enforcement of franchise tax assessments for the respective years 1912 and 1913, made against the Illinois Central Railroad Company (plaintiff below in each case) by Henry M. Bosworth and others, constituting the Board of Valuation and Assessment of the State of Kentucky, who were among the original defendants, and to whose offices the cross-appellants Robert L. Greene and others succeeded pending the suits, and were thereupon brought in as parties defendant. Plaintiff being an Illinois corporation, the federal jurisdiction was invoked upon the ground of diversity of citizenship, and also of alleged infringement of plaintiff's rights under the due process and equal protection provisions of the Fourteenth Amendment; the assessments being attacked as having been made by the Board in a manner not in accordance with the state law, as including in the valuation property not within the State, contrary to the due process clause, and as being based upon a discriminatory rule of valuation as compared with other property in the State, and thus

amounting to a denial of the equal protection of the laws. The equity jurisdiction was invoked upon the usual grounds. The pleadings are involved, and no attempt will be made to summarize them. In the case relating to the 1912 assessment, they differ somewhat from those in the case relating to the assessment for the following year; but the two cases were consolidated for the purposes of final hearing. They resulted in decrees granting relief to the plaintiff to the extent of equalization with the basis of assessment customarily adopted by assessing officers with respect to other property in the State, and denying relief upon the other grounds of complaint. Plaintiff appealed to this court in both cases upon the ground that it was entitled to more ample relief; defendants took cross-appeals upon the ground that no relief ought to have been granted.

The cases were heard here together with several cognate cases, this day decided, viz: Nos. 617 and 618, *Greene* v. *Louisville & Interurban R. R. Co.*, *ante*, 499, and Nos. 778 and 779, *Louisville & Nashville R. R. Co.* v. *Greene*, *ante*, 522.

The salient facts of the present cases are as follows: During the two years pertinent to the controversy, plaintiff operated a system of railroads extending throughout the State of Kentucky and ten other States, having, according to the averments contained in the bills of complaint and the proofs upon which the cases were heard, a total mileage owned, operated, leased, or controlled amounting to 4,550.54, of which 563.79 miles, or 12.3 per cent., were in Kentucky. For the year 1912, the Board of Valuation and Assessment fixed plaintiff's capital stock valuation for the State of Kentucky at $27,124,240, and deducted from this the tangible property assessment made by the Railroad Commission, $12,377,383, leaving the franchise assessment $14,746,857. The District Court granted a restraining order, followed by a preliminary

injunction, conditioned that plaintiff should pay taxes, state and local, on a valuation of $6,618,585 (209 Fed. Rep. 465), and eventually made a final decree enjoining the enforcement of the assessment, conditioned upon plaintiff's paying taxes upon an additional valuation of $1,347,212, or $7,965,797 in all.

For the year 1913, the capital stock value fixed for Kentucky was $23,679,180, the assessed value of tangible property $12,478,903, which, being deducted, left $11,200,277 as the franchise valuation. The court granted a restraining order upon payment of taxes on an assessment of $6,000,000, followed this with a temporary injunction upon the same terms, and made a final decree granting a permanent injunction upon condition of the payment of taxes upon $2,161,067 in addition to the $6,000,000 upon which taxes had been paid under the order for preliminary injunction.

With respect to three of the questions raised by defendants herein: (a) That the suits are not maintainable because in effect suits against the State; (b) that plaintiff has an adequate remedy at law under § 162, Kentucky Statutes; and (c) that plaintiff is not entitled to relief by way of equalization because of the undervaluation of property in general by the local assessors; these cases, like the *Louisville & Nashville Cases*, are controlled by the decision in *Greene* v. *Louisville & Interurban R. R. Co.*, *ante*, 499. Upon the question of the sufficiency of the proofs to warrant the conclusion of the District Court as to the general, systematic, and notorious undervaluation of property in Kentucky by the assessing officers for purposes of taxation, and as to the ratio of such undervaluation, the present cases are indistinguishable from the *Louisville & Nashville Cases*, *ante*, 522, and are controlled by our decision therein. Upon the point that the jurisdiction of the court extends to enjoining the collection of illegal taxes, whether assessed for state or for local pur-

poses, the present cases are controlled by the decision in the *Louisville & Nashville Cases*.

This disposes of all assignments of error filed by the cross-appellants (defendants below).

In these cases, as in those last mentioned, it is earnestly insisted by plaintiff that the District Court erred in holding that the Kentucky statutes, properly construed, require first an apportionment of a proper share of the total "capital stock" value to Kentucky followed by a deduction from Kentucky's proportion thereof of the value of its tangible property in the State, instead of holding that the total tangible property in and out of Kentucky should first be deducted from the total capital stock value before apportionment to the State. We need only repeat what was said in the *Louisville & Nashville Cases*, that this is a question of state law that has been definitely passed upon by the Kentucky Court of Appeals in *Commonwealth* v. *Covington & Cincinnati Bridge Co.*, 114 Kentucky, 343, whose decision the District Court properly followed.

We come to questions peculiar to the present cases.

For the year 1912 the Board of Valuation and Assessment made a preliminary assessment of the franchise at $21,500,000, of which notice was given to plaintiff, and, after a hearing, finally assessed the franchise at $14,746,857; a result reached, as already stated, by taking Kentucky "capital stock" at $27,124,240, and deducting the tangible property assessment of $12,377,383. In granting the preliminary injunction (209 Fed. Rep. 465), the court, deeming that the Board had found the fair cash value of the portion of plaintiff's capital stock in the State to be $27,124,240, equalized this with the undervaluation of other property in the State on a basis of 70 per cent. in order to arrive at a proper valuation of the franchise for the purposes of a temporary injunction. Upon the final hearing, the court reached the conclusion that the valuation of $27,124,240 was itself the result of an equaliza-

tion by the Board at 80 per cent. of what they had found to be the fair cash value of the capital stock in Kentucky; that is to say, that they had found the fair cash value to be $33,905,300. Having concluded that equalization should be made upon the basis of 60 per cent., the court applied this percentage to the $33,905,300, making the equalized capital stock value $20,343,180, deducting from which the assessed value of the tangibles $12,377,383, left $7,965,797 as the value of the franchise. Plaintiff contends that there was no sufficient evidence to support the conclusion that the Board's valuation of $27,124,240 was the result of an 80 per cent. equalization; but the contention is clearly unfounded.

There is a similar contention, equally unfounded, with respect to the mode in which the District Court applied the 60 per cent. equalization factor to the 1913 valuation.

As to the mode in which the Board arrived at a capital stock valuation for the entire system, and the mode in which the Kentucky apportionment was arrived at, several contentions are made by plaintiff besides the one of which we already have disposed. They are: (a) That when the Board capitalized earnings as an index to value they took 6 per cent. as a basis instead of 7½ or 8 per cent., either of which is said to be a more proper rate upon the ground that because of annual unproductive items of expense, amounting to nearly or quite 2 per cent. of plaintiff's capitalization, the higher rate is necessary in order to yield a net 6 per cent. return upon the investment; (b) that when the stock-and-bond method was employed as an index to value the highest instead of the average market prices were employed; (c) that in capitalizing earnings gross income was used, although it included income from investments in the company's treasury, instead of net operating income, which it is insisted is the proper factor; (d) that plaintiff in each year had in its

treasury, at its principal office without the State, large amounts of investment securities that improperly were included in the sum found as the value of its aggregate capital stock and apportioned in part to Kentucky; and (e) that plaintiff owned large and costly terminals at Chicago, New Orleans, Memphis, and elsewhere outside of Kentucky, causing a great excess value mile for mile of plaintiff's lines outside the State as compared with those inside, and that this excess value was not eliminated either before or after the apportionment to Kentucky.

The first three points relate to valuation, the last two to apportionment. The District Court properly held that the action of the Board must be sustained unless it was made to appear that they had adopted a fundamentally wrong principle, or had been guilty of fraud. It held further, that no fundamentally wrong principle was involved in determining whether such a railroad system should be valued on the capitalization-of-income or on the stock-and-bond plan; or, if the former, what rate of interest should be used in capitalizing, or how many years' earnings should be considered, or what was in fact the amount of net income for a given year; or, if the stock-and-bond plan was adopted, what was the value of the stock and bonds; and that on these and similar matters the action of the Board, in the absence of fraud, was binding upon the court. In this we concur.

The claim for an allowance by reason of the treasury securities and the terminals situate in other States is based upon the principle laid down in *Fargo* v. *Hart*, 193 U. S. 490, 499, and similar cases, to which we adhere, that a State cannot tax property outside of its jurisdiction belonging to persons domiciled elsewhere, and that although the fact that property is part of a system and has its actual uses only in connection with other parts of the system may be considered by the State in taxing that portion of the system which is within its borders, yet the notion of

organic unity must not be made the means of unlawfully taxing property without the State.

As to the terminals, the District Court held that since it did not appear but that the Board made due allowance on account of them, it must be presumed that they did make such an allowance. As to the treasury securities, the court held that plaintiff had not made an adequate showing to the Board of Valuation and Assessment; that it did not appear but that the Board had given proper consideration to them; and that plaintiff had not put the court in possession of the evidence upon which to determine whether the securities were a part of its "unit," or why the securities were held by plaintiff instead of being distributed to the stockholders, and that the case of *Coulter* v. *Weir*, 127 Fed. Rep. 897, 909–911, did not apply because there the property in question had been placed in the hands of trustees for the benefit of stockholders. Upon petitions for rehearing, plaintiff insisted that if the treasury securities were to be taken as a part of the unit, then, since these securities represented a controlling interest in certain large lines of railroad lying outside of Kentucky (the Central of Georgia, the Yazoo & Mississippi Valley, and the Indianapolis Southern systems), the apportionment should take the mileage of these controlled lines into account, which would have yielded a total mileage of all lines amounting to 7,862.95, and Kentucky mileage 560.49, or only 7.13 per cent. for the year upon which the 1912 assessment was based, and a somewhat smaller percentage for the following year. To this the court responded that the contention came too late, and it cannot be said that this was an unreasonable view, or showed an abuse of discretion. In addition to the averments respecting comparative mileage contained in the original bills, it was distinctly stated in an amended bill in the case pertaining to the 1912 assessment that the treasury securities in question had not "any connection

whatever with the business of transportation carried on by complainant, and that none of said stocks, bonds or other properties covered or represented the physical railroads or other properties operated by complainant."

In criticism of the conclusions of the court upon these and some other points, a most elaborate argument is submitted; but we see no sufficient ground for disturbing the decision.

Decrees affirmed.

MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE dissent in Nos. 643 and 645. In Nos. 642 and 644, they concur in the result.

DARNELL *v.* EDWARDS ET AL., CONSTITUTING THE MISSISSIPPI RAILROAD COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 216. Argued April 25, 1917.—Decided June 11, 1917.

In determining whether railroad rates fixed by a state authority are confiscatory because not yielding a proper return, the basis of calculation is the fair value of the property used in the service of the public.

Therefore, when a railroad which was originally constructed and owned by two is operated by one of them under an arrangement whereby his interest will end and become vested in the other at the expiration of a term of years, the original investment of the operating owner should not be charged in annual instalments against the annual operating revenue, in determining whether the rates fixed are remunerative.

There is a strong presumption in favor of rates fixed by an experienced administrative body after a full hearing.

Rates should not be held too low upon evidence that they proved un-

remunerative during a brief period, when conditions for traffic were abnormally poor and little effort was made to improve them.

In determining the adequacy of rates, the circumstance that the railroad has been unwisely built in an unfavorable locality, and the nature and value of the service actually rendered by it to the public, are matters to be considered.

Semble, that, in testing the validity of rates affecting a limited class of traffic in which the railroad is for the time engaged, an extra cost of construction, not justified by that traffic but incurred with a view to extending the road ultimately into more lucrative territory, should not be accounted as a part of the fair value by which the rates must be gauged.

In the absence of a fair test of rates challenged as confiscatory, and in the presence of some doubt of their adequacy, dismissal of the bill should not be absolute, but should be without prejudice to another suit, in case they should prove confiscatory when fully and fairly tested.

Final decree following 209 Fed. Rep. 99, modified and affirmed.

THE case is stated in the opinion.

Mr. Roger Montgomery, with whom *Mr. William P. Metcalf* was on the brief, for appellant.

Mr. James N. Flowers, *Mr. George H. Ethridge*, Assistant Attorney General of the State of Mississippi, *Mr. James Stone* and *Mr. J. B. Harris* for appellees, submitted.

MR. JUSTICE PITNEY delivered the opinion of the court.

Appellant filed his bill in the District Court against the members of the Mississippi Railroad Commission, an administrative body having the usual powers, in which he sought relief by injunction against an order prescribing maximum rates on logs in carload lots transported in intrastate commerce, upon a railroad operated by him; the ground of his complaint being that the rates were so low as to be confiscatory and therefore violative of the due process of law provision of the Fourteenth Amend-

ment. The court refused a preliminary injunction (209 Fed. Rep. 99), and, upon final hearing, dismissed the bill. The case is brought here by direct appeal because of the constitutional question, under § 238, Jud. Code.

The railroad in question is known as the Batesville Southwestern, and extends from a junction with the Illinois Central at Batesville for a distance of about 17 miles through a timber country, its entire line being within the State of Mississippi. It was built jointly by appellant and the Illinois Central Railroad Company, under a contract pursuant to which he disbursed approximately $146,000 and the company approximately $98,000. The contract was made in 1910, and by its terms Darnell was to maintain and operate the road for twenty years, the company to pay him for maintaining it $143 per mile per annum, and the road was to become the property of the company at the end of twenty years without further payment; the agreement, however, being subject to termination by the company prior to the expiration of the twenty years upon specified terms. The building of the road was commenced about June, 1911. Darnell began operating it as a common carrier in March, 1912, but its construction was not finally completed until about the middle of June, 1914.

The road is of standard gauge and construction, ballasted, and built in a first-class manner. Its traffic consists almost wholly of shipments of logs in carload lots from points along the line to the terminus at Batesville.

Pending the construction of the road, the Batesville Southwestern Railroad Company was organized as a corporation to take over the property, but the road remained in the hands of Darnell as lessee. In April, 1912, he established and promulgated a tariff providing a uniform rate for freight on logs in carload lots, with a minimum of 4,500 feet, regardless of the kind or character of the timber; which was, for 10 miles and under, $2.80 per thousand

feet; 10 to 15 miles, $3.35 per thousand; 15 to 20 miles, $3.90 per thousand. Complaint having been made to the Mississippi Railroad Commission, by citizens interested in the logging business, that these rates were extortionate, unjust, and confiscatory, a hearing was had, and, as a result, the commission, in July, 1913, made an order reducing the rates nearly 50 per cent. on oak, ash, and hickory, and more than 50 per cent. on other kinds of logs.

It appears that at the time of the construction of the railroad Darnell individually was the owner of a large amount (at the time of the hearing he owned 19,000 acres) of timber land in the country through which the road was projected, and that this furnished the reason for his interest in its construction and operation. At the same time he owned the principal part of the stock of R. J. Darnell, Incorporated, a lumber-milling corporation; but between that time and the time of the hearing the bulk of the stock had passed into the hands of his sons, he still remaining president of the company, and having sold to it the timber on the lands owned by him, the company agreeing to cut it, have it hauled, and loaded on the cars, and to pay him a fixed amount per stump.

The bill of complaint showed gross receipts from the operation of the railroad for the year ending June 30, 1913, amounting to $15,553.01, and operating expenses $4,296.20, leaving net earnings of $11,256.81. Against this, however, complainant charged as an annual rental $8,133.39, this being 1/20 of $162,667.69, then stated to be the amount invested by him in the construction of the road. Deducting this so-called rental charge left only $3,123.42, or less than 2 per cent. on the sum alleged to have been expended by complainant. These figures were the result of the rates established by him; and it was alleged that at the much lower rates established by the commission the road would yield no return above operating expenses.

The bill was filed in September, 1913, the commission's rates not having as yet been put into effect. At the preliminary hearing the District Court held (209 Fed. Rep. 99) that upon the showing then made it would not interfere with the commission's rates at least until final hearing, thus affording a period for experiment as to whether new business would be developed in volume sufficient to make those rates remunerative.

Upon the final hearing, evidence having been submitted by both sides, the court's decree was to the effect that the rates established by the commission were reasonable and should be enforced.

In this court appellant insists, first, that the District Court erred in holding that he was not entitled to charge against the annual operating revenue 1/20 of the amount expended by him in the construction of the road. We are clear that this contention is untenable. In determining whether rates are confiscatory because not yielding a proper return, the basis of calculation is the fair value of the property used in the service of the public. *Smyth* v. *Ames*, 169 U. S. 466, 546; *Minnesota Rate Cases*, 230 U. S. 352, 434. The hypothetical annual payments of 1/20 of the cost of the road to Darnell were not a proper rent charge, and bore no relation to the actual value of the property. They arose out of the contractual arrangement between Darnell and the Illinois Central, and were in the nature of an amortization charge to take account of his diminishing interest in the road. But, upon that theory, the interest of the Illinois Central increased in value by as much as that of Darnell decreased. In any aspect, the transference of his interest to the Illinois Central, and any charge on that account, made by him for purposes of his own bookkeeping, had no proper relation to the question of the value of the property, and hence were of no concern to the public.

It is insisted that upon the proofs, and especially by

actual experiment, the rates established by the commission were shown to be confiscatory.

It is well established that in a question of rate-making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing. Besides this, there was affirmative evidence before the District Court to the effect that the rates were reasonable. The evidence for complainant, tending to show they were non-remunerative, while based upon actual experience in the operation of the road, yet relates to only a brief period when conditions were abnormal. The road was a new one, not completed until June, 1914, that is, after the filing of the bill and shortly before the final hearing. The commission's rates, although promulgated in June, 1913, were not put into effect until September 10, and the period of experimentation to which the evidence related extended only from the date last mentioned to March 31, 1914. Practically the entire business of the road, at first, was hauling logs from complainant's land to a mill operated by R. J. Darnell, Incorporated, at Memphis. That mill was destroyed by fire in June, 1913, and thereafter the corporation constructed a mill at Batesville, but this was not placed in operation until March 17, 1914. In consequence there was a heavy falling off in traffic on the road, there being no Darnell shipments except such logs as were on hand when the Memphis mill was burned.

The evidence throws doubt upon the question whether the road, if built merely for the purpose of serving the timber country that is tributary to its present line, was not an extravagant venture. But, as yet, there has been no serious effort to develop traffic even from that country, aside from complainant's own properties. If the road was built rather as a branch of the Illinois Central, and with a view to extending it into a more lucrative territory, any extra cost of construction attributable to this is

hardly to be accounted as a part of the fair value devoted to the use of the timber traffic. The circumstance that a road may have been unwisely built, in a locality where there is not sufficient business to sustain it, may be taken into account. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 412. And the nature and value of the service rendered by the company to the public are matters to be considered. *Covington &c. Turnpike Co.* v. *Sandford*, 164 U. S. 578, 597; *Smyth* v. *Ames*, 169 U. S. 466, 544.

In the case before us, if the earning capacity of the railroad, present and prospective, really is as small as appellant claims, it may be doubted whether the road is worth what it cost. But it is sufficient for the present to say that the experimental period was too brief; there is too little showing of an effort to develop traffic along the line of the road from property other than that of complainant; and conditions during the entire period covered by the testimony have been too abnormal to enable us to say that the commission's rates are confiscatory.

The decree under review should be so modified that the dismissal of the bill shall be without prejudice to another suit to restrain the enforcement of the commission's rates, if after a full and fair test they shall be found to be confiscatory (*Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 19; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 55), and, as so modified, it should be affirmed.

Modified and affirmed.

SOUTHERN RAILWAY COMPANY *v.* PUCKETT.

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

No. 219. Argued April 25, 1917.—Decided June 11, 1917.

A case arising under the Federal Employers' Liability Act, as amended April 5, 1910, c. 143, 36 Stat. 291, cannot be removed to the District Court upon the ground of diversity of citizenship.

Plaintiff's injury occurred while he was helping in the task of raising a wrecked car to rescue a fellow employee and, coincidently, to clear a track for interstate commerce. *Held:* Engaged in interstate commerce, within the Federal Employers' Liability Act.

The mere fact that the employee was engaged in interstate commerce when called aside by the event which led to his injury does not stamp his employment at the time of injury as an employment in interstate commerce.

Finding no reason for disturbing the finding of both state courts as to the defendant carrier's negligence, and no exceptional circumstances being involved, this court merely announces its conclusion.

16 Ga. App. 551, affirmed.

THE case is stated in the opinion.

Mr. Sanders McDaniel, with whom *Mr. L. E. Jeffries* and *Mr. E. R. Black* were on the briefs, for plaintiff in error.

Mr. Edgar Watkins, with whom *Mr. Spencer R. Atkinson* and *Mr. E. W. Born* were on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

Puckett recovered a verdict and judgment in the City Court of Atlanta against the Southern Railway Company

for damages arising from personal injuries sustained by him in August, 1911, while at work for the company in its yard at Atlanta, Georgia. As submitted to the jury, the action was founded upon the Federal Employers' Liability Act of April 22, 1908, as amended by Act of April 5, 1910, (35 Stat. 65, c. 149; 36 Stat. 291, c. 143). The judgment was affirmed by the Georgia Court of Appeals (16 Ga. App. 551), and a writ of error brings it under our review.

The record shows that a petition and bond for the removal of the cause to the appropriate federal court upon the ground of diversity of citizenship was filed in due time by the defendant and overruled by the trial court. An assignment of error based upon this ruling has been abandoned, and properly so, in view of our decision in *Kansas City Southern Ry. Co.* v. *Leslie*, 238 U. S. 599, 602.

Whether, at the time he was injured, plaintiff was employed in interstate commerce, is the only substantial question; there being no dispute that defendant at that time was a common carrier by railroad engaged in commerce of that character.

As detailed in the opinion of the Court of Appeals, the circumstances of the occurrence were as follows: Plaintiff had been engaged in inspecting cars which had been put into an interstate train—No. 75—that ran between Atlanta, Georgia, and Birmingham, Alabama; he had inspected about 25 cars, and there remained to be inspected about 12 cars which were to be placed in the same train; while plaintiff was waiting for these, a collision between other cars of defendant occurred in the yard nearby, and several tracks were blocked by the wreckage; one of defendant's employees named O'Berry was caught in the collision and pinned beneath a car; in obedience to the printed rules of the company, plaintiff went immediately to the scene of the wreck to render what assistance he could, and was there instructed by a superior employee to go and get a "jack" to assist in raising the wrecked car

so as to extricate O'Berry and clear the tracks of the wreckage; some of the remaining cars not yet placed in train No. 75 were to have been hauled over the tracks that were obstructed by the wreck, and on account of the obstruction it became necessary to detour them, whereby train No. 75 was delayed for about an hour; while plaintiff, assisting in clearing up the wreck, was carrying some blocks on his shoulder to be used in jacking up the wrecked car and replacing it upon the track, he stumbled over certain large clinkers which were on the roadway near the track, and, in stumbling, struck his foot against some old cross ties overgrown with grass, and in consequence fell and was seriously injured.

The court held that although plaintiff's primary object may have been to rescue his fellow employee, his act nevertheless was the first step in clearing the obstruction from the tracks, to the end that the remaining cars for train No. 75 might be hauled over them; that his work facilitated interstate transportation on the railroad, and that consequently he was engaged in interstate commerce when injured.

We concur in this view. From the facts found, it is plain that the object of clearing the tracks entered inseparably into the purpose of jacking up the car, and gave to the operation the character of interstate commerce. The case is controlled by *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152; *New York Central & Hudson River R. R. Co.* v. *Carr*, 238 U. S. 260, 263; *Pennsylvania Co.* v. *Donat*, 239 U. S. 50; *Louisville & Nashville R. R. Co.* v. *Parker*, 242 U. S. 13. *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co., supra*, holds that a workman employed in maintaining interstate tracks in proper condition while they are in use is employed in interstate commerce; the other cases are to the effect that preparatory movements in aid of interstate transportation are a part of such commerce within the meaning of the act.

Of course, we attribute no significance to the fact that plaintiff had been engaged in inspecting interstate cars before he was called aside by the occurrence of the collision. *Illinois Central R. R. Co.* v. *Behrens*, 233 U. S. 473, 478; *Erie R. R. Co.* v. *Welsh*, 242 U. S. 303, 306.

It is contended that there was no sufficient ground for attributing negligence to defendant because of the presence of large clinkers in the path along which plaintiff, in the course of his duty, was called upon to pass. This is no more than a question of fact, without exceptional features, and we content ourselves with announcing the conclusion that we see no reason for disturbing the result reached by two state courts. *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464, 466.

Judgment affirmed.

THE CHIEF JUSTICE dissents.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY *v.* REYNOLDS ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF WASHINGTON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 220. Submitted April 25, 1917.—Decided June 11, 1917.

City ordinances granting street railway franchises in the State of Washington, with the right at any and all times to make reasonable rules and regulations for the management and operation of the railway lines thereby authorized, contained a proviso that such rules and regulations should not conflict with the laws of the State. *Held:* (1) That the proviso, fairly construed, meant the laws as they should from time to time exist. (2) That the act establishing the Public

Service Commission of Washington (Laws 1911, c. 117), and orders of the commission requiring the appellant company to run through cars beyond the limits of the lines covered by such franchises over other parts of its system, were within the description of the proviso, and so did not impair its contract rights (if such they were) to make such rules and regulations.

A municipality cannot, by contract with a street railway company, foreclose the exercise of the police power of the State in respect of the regulation of rates of fare and transfer privileges, unless clearly authorized to do so by the supreme legislative power. *Detroit United Railway* v. *Michigan*, 242 U. S. 238, distinguished.

Under the Constitution of Washington, which antedated the ordinances here in question, contractual provisions in franchises conferred by municipal corporations without express legislative authority are subject to be set aside by the legislature; and the Public Utilities Act, *supra*, supersedes any conflicting ordinance or charter provision of a city.

Where several street railway lines, built under distinct franchises, are owned and operated as one system, a public regulation concerning car service and fares will not be adjudged confiscatory because of its financial results to the line immediately affected, if the system as a whole remains profitable.

Where several street railway lines, built under distinct franchises, are owned and operated as one system, it is clearly within the bounds of reasonable regulation to establish through service between them, for a single fare.

223 Fed. Rep. 371, affirmed.

THE case is stated in the opinion.

Mr. James B. Howe and *Mr. Hugh A. Tait* for appellant.

Mr. W. V. Tanner, Attorney General of the State of Washington, *Mr. Scott Z. Henderson* and *Mr. L. L. Thompson*, Assistant Attorneys General of the State of Washington, and *Mr. C. E. Arney* for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

Appellant (plaintiff below) owns and operates a street railway system in the City of Seattle, Washington,

aggregating about 200 miles, as assignee of numerous franchises granted to its predecessors in interest by the cities of Seattle, West Seattle, and Ballard, and by King County. It filed its bill in the District Court to obtain relief from the operation and effect of an order made by the Public Service Commission of the State on March 24, 1915, bringing in as defendants the members of the commission and the Attorney General of the State. Plaintiff being a corporation of the State of Massachusetts, and defendants citizens of the State of Washington, the jurisdiction was invoked both upon the ground of diversity of citizenship and upon the ground that the order complained of was alleged to impair the obligation of contracts and deprive plaintiff of its property without due process of law, in violation of the Constitution of the United States. The order was made as the result of an investigation of which plaintiff had notice, and it contains the following provisions:

"(1) That the defendant company [plaintiff] continue the operation of through service on the Ballard Beach Line.

"(2) That the Alki Point and Fauntleroy Park lines be operated through the City of Seattle on First or Second Avenue as far north at least as Virginia Street.

"(3) That the defendant company furnish sufficient cars to provide seats for substantially all persons using the Alki Point and Fauntleroy Park lines."

The third paragraph was subject to a qualification; but since the District Court granted an injunction against this part of the order, and defendants have not appealed, the qualifying clause need not be set forth and we may confine our attention to the requirements of paragraphs 1 and 2. As to these, the District Court, three judges sitting, denied an application for a temporary injunction (223 Fed. Rep. 371), and plaintiff brings the case here by direct appeal under § 238, Jud. Code.

In order to understand the effect of the first two paragraphs and the grounds upon which they are attacked, it should be stated that the Ballard Beach line was constructed and is operated under a franchise ordinance of the City of Ballard, which city afterwards became and now is a part of the City of Seattle. The line extends from Ballard Beach to the intersection of West 59th Street and 24th Avenue, at which point it connects with lines of plaintiff that were constructed under other franchises. For some time prior to and at the date of the making of the order in question, plaintiff had been and was operating through cars over the Ballard Beach line and the connecting lines to and into the business section of Seattle, instead of physically transferring passengers from car to car at West 59th Street and 24th Avenue. Because, as is said, of the expense attached to the operation of through cars, plaintiff had given notice that it would discontinue such operation and require the transfer of passengers at the point mentioned. The effect of the order was to require plaintiff to continue the through service.

The Alki Point and Fauntleroy Park lines, each of them 8 or 9 miles in length, were constructed under separate franchises granted to predecessors in interest of plaintiff by the City of Seattle. They have their northern termini at or about Yessler Way, but for two or three years prior to the date of the order cars on these lines, instead of stopping on their north-bound trips at that point, continued about a mile farther north along First or Second Avenue to Virginia Street, in the business district of the city. Shortly before the promulgation of the order, this through service was discontinued, and north- and south-bound passengers required to transfer at Yessler Way. The effect of the order was to compel the reinstatement of the through service.

The ordinances under which these three lines were constructed provide in substance that the company "shall

have the right at any and all times to make reasonable rules and regulations for the management and operation of the railway lines herein provided for; provided, that such rules and regulations shall not conflict with the laws of the State of Washington and the charter and ordinances of the city." Each franchise provides also that the company shall have the right to charge a passenger fare for one continuous passage not exceeding five cents, even though a transfer be necessary, but shall sell commutation tickets entitling the purchaser to 25 rides for one dollar, such tickets however, not to be transferable and not to entitle the owner to the transfer privilege.

(1) One ground of complaint respecting the order of the commission is that, in requiring passengers to be carried beyond the limits of a particular franchise, it in effect confers the transfer privilege upon holders of commutation or "four-cent" tickets. The order says nothing about rates of fare; but we will assume, as the District Court assumed, that it has the effect attributed to it in this respect.

It is urged that the order impairs the obligation of the contracts contained in the franchise ordinances, both in regard to transfers and in regard to plaintiff's right to make rules for the management and operation of its lines. As to the latter point, the proviso that the rules "shall not conflict with the laws of the State," etc., by fair construction, means the laws as they shall from time to time exist. The act establishing the Public Service Commission (Laws, 1911, c. 117) and orders made by that commission are within the description; hence, the contract, if it be a contract, was subject to and is not impaired by the order in question.

Assuming (what is not clear) that the provision in the franchise ordinances respecting the rates of fare and the transfer privilege are contractual in form, still it is well settled that a municipality cannot, by a contract of this

nature, foreclose the exercise of the police power of the State unless clearly authorized to do so by the supreme legislative power. The Constitution of Washington, Art. XII, § 18, requires the legislature to pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight, and to correct abuses and prevent discrimination in rates by railroads and other common carriers, and provides that "A railroad and transportation commission may be established, and its powers and duties fully defined by law." By Art. XI, § 10, any city containing a population of twenty thousand inhabitants or more is permitted to frame a charter for its own government "consistent with and subject to the constitution and laws of this state." This constitution was adopted in 1889, long previous to the date of the earliest of plaintiff's franchise ordinances. The Supreme Court of Washington has held that the provisions of municipal charters are subject to the legislative authority of the State; that the Public Utilities Act superseded any conflicting ordinance or charter provision of any city; and that contractual provisions in franchises conferred by municipal corporations without express legislative authority are subject to be set aside by the exercise of the sovereign power of the State. *Ewing* v. *Seattle*, 55 Washington, 229; *State ex rel. Webster* v. *Superior Court*, 67 Washington, 37, 43–50.

The present case is very clearly distinguishable from *Detroit United Railway* v. *Michigan*, 242 U. S. 238, 248, where the state legislature had expressly provided that the municipal corporation might make a binding agreement with a street railway respecting the rates of fare.

(2) It is insisted that neither the Alki nor the Fauntleroy Park line is earning sufficient to pay its operating cost, or ever can do so under a fare limited to five cents, and that for this reason an order requiring these lines to carry passengers beyond the termini fixed in their fran-

chises upon four-cent tickets, and to give them the more costly through service by means of a single car, is necessarily a taking of plaintiff's property without compensation, and hence without due process of law within the meaning of the Fourteenth Amendment. A similar point was made in the bill with respect to the Ballard Beach line, but is not seriously pressed here. As to the other two lines, there seems to be no question that since they run for a considerable distance over the tide flats, receiving and discharging but few passengers *en route*, so that a majority of the passengers are carried distances of five or six miles, these lines, separately considered, never have paid operating expenses, and probably never will.

But we cannot accede to the suggestion that the question whether the commission's order is confiscatory or otherwise arbitrary within the inhibition of the Fourteenth Amendment is to be determined with reference alone to the Alki, the Fauntleroy, or the Ballard Beach lines. These are and long have been operated by plaintiff as parts of a system comprising two hundred miles of tracks. The commission found that the net earnings of the system for the year ending February 28, 1915, not including depreciation and taxes, were upwards of $1,600,000; that the company had refused to produce the valuations of its property made by experts, and had failed to show that there was not sufficient return from its property to pay operating expenses, taxes, and depreciation, and leave a balance. And from the evidence introduced the commission found the fact to be that, allowing for the services required by its order, the company would have net returns over and above operating expenses, taxes, and depreciation. It was not and is not contended that the system earnings are unremunerative.

Plaintiff relies upon *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 604, where this court held that a

statute which segregated a single commodity, and imposed upon it a rate that would compel the carrier to transport it for less than the proper cost of transportation, was in excess of the power of the State. In our opinion, that decision is inapplicable, the present case being controlled rather by *St. Louis & San Francisco Ry. Co.* v. *Gill*, 156 U. S. 649, 665, where the State of Arkansas had prescribed a maximum rate of three cents per mile for each passenger, under a penalty payable to the passenger from whom an overcharge was exacted, and in an action to recover such a penalty the company defended on the ground that the portion of its road over which plaintiff was carried was highly expensive to construct and maintain, and that the cost of maintaining it and transporting passengers over it exceeded the maximum rate fixed by law. But this court held "that the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; . . . and, finally, that to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the State of Arkansas."

(3) Plaintiff's brief contains some general attacks upon the effect of the commission's order in requiring plaintiff to carry passengers over portions of "separate and distinct franchise routes" upon payment of a single fare. This criticism is not well founded. Even were the several portions of its lines separately owned, they being operated practically as a single system, it would be within the

bounds of reasonable regulation to establish through service and a joint rate. *Wisconsin, Minnesota & Pacific R. R. Co.* v. *Jacobson*, 179 U. S. 287, 296, 301; *Michigan Central R. R. Co.* v. *Michigan Railroad Commission*, 236 U. S. 615, 629.

The decree of the District Court, so far as appealed from, is

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE MCKENNA dissent because they are of the opinion that this case as a matter of authority is controlled by *Detroit United Railway* v. *Michigan*, 242 U. S. 238, and that as a matter of original consideration the assailed legislation has impaired the obligation of a contract in violation of the Constitution of the United States and was repugnant to the Constitution because wanting in due process.

MR. JUSTICE MCREYNOLDS also dissents.

LANHAM, ADMINISTRATOR OF LANHAM, ET AL. *v.* McKEEL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 245. Submitted April 30, 1917.—Decided June 11, 1917.

An order of the Secretary of the Interior, approving an Indian agent's recommendation that restrictions on alienation be removed from an Indian's allotment, was made on March 26, "to be effective thirty days from date." *Held* that the approval became effective on the thirtieth day after its date, i. e., on April 25th, and enabled the allottee to make a valid conveyance on that day.

47 Oklahoma, 348, affirmed.

THE case is stated in the opinion.

Mr. Orion L. Rider, Mr. Geo. E. Rider and *Mr. E. S. Hurt* for plaintiffs in error.

Mr. J. F. McKeel (*in propria persona*), *Mr. C. H. Ennis* and *Mr. James E. Webb* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This writ of error presents but a single federal question, and that is within narrow compass. The suit involves the title to a part of the surplus allotment of Mary Jane Lanham, who was a Choctaw Indian of three-fourths blood. Defendant in error claims title under a deed made by her on April 25, 1908. It is conceded that because of legislation by Congress prior to the Act of April 21, 1904, c. 1402, 33 Stat. 189, 204, the land was inalienable, unless the restriction upon its alienation had been removed by an order of the Secretary of the Interior, made pursuant to that act. In conformity to its provisions, the United States Indian Agent, after investigation, made the appropriate finding and recommended the removal of restrictions upon the alienation by Mary Jane Lanham of her surplus allotment, and this was approved by the Secretary of the Interior in writing under date of March 26, 1908, in these terms: "Approved: This approval to be effective thirty days from date." If either the day of the approval or the day of the conveyance be included, thirty days had expired on the day the deed was executed. The Supreme Court of Oklahoma, following *Taylor* v. *Brown*, 147 U. S. 640, and *Baker* v. *Hammett*, 23 Oklahoma, 480, held that the date of approval should be included in computing the thirty-day period, and that therefore the deed was valid. 47 Oklahoma, 348.

In our opinion the decision was correct, although we sustain it upon grounds differing somewhat from those

upon which the cited cases rest. In *Taylor* v. *Brown*, the question arose under the proviso to § 15 of an Act of March 3, 1875, c. 131, 18 Stat. 402, 420, that the title to lands acquired by certain Indians under that section should "remain inalienable for a period of five years from the date of the patent." In *Baker* v. *Hammett*, the language in question was that contained in § 16 of the Supplemental Creek Agreement (Act of June 30, 1902, c. 1323, 32 Stat. 500, 503), to the effect that lands allotted to citizens should not be alienated "before the expiration of five years from the date of the approval of this supplemental agreement." In each case the statute contemplated a vesting of title accompanied with a prohibition of alienation during a specified period, and it was held that the initial date should be included in the computation because, but for the restriction, the land might have been alienated on that date. Here the restriction upon alienation arose out of antecedent legislation, and continued until the effective approval by the Secretary of the Interior of an appropriate finding by the Indian Agent. The approval was required to be, and in this case was, in writing, and we have to do merely with its interpretation. What, then, is the meaning of "effective thirty days from date"? Certainly this cannot be construed the same as if it read: "effective *after* thirty days from date." Plaintiffs in error, in argument, suppose it to have read: "effective one day from date," and ask whether in that event it would have become effective immediately upon being signed by the Secretary of the Interior. We answer "No," but that it would have become effective on the following day, that is, on the first day after its date. By like reasoning, the order as written became effective on the thirtieth day after its date, that is to say, on April 25th, and enabled the allottee to make a valid conveyance on that day.

Judgment affirmed.

McCOACH, COLLECTOR OF INTERNAL REVENUE, *v.* INSURANCE COMPANY OF NORTH AMERICA.

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

No. 475. Argued March 14, 1917.—Decided June 11, 1917.

A fire and marine insurance company in Pennsylvania is not required to maintain a reserve against unpaid losses by the law of that State (P. L. 1911, p. 607), and, therefore, amounts added by it to such a reserve may not be deducted in determining the company's taxable net income under § 38 of the Federal Corporation Excise Tax Act of August 5, 1909, c. 6, 36 Stat. 11, 112.

224 Fed. Rep. 657, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Wallace for petitioner.

Mr. B. F. Pepper, with whom *Mr. G. W. Pepper* and *Mr. Bayard Henry* were on the brief, for respondent.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an action brought by respondent, a fire and marine insurance company of the State of Pennsylvania, to recover a part of the excise taxes exacted of it for the years 1910 and 1911 under the Act of August 5, 1909, c. 6, § 38, 36 Stat. 11, 112. As the case comes here, only two items are in dispute, one for each of the years mentioned, representing the tax upon amounts added in each of those years to that part of what are called its "reserve funds" that is held against accrued but unpaid losses.

The act imposed upon every insurance company organ-

ized under the laws of the United States or of any State an annual excise tax with respect to the carrying on or doing business, equivalent to one per centum upon its entire net income over and above $5,000, with exceptions not here pertinent. The second paragraph of § 38 provided: "Such net income shall be ascertained by deducting from the gross amount of the income of such . . . insurance company . . . (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts *and the net addition, if any, required by law to be made within the year to reserve funds.*"

The italics indicate the particular words upon which the controversy turns; the question being whether, within the meaning of the act of Congress, "reserve funds," with annual or occasional additions, are "required by law," in Pennsylvania, to be maintained by fire and marine insurance companies, other than the "unearned premium" or "reinsurance reserve," known to the general law of insurance.

The District Court rendered a judgment in plaintiff's favor, excluding however the disputed items (218 Fed. Rep. 905); on plaintiff's writ of error the Circuit Court of Appeals reversed this judgment, with instructions to allow the claim in full (224 Fed. Rep. 657); and the case was brought here by writ of certiorari.

Plaintiff was chartered by a special act, but is subject to the state insurance law. Its business is confined to fire and marine insurance.

The law of Pennsylvania (Act of June 1, 1911, P. L. 607, 608) creates a State Insurance Commissioner with supervisory control over the companies; provides in § 4 that he shall see that all the laws of the Commonwealth

respecting insurance companies are faithfully executed, authorizing him to make examinations, to have access to all the books and papers of any company, to examine witnesses relative to its affairs, transactions, and condition, to publish the result of his examination when he deems it for the interest of the policy-holders to do so, and to suspend the entire business of any company during its non-compliance with any provision of law obligatory upon it, or whenever he shall find that its assets are insufficient to justify its continuance in business; and whenever he finds any company to be insolvent or fraudulently conducted, or its assets insufficient for the carrying on of its business, he is to communicate the facts to the Attorney General. By § 15 every insurance company is required to file annual statements with the commissioner, upon blank forms to be furnished by him such as shall seem to him best adapted to elicit a true exhibit of their financial condition. Sections 7, 8, and 9, set forth in the margin,[1]

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[1] Section 7. In determining the liabilities upon its contracts of insurance of any insurance company other than life insurance, and the amount such company should hold as a *reserve for reinsurance*, he shall, for *casualty* insurance companies, charge one-half of the premium on all annual policies written within one year, and on policies written for more than one year he shall charge one-half of the current year's premiums, plus the whole of the premiums for subsequent years. For *fire* insurance companies he shall charge fifty per centum of the premiums written in their policies upon all unexpired risks that have one year, or less than one year, to run, and a pro rata of all premiums on risks having more than one year to run; on perpetual policies he shall charge the deposit received, less a surrender charge of not exceeding ten per centum thereof. For *marine* and inland risks he shall charge fifty per centum of the premium written in the policy upon yearly risks, and the full amount of the premium written in the policy upon all other marine and inland risks not terminated.

Section 8. He shall, in calculating the reserve against unpaid losses of *casualty* companies, other than losses under liability policies, set down by careful estimate in each case the loss likely to be incurred against every claim presented, or that may be presented in pursuance

make specific provisions for ascertaining the reserve for different classes of companies other than life insurance companies. Another act of the same date (P. L. 1911, p. 599) provides for judicial proceedings at the instance of the insurance commissioner looking to the dissolution of insolvent and delinquent companies. Its provisions need not be quoted.

A previous act (April 4, 1873, P. L. 20, 22), required a specific reinsurance reserve against unexpired risks on fire, marine, and inland policies. The Act of 1911, just quoted, requires the maintenance of a substantially similar reserve; and, with respect to casualty companies and these only, that a reserve be maintained against unpaid losses, based upon the amount of claims presented. The reference in § 9 to "reinsurance and loss reserves, as above defined" is limited by what precedes it; and the section deals not alone with "reserves," but requires "all other debts and claims" to be accounted as liabilities.

It appears that under this legislation, and under previous statutes in force since 1873, the insurance commissioner has required plaintiff and similar companies to return each year, as an item among their liabilities, the net amount of unpaid losses and claims, whether actually adjusted, in process of adjustment, or resisted. And, although this practice has not been sanctioned by any decision of the Supreme Court of the State, it is relied upon as an administrative interpretation of the law.

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of notice from the insured of the occurrence of an event that may result in a loss; and the sum of the items so estimated shall be the total amount of the reserve. . . .

Section 9. Having charged as a liability the reinsurance and loss reserves, as above defined for insurance companies of this Commonwealth other than life, and adding thereto all other debts and claims against the company, the Commissioner shall, in case he finds the capital of the company impaired twenty per centum, give notice to the company to make good the capital within sixty days. . . .

Conceding full effect to this, it still does not answer the question whether the amounts required to be held against unpaid losses, in the case of fire and marine insurance companies, are held as "reserves," within the meaning of the Pennsylvania law or of the act of Congress, however they may be designated upon the official forms. As already appears, the Pennsylvania act specifically requires debts and claims of all kinds to be included in the statement of liabilities, and treats them as something distinct from reserves. The object is to exercise abundant caution to maintain the companies in a secure financial position.

The act of Congress, on the other hand, deals with reserves not particularly in their bearing upon the solvency of the company, but as they aid in determining what part of the gross income ought to be treated as net income for purposes of taxation. There is a specific provision for deducting "all losses actually sustained within the year and not compensated by insurance or otherwise." And this is a sufficient indication that losses in immediate contemplation, but not as yet actually sustained, were not intended to be treated as part of the reserve funds; that term rather having reference to the funds ordinarily held as against the contingent liability on outstanding policies.

In our opinion the reserve against unpaid losses is not "required by law," in Pennsylvania, within the meaning of the act of Congress.

It results that the judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Reversed.

THE CHIEF JUSTICE and MR. JUSTICE MCKENNA dissent.

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

ADAMS ET AL. *v.* TANNER, ATTORNEY GENERAL OF THE STATE OF WASHINGTON, ET AL.

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

No. 273. Argued May 7, 1917.—Decided June 11, 1917.

The business of securing honest work for the unemployed in return for an agreed consideration is a useful and legitimate business which, though subject to regulation under the state police power, cannot be forbidden by an act of a State without violating the guaranty of liberty secured by the Fourteenth Amendment.

A law forbidding employment agents from receiving fees from the workers for whom they find places in effect destroys their occupation as agents for workers, and cannot be sustained upon the ground that the fees may be charged against employers.

Washington Initiative Measure Number 8 (popularly known as "The Employment Agency Law,") as construed by the Supreme Court of the State, is contrary to the Fourteenth Amendment.

Decree of the District Court reversed.[1]

THE case is stated in the opinion.

Mr. Dallas V. Halverstadt, with whom *Mr. Samuel H. Piles, Mr. Edward J. Cannon* and *Mr. George Ferris* were on the briefs, for appellants.

Mr. L. L. Thompson, Assistant Attorney General of the State of Washington, with whom *Mr. W. V. Tanner,* Attorney General of the State of Washington, was on the brief, for appellees.

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[1] By an order of the District Court, the majority and minority opinions in *Wiseman* v. *Tanner,* 221 Fed. Rep. 694, were adopted in this case.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Initiative Measure Number 8—popularly known as "The Employment Agency Law"—having been submitted to the people of Washington at the general election, received a majority vote and was thereafter declared a law, effective December 3, 1914, as provided by the state constitution. (Laws of Washington, 1915, 1.) It follows:

"Be it enacted by the People of the State of Washington:

"Section 1. The welfare of the State of Washington depends on the welfare of its workers and demands that they be protected from conditions that result in their being liable to imposition and extortion.

"The State of Washington therefore exercising herein its police and sovereign power declares that the system of collecting fees from the workers for furnishing them with employment, or with information leading thereto, results frequently in their becoming the victims of imposition and extortion and is therefore detrimental to the welfare of the state.

"Section 2. It shall be unlawful for any employment agent, his representative, or any other person to demand or receive either directly or indirectly from any person seeking employment, or from any person on his or her behalf, any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto.

"Section 3. For each and every violation of any of the provisions of this act the penalty shall be a fine of not more than one hundred dollars and imprisonment for not more than thirty days."

In *Huntworth* v. *Tanner*, 87 Washington, 670, the Supreme Court held school teachers were not "workers" within the quoted measure and that it did not apply to one conducting an agency patronized only by such teachers

and their employers. And in *State* v. *Rossman*, 93 Washington, 530, the same court declared it did not in fact prohibit employment agencies since they might charge fees against persons wishing to hire laborers; that it was a valid exercise of state power; that a stenographer and book-keeper is a "worker"; and that one who charged him a fee for furnishing information leading to employment violated the law.

As members of co-partnerships and under municipal licenses, during the year 1914 and before, appellants were carrying on in the City of Spokane well established agencies for securing employment for patrons who paid fees therefor. November 25, 1914, in the United States District Court, they filed their original bill against W. V. Tanner, Attorney General of the State, and George H. Crandall, Prosecuting Attorney for Spokane County, asking that Initiative Measure Number 8 be declared void because in conflict with the Fourteenth Amendment, Federal Constitution, and that the defendants be perpetually enjoined from undertaking to enforce it. On the same day they presented a motion for preliminary injunction supported by affidavits which were subsequently met by countervailing ones. Appellees thereafter entered motions to dismiss the original bill because: (1) "Said bill of complaint does not state facts sufficient to warrant this court in granting any relief to the plaintiffs; (2) that plaintiffs have a plain, speedy and adequate remedy at law; (3) that this court has no jurisdiction over the persons of these defendants or either of them, or of the subject-matter of this action." A temporary injunction was denied. The motions to dismiss were sustained and a final decree to that effect followed.

Considering the doctrine affirmed in *Truax* v. *Raich*, 239 U. S. 33, and cases there cited, the record presents no serious question in respect of jurisdiction.

The bill alleges "that the employment business con-

sists in securing places for persons desiring to work" and unless permitted to collect fees from those asking assistance to such end the business conducted by appellants cannot succeed and must be abandoned. We think this conclusion is obviously true. As paid agents their duty is to find places for their principals. To act in behalf of those seeking workers is another and different service, although, of course, the same individual may be engaged in both. Appellants' occupation as agent for workers cannot exist unless the latter pay for what they receive. To say it is not prohibited because fees may be collected for something done in behalf of other principals is not good reasoning. The statute is one of prohibition, not regulation. "You take my house when you do take the prop that doth sustain my house; you take my life when you do take the means whereby I live."

We have held employment agencies are subject to police regulation and control. "The general nature of the business is such that unless regulated many persons may be exposed to misfortunes against which the Legislature can properly protect them," *Brazee* v. *Michigan*, 241 U. S. 340, 343. But we think it plain that there is nothing inherently immoral or dangerous to public welfare in acting as paid representative of another to find a position in which he can earn an honest living. On the contrary, such service is useful, commendable, and in great demand. In *Spokane* v. *Macho*, 51 Washington, 322, 324, the Supreme Court of Washington said: "It cannot be denied that the business of the employment agent is a legitimate business, as much so as is that of the banker, broker, or merchant; and under the methods prevailing in the modern business world it may be said to be a necessary adjunct in the prosecution of business enterprises." Concerning the same subject, *Ex parte Dickey*, 144 California, 234, 236, the Supreme Court of California said: "The business in which this defendant is engaged is not only innocent and

innocuous, but is highly beneficial, as tending the more quickly to secure labor for the unemployed. There is nothing in the nature of the business, therefore, that in any way threatens or endangers the public health, safety or morals." And this conclusion is fortified by the action of many States in establishing free employment agencies charged with the duty to find occupation for workers.

It is alleged: "That plaintiffs have furnished positions for approximately ninety thousand persons during the last year, and have received applications for employment from at least two hundred thousand laborers, for whom they have been unable to furnish employment. . . . That such agencies have been established and conducted for so long a time that they are now one of the necessary means whereby persons seeking employment are able to secure the same." A suggestion in behalf of the State that while a pursuit of this kind "may be beneficial to some particular individuals, or in specific cases, economically it is certainly non-useful, if not vicious, because it compels the needy and unfortunate to pay for that which they are entitled to without fee or price, that is, the right to work," while possibly indicative of the purpose held by those who originated the legislation, in reason, gives it no support.

Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the

fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.

The general principles by which the validity of the challenged measure must be determined have been expressed many times in our former opinions. It will suffice to quote from a few.

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, we held invalid a statute of Louisiana which undertook to prohibit a citizen from contracting outside the State for insurance on his property lying therein because it violated the liberty guaranteed to him by the Fourteenth Amendment. "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

"If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law." *Booth* v. *Illinois*, 184 U. S. 425, 429.

"It is also true that the police power of the State is not unlimited, and is subject to judicial review, and when

exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself. The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. . . . If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail." *McLean* v. *Arkansas*, 211 U. S. 539, 547, 548.

"The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations, which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted." *Murphy* v. *California*, 225 U. S. 623, 628.

We are of opinion that Initiative Measure Number 8 as

construed by the Supreme Court of Washington is arbitrary and oppressive, and that it unduly restricts the liberty of appellants, guaranteed by the Fourteenth Amendment, to engage in a useful business. It may not therefore be enforced against them.

The judgment of the court below is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE MCKENNA dissents upon the ground that under the decisions of this court—some of them so late as to require no citation or review—the law in question is a valid exercise of the police power of the State, directed against a demonstrated evil.

MR. JUSTICE BRANDEIS, dissenting.

To declare the statute of a State, enacted in the exercise of the police power, invalid under the Fourteenth Amendment, is a matter of such seriousness that I state the reasons for my dissent from the opinion of the court.

The statute of the State of Washington, commonly known as the "Abolishing Employment Offices Measure" was proposed by Initiative Petition No. 8, filed July 3, 1914, and was adopted November 3, 1914, at the general election; 162,054 votes being cast for the measure and 144,544 against it. In terms the act merely prohibits the taking of fees from those seeking employment.[1]

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[1] "An Act to prohibit the collection of fees for the securing of employment or furnishing information leading thereto and fixing a penalty for violation thereof.

"Be it enacted by the People of the State of Washington:

"Section 1. The welfare of the State of Washington depends on the welfare of its workers and demands that they be protected from conditions that result in their being liable to imposition and extortion.

Plaintiffs, who are proprietors of private employment agencies in the City of Spokane, assert that this statute, if enforced, would compel them to discontinue business and would thus, in violation of the Fourteenth Amendment, deprive them of their liberty and property without due process of law. The act leaves the plaintiffs free to collect fees from employers; and it appears that private employment offices thus restricted are still carrying on business.[1] But even if it should prove, as plaintiffs allege, that their business could not live without collecting fees

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"The State of Washington therefore exercising herein its police and sovereign power declares that the system of collecting fees from the workers for furnishing them with employment, or with information leading thereto, results frequently in their becoming the victims of imposition and extortion and is therefore detrimental to the welfare of the state.

"Section 2. It shall be unlawful for any employment agent, his representative, or any other person to demand or receive, either directly or indirectly, from any person seeking employment, or from any person on his or her behalf, any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto.

"Section 3. For each and every violation of any of the provisions of this act the penalty shall be a fine of not more than one hundred dollars and imprisonment for not more than thirty days."

The Supreme Court of Washington has twice passed upon the scope of the act; holding in *Huntworth* v. *Tanner*, 87 Washington, 670, that it is not applicable to teachers and in *State* v. *Rossman*, 93 Washington, 530, that it is applicable to stenographers and bookkeepers.

[1] See Report of the State of Washington Bureau of Labor (1915–1916), pp. 120–1.

"The free agencies, we are pleased to be able to say, are growing in popularity, and while they do not advertise their business with the same thrift that the other fellows did, they are coming into general service. There are three services of this kind: The private agency that receives all compensation from employers, either by the month, year, or per the service rendered; the federal agency, and the municipal agency; these latter two have offices in the larger places and are doing good work and the service is free to both employe and the employer. In the smaller cities and towns the federal is the prevailing agency and the postmaster of the place is usually the local representative."

from employees, that fact would not necessarily render the act invalid. Private employment agencies are a business properly subject to police regulation and control. *Brazee* v. *Michigan*, 241 U. S. 340. And this court has made it clear that a statute enacted to promote health, safety, morals or the public welfare may be valid, *although* it will compel discontinuance of existing businesses in whole or in part. Statutes prohibiting the manufacture and sale of liquor present the most familiar example of such a prohibition. But where, as here, no question of interstate commerce is involved, this court has sustained also statutes or municipal ordinances which compelled discontinuance of such businesses as (*a*) of manufacturing and selling oleomargarine, *Powell* v. *Pennsylvania*, 127 U. S. 678; (*b*) of selling cigarettes, *Austin* v. *Tennessee*, 179 U. S. 343; (*c*) of selling futures in grain or other commodities, *Booth* v. *Illinois*, 184 U. S. 425; (*d*) of selling stocks on margin, *Otis* v. *Parker*, 187 U. S. 606; (*e*) of keeping billiard halls, *Murphy* v. *California*, 225 U. S. 623; (*f*) of selling trading stamps, *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 368.

These cases show that the scope of the police power is not limited to regulation as distinguished from prohibition. They show also that the power of the State exists equally, whether the end sought to be attained is the promotion of health, safety or morals or is the prevention of fraud or the prevention of general demoralization. "If the State thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.'" *Otis* v. *Parker*, 187 U. S. 606, 609; *Booth* v. *Illinois*, 184 U. S. 425, 429. Or as it is so frequently expressed, the action of the legislature is final, unless the measure adopted appears clearly to be arbitrary

or unreasonable or to have no real or substantial relation to the object sought to be attained. Whether a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed is obviously not to be determined by assumptions or by *a priori* reasoning. The judgment should be based upon a consideration of relevant facts, actual or possible—*Ex facto jus oritur.* That ancient rule must prevail in order that we may have a system of living law.

It is necessary to enquire therefore: What was the evil which the people of Washington sought to correct? Why was the particular remedy embodied in the statute adopted? And, incidentally, what has been the experience, if any, of other States or countries in this connection? But these enquiries are entered upon, not for the purpose of determining whether the remedy adopted was wise or even for the purpose of determining what the facts actually were. The decision of such questions lies with the legislative branch of the government. *Powell* v. *Pennsylvania,* 127 U. S. 678, 685. The sole purpose of the enquiries is to enable this court to decide, whether in view of the facts, actual or possible, the action of the State of Washington was so clearly arbitrary or so unreasonable, that it could not be taken "by a free government without a violation of fundamental rights." See *McCray* v. *United States,* 195 U. S. 27, 64.

1. *The Evils.*[1]

The evils with which the people of Washington were confronted arose partly from the abuses incident to the

[1] The evils incident to private employment agencies first arrested public attention in America about 1890. During the fifteen years preceding the enactment of the Washington law there were repeated investigations, official and unofficial, and there was much discussion and experimentation. See Free Public Employment Offices in the United States, U. S. Bureau of Labor Bulletin No. 68, p. 1; Statistics of Unemployment and the Work of Employment Offices, U. S. Bureau

system of private employment agencies and partly from its inadequacy.

(a) *The abuses.*

These are summarized in a report published by the United States Bureau of Labor in October, 1912,[1] thus:

"Private employment agencies, which charge a fee for their services, are found in every city of any size in the United States. The nature of their business is such as to make possible most iniquitous practices. Their patrons are frequently men and women with only a dollar or two, which they are eager to give up for the opportunity of earning more. They are often of small intelligence and easily duped. Stories of how these agencies have swindled and defrauded those who sought employment through them are heard universally Some of the more common of the fraudulent methods said to be used by these agencies are the following:

"1. Charging a fee and failing to make any effort to find work for the applicant.

"2. Sending applicants where no work exists.

"3. Sending applicants to distant points where no work or where unsatisfactory work exists, but whence the applicant will not return on account of the expense involved.

"4. Collusion between the agent and employer, whereby the applicant is given a few days work and then discharged to make way for new workmen, the agent and employer dividing the fee.

"5. Charging exorbitant fees, or giving jobs to such applicants as contribute extra fees, presents, etc.

"6. Inducing workers, particularly girls, who have been placed, to leave, pay another fee, and get a 'better job.'

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of Labor Bulletin No. 109, p. 5; Subject Index of the U. S. Bureau of Labor Statistics, Bulletin No. 174, pp. 85–87; Munro, Bibliography of Municipal Government, pp. 379–381.

[1] United States Bureau of Labor Bulletin No. 109, p. 36.

"Other evils charged against employment agents are the congregating of persons for gambling or other evil practices, collusion with keepers of immoral houses, and the sending of women applicants to houses of prostitution; sometimes employment offices are maintained in saloons, with the resulting evils."

In the report to Congress of the United States Commission on Industrial Relations, created by Act of August 23, 1912, c. 351, 37 Stat. 415, which gave public hearings on the subject of employment offices, in May, 1914, the abuses are found to be as follows: [1]

"23. There are many private employment agents who try to conduct their business honestly, but they are the exception rather than the rule. The business as a whole reeks with fraud, extortion, and flagrant abuses of every kind. The most common evils are as follows:

"Fees are often charged out of all proportion to the service rendered. We know of cases where $5, $9, $10, and even $16 apiece has been paid for jobs at common labor. In one city the fees paid by scrubwomen is at the rate of $24 a year for their poorly paid work. Then there is discrimination in the charges made for the same jobs. Often, too, men are sent a long distance, made to pay fees and transportation, only to find that no one at that place ordered men from the employment agent. A most pernicious practice is the collusion with foremen or superintendents by which the employment agent 'splits fees' with them. That is, the foreman agrees to hire men of a certain employment agent on condition that one-fourth or one-half of every fee collected from men whom he hires be given to him. This leads the foreman to discharge men constantly in order to have more men hired through the

[1] Final Report and Testimony submitted to Congress by the Commission on Industrial Relations created by the Act of August 23, 1912, 64th Cong. 1st sess., Doc. 415, vol. I, pp. 109–111. See also vol. II, pp. 1165–1440.

agent and more fees collected. It develops the 'three-gang' method so universally complained of by railroad and construction laborers, namely, one gang working, another coming to work from the employment agent, and a third going back to the city.

"Finally, there is the most frequent abuse—misrepresentation of terms and condition of employment. Men are told that they will get more wages than are actually paid, or that the work will last longer than it actually will, or that there is a boarding house when there really is an insanitary camp, or that the cost of transportation will be paid, when it is to be deducted from the wages. They are not told of other deductions that will be made from wages; they are not informed about strikes that may be on at the places to which they are sent, nor about other important facts which they ought to know. These misrepresentations, it must be said, are often as much the fault of the employer as of the labor agent. Also the employer will place his call for help with several agents, and each will send enough to fill the whole order, causing many to find no jobs. Labor agents and laborers alike are guilty of the misuse of free transportation furnished by employers to prospective help. And it is true also that many applicants perpetrate frauds on the labor agents themselves, as, for example, causing them to return fees when positions actually were secured. This is the result of the general feeling that the whole system of paying fees for jobs is unjust; and if they must pay in order to get work, then any attempt to get the fee back is justifiable."

(b) *The Inadequacy.*

But the evils were not limited to what are commonly called abuses—like the fraud and extortion described above. Even the exemplary private offices charging fees to workers might prove harmful, for the reason thus stated in the report to Congress of the United States Commission on Industrial Relations, cited *supra.*

"18. . . . Investigations show, however, that instead of relieving unemployment and reducing irregularity, these employment agencies actually serve to congest the labor market and to increase idleness and irregularity of employment. They are interested primarily in the fees they can earn, and if they can earn more by bringing workers to an already overcrowded city, they do so. Again, it is an almost universal custom among private employment agents to fill vacancies by putting in them people who are working at other places. In this way new vacancies are created and more fees can be earned.

"19. They also fail to meet the problem because they are so numerous and are necessarily competitive. With few exceptions, there is no co-operation among them. This difficulty is further emphasized by the necessity of paying the registration fees required by many agencies; obviously the laborer can not apply to very many if he has to pay a dollar at each one.

"20. The fees which private employment offices must charge are barriers which prevent the proper flow of labor into the channels where it is needed and are a direct influence in keeping men idle. In the summer, when employment is plentiful, the fees are as low as 25 cents, and men are even referred to work free of charge. But this must necessarily be made up in the winter, when work is scarce. At such times, when men need work most badly, the private employment offices put up their fees and keep the unemployed from going to work until they can pay $2, $3, $5, and even $10 and more for their jobs. This necessity of paying for the privilege of going to work, and paying more the more urgently the job is needed, not only keeps people unnecessarily unemployed, but seems foreign to the spirit of American freedom and opportunity.

"21. An additional injustice inevitably connected with labor agencies which charge fees is that they must place

the entire cost of the service upon those least able to bear it. Employment agents say that employers will not pay the fees; hence they must charge the employees. Among the wage earners, too, however, those who are least in need and can wait for work, pay the least for jobs and even get them free, while those who are most in need make up for all the rest and pay the highest fees. The weakest and poorest classes of wage earners are therefore made to pay the largest share for a service rendered to employers, to workers, and to the public as well."

2. *The Remedies.*

During the fifteen years preceding 1914 there had been extensive experimentation in the regulation of private employment agencies. Twenty-four States had attempted *direct* regulation under statutes often supplemented by municipal ordinances.[1] Nineteen States had attempted *indirect* regulation through the competition of state offices, and seven others through competition of municipal

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[1] "It is not necessary here to enter into the relative merits of governmental regulation and governmental operation. Suffice it to say that twenty-four States and the District of Columbia have attempted to regulate private employment agencies and have made a miserable failure of it. The business lends itself easily to fraud and imposition and it is far more true of the private agencies than of the public offices that they have been frauds as well as failures."

Public Employment Offices—W. M. Leiserson, 29 Political Science Quarterly (March, 1914), p. 36.

"The United States possesses at the present time no adequate system, either state or national, for the regulation of private employment agencies, either from the point of view of the content of the laws, affording regulations of the business and restrictions as to how the business shall be carried on, or as to proper methods of enforcement." [Labor Laws and Their Enforcement, edited by Susan M. Kingsbury (Boston, 1911), p. 366. See Chapter VI of this work for a study of the regulation of private employment agencies by Mabelle Moses. See also Chapter 663, Laws of 1913, State of Wisconsin.]

offices.[1] Other experiments in indirect regulation through competition were made by voluntary organizations, philanthropic, social and industrial.[2] The results of those experiments were unsatisfactory. The abuses continued in large measure; and the private offices survived to a great extent the competition of the free agencies, public and private. There gradually developed a conviction that the evils of private agencies were inherent and ineradicable, so long as they were permitted to charge fees to the workers seeking employment. And many believed that such charges were the root of the evil.

On September 25, 1914, the American Association of Public Employment Offices adopted at its annual meeting the following resolutions:

"*Resolved*, That this association go on record as favoring the elimination as soon as possible, of all private employment agencies operating for a profit within the United States, and that it recommends to the consideration of the United States Commission on Industrial Relations and Congress and the various State legislatures legislation having this end in view."

The United States Commission on Industrial Relations declared in its report to Congress:[3]

"24. Attempts to remove these abuses by regulation have been made in 31 States, but with few exceptions they have proved futile, and at most they have served only to promote a higher standard of honesty in the business and have not removed the other abuses which are inherent

[1] Proceedings of the Association of Public Employment Offices (Sept. 25, 1914), U. S. Dep. of Labor, Bureau of Labor Statistics Bulletin No. 192, p. 61.

[2] Unemployment and Work of Employment Offices, Bulletin of U. S. Bureau of Labor No. 109, pp. 5, 37 (Oct., 1912).

[3] Made in August, 1915, and cited *supra*, p. 602, note 1. Between 1914 and this date six States had legislated on the subject. See Unemployment Survey, 1914–1915. 5 American Labor Legislation Review, p. 560.

in the system. Where the States and cities have spent much money for inspectors and complaint adjusters there has been considerable improvement in the methods of private employment agencies, but most of the officers in charge of this regulation testify that the abuses are in 'the nature of the business' and never can be entirely eliminated. They therefore favor the total abolition of private labor agencies. This is also the common opinion among working people, and in the several States attempts have already been made to accomplish this by law."

But the remedies proposed were not limited to the suppression of private offices charging fees to workers, and the extension of the systems of state and municipal offices. The conviction became widespread that for the solution of the larger problem of unemployment the aid of the Federal Government and the utilization and development of its extensive machinery was indispensable. During the seven years preceding 1914 a beginning had been made in this respect. The Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898, 909, created within the Bureau of Immigration and Naturalization a Division of Information, charged with the duty of promoting "a beneficial distribution of aliens." The services rendered by this division included, among others, some commonly performed by employment agencies. While it undertook to place in positions of employment only aliens, its operations were national in scope. The Act of March 4, 1913, creating the Department of Labor, resulted in a transfer of the Bureau of Immigration, including the Division of Information, to that department. (37 Stat. 736.) By this transfer the scope of the division's work was enlarged to correspond with the broad powers of the Labor Department. These were declared by Congress to be: "to foster, promote and develop the welfare of the wage earners of the United States, to improve their

working conditions, and to advance their opportunities for profitable employment."

Then its efforts "to distribute" (that is both to supply and to find places for) labor were extended to include citizens as well as aliens; and much was done to develop the machinery necessary for such distribution. In the summer of 1914, and in part before the filing in the State of Washington of the proposal for legislation here in question, action had been taken by the Department of Labor which attracted public attention. It undertook to supply harvest hands needed in the Middle West and also to find work for the factory hands thrown out of employment by the great fire at Salem, Massachusetts, June 25, 1914.[1] The division was strengthened by co-operation with other departments of the Federal Government (Agriculture, Interior, Commerce, and the Post Office with its 60,000 local offices) and with state and municipal employment offices. As early as June 13, 1914, the United States Department of Labor had also sought the co-operation in this work of all the leading newspapers in America including those printed in foreign languages.[2]

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[1] The fire was so extensive that the Congress appropriated $200,000 for relief of all sufferers. Act of August 1, 1914, c. 223, 38 Stat. 681.

[2] Annual Report of the Secretary of Labor, 1914, pp. 48–55; Monthly Review of the U. S. Bureau of Labor Statistics, July, 1915, p. 8; See also Annual Report of the Secretary of Labor, 1915, p. 36: "*Interdepartmental coöperation.*—Through the coöperation of the Post Office Department it became possible to bring to the aid of this labor-distribution service some 60,000 post offices and thereby to create a network of communication between employers needing help without knowing where to get it and workers wanting employment without knowing where to find it. Either employer or workman may obtain at any post office in the United States a blank application supplied by this department which, after filling out and signing it, he may deposit in the mails anywhere free of postage." "*Employment bulletins.*—The bulletins contain a statement of unmatched applications, no matter what part of the country they may come from. It is not expected, of course, that applications for work of a minor character will ordinarily

3. *Conditions in the State of Washington.*

The peculiar needs of Washington emphasized the defects of the system of private employment offices.

(a) *The evils.*

The conditions generally prevailing are described in a report recently published by the United States Department of Labor, thus: [1]

"In no part of the United States perhaps is there so large a field for employment offices as in the Pacific States. As has been noted, industrial conditions there favor inconstancy of employment. Much of the business activity is based upon the casual, short-time job. This in itself means the frequent shifting of workers from place to place. And the shifting is the more difficult, as much of the work offered is in more or less remote districts of the country. . . .

"The necessity laid upon so many workers of constantly seeking new jobs opens a peculiarly fertile field for their exploitation by unscrupulous private employment agencies. There is much testimony to the fact and frequency of such exploitation. The most striking evidence of this is that in the State of Washington private agencies made themselves so generally distrusted that in 1915 their complete abolition was ordered by popular vote. . . .

"Prior to 1914 there was practically no legislation regarding private employment agencies, and there had been no attempt at State supervision of their conduct. But

be matched by applications for workers of that kind from distant stations. It is assumed, however, that bulletined applications may possibly be matched through the coöperation of near-by stations within a reasonable radius. The bulletins are also systematically sent to such newspapers as have indicated their desire to receive them for possible publication as news matter of interest to their respective readers."

[1] Labor Laws and their Administration in the Pacific States. United States Department of Labor, Bureau of Labor Bulletin No. 211 (1917), pp. 17–18.

distrust of such agencies was constantly increasing and culminated in the year mentioned in the passage by popular initiative of an act aiming at the total suppression of all private employment agencies of the commercial type."

The reports of the Washington State Bureau of Labor give this description:

"The investigations of the Bureau show that the worst labor conditions in the state are to be found on highway and railroad construction work, and these are largely because the men are sent long distances by the employment agencies, are housed and fed poorly at the camps, and are paid on an average of $1.75 to $2.25 a day, out of which they are compelled to pay $5.50 to $7.00 per week for board, generally a hospital fee of some kind, always a fee to the employment agency and their transportation to the point where the work is being done. The consequence is that they usually have but little money left when the work is finished and if, as frequently happens, they work only a week or two and are then discharged they are in as bad a situation as they were before they went to work, and sometimes worse, if they do not have enough money to get back to the place from which they started." [1]

"That the honest toiler was their victim there is no question: not alone of a stiff fee for the information given but a systematic method was adopted in order to keep the business going. Managers of agencies and managers of jobs, their superintendents, foremen or sub-foremen, were in this scheme for fleecing the workingman. Men in large numbers would be sent to contract jobs and if on the railroads 'free fare' was part of the inducement, or perhaps the agency would charge a nominal fee if the distance was great and this, too, would become a perquisite of the

[1] Washington State Bureau of Labor. Report 1913–14, pp. 27–28.

bureau to finally go through the clearing house. In many cases men would be unsatisfactory, at least they would be told so, discharged in a few days and sent adrift as poor, may be poorer, than when they came there. New men would have to be secured, and thus the thing would go on revolving. So it went until at last it became so obnoxious that the public indignation was at length aroused, resulting in the passing of a law doing away with them." [1]

The abuses and the inadequacy of the then existing system are also described by state officials in affidavits included in the record.

(*b*) *The remedies.*

Washington had not tried direct regulation of private employment offices; but that method was being considered as late as 1912.[2] Its people had had, on the other hand, exceptional opportunities of testing public employment offices. The municipal employment office established at Seattle in 1894 under an amendment of the city charter is among the oldest public offices in the United States. Takoma established a municipal office in 1904, Spokane in 1905 and Everett in 1908.[3] The continuance and increase of these municipal offices indicate that their experience in public employment agencies was at least encouraging. And the low cost of operating them was extraordinary. In Spokane the fees charged by private agencies ranged from $1 upward and were usually about

[1] Washington State Bureau of Labor. Report 1915–16, p. 120.

[2] Washington State Bureau of Labor, 1911–1912. Report of Commissioner, p. 16: "It has been demonstrated that state control of employment agencies is the most effective way to properly regulate them. I would earnestly recommend a state law similar to the one in Illinois that went into effect July 1, 1911, and has proven to be the best law for this purpose in this country."

[3] The first free public employment office in the United States was the municipal agency established in Cleveland in 1890. Then followed (in 1893) the Los Angeles office. Bulletin of United States Bureau of Labor No. 68, p. 1 (Jan. 1907).

$2.[1] In the Seattle free municipal agency the cost of operation, per position filled, was reduced to a trifle over 4 cents.[2] The preliminary steps for establishing "Distribution Stations" under the federal system, including one at Seattle, had been taken before the passage of the Washington law.[3] Later branch offices were established in thirteen other cities.[4]

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[1] Washington State Bureau of Labor Report 1913-14, p. 291.

W. D. Wheaton, Labor Agent.—"The complaint against the private office is almost universal. The experience of this office is that private agencies charge all that the traffic will bear and that in hard times, when work is scarce and the worker poverty stricken, the fee is placed so high as to be almost prohibitive, and the agencies take longer chances, sometimes sending men on only a rumor, depending on their financial straits to make it impossible to return.

"The fees charged run from $1.00 for the poorest job of uncertain duration to as high as 10 per cent. of the first year's salary in educational lines, and 30 per cent. of the first month's salary in office or mercantile lines. Most of the agencies catering to the better class of positions charge a registration fee which is worked to the limit—or rather without limit. Advertisements for attractive positions are placed with the newspapers and registration is made of all that apply, irrespective of whether the position has been filled or not, and generally at a fee of $2.00 or more. This registration fee is always followed by a percentage of the earnings when a position is secured, but only a small proportion of those registering are placed in positions.

"The average charge per position in all agencies will run high, and yet the applicant cannot having a feeling of security in the position obtained for the reason that the great majority of private agencies are primarily interested in the fee and are not as careful in placing applicants as they would be did the possibility of another fee not exist."

[2] United States Bureau of Labor Bulletin No. 109, p. 136.

"The extremely low cost of each position filled is noteworthy, as is the large number of positions secured. A total of 37,834 positions were filled in 1906, and in 1909, 38,846. The cost per position was lowest in 1906, only 4.03 cents. Only twice since 1897 has the average cost gone above 6 cents."

[3] See Report of Secretary of Labor, 1914, p. 51.

[4] Aberdeen, Bellingham, Custer, Everett, Friday Harbor, Lynden, Noosack, North Yakima, Port Angeles, Port Townsend, Spokane,

4. *The Fundamental Problem.*

The problem which confronted the people of Washington was far more comprehensive and fundamental than that of protecting workers applying to the private agencies. It was the chronic problem of unemployment—perhaps the gravest and most difficult problem of modern industry—the problem which, owing to business depression, was the most acute in America during the years 1913 to 1915.[1] In the State of Washington the suffering from unemployment was accentuated by the lack of staple industries operating continuously throughout the year and by unusual fluctuations in the demand for labor with consequent reduction of wages and increase of social unrest.[2] Students of the larger problem of unemployment appear to agree that establishment of an adequate system of employment offices or labor exchanges [3] is an in-

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Takoma, Walla Walla. Monthly Review of U. S. Labor Statistics, July, 1915, p. 9. See Report of Secretary of Labor, 1915, p. 36; 1916, p. 54. Hearings Committee on Labor, on H. R. 5783, to establish a National Employment Bureau. 64th Cong., 1st sess., February, 1916, p. 49.

[1] The Unemployment Crisis of 1914–1915, 5 American Labor Legislation Review, p. 475.

[2] Washington State Bureau of Labor Report, 1913–1914, pp. 13, 16–17. Unemployment Survey, 5 American Labor Legislation Review, 482, 483 (1915).

[3] Recent Advances in the Struggle against Unemployment, by Prof. Charles R. Henderson, 2 American Labor Legislation Review, 105, 106 (1911). "The point of starting ameliorative effort is the employment agency or 'labor exchange.'"

"When we compare the ordinary employment office with the board of trade for cotton or grain, or with the bankers' clearing-house, we begin to realize how belated, rudimentary and primitive our present labor exchange is. Yet the issues at stake are quite as vital in the case of demand and supply in the labor market as in the stock and grain exchange."

A Problem of Industry, 4 American Labor Legislation Review, p. 211:

"The labor market is unorganized, resulting in confusion, waste and

dispensable first step toward its solution. There is reason to believe that the people of Washington not only considered the collection by the private employment offices of fees from employees a social injustice; [1] but that they considered the elimination of the practice a necessary

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loss to employers and employees. It means suffering to individual workers and their families, a lowering of the standard of living, impaired vitality and efficiency, and a tendency for the unemployed to become unemployable, dependent, degraded. In fact, the demoralizing effect of unemployment upon the individual is matched only by its wastefulness to society."

The Prevention of Unemployment, 5 American Labor Legislation Review, p. 176:

"An essential step toward a solution of the problem of unemployment is the organization of the labor market through a connected network of public employment exchanges. This is vitally important as a matter of business organization and not of philanthropy. It is of as much importance for the employer to find help rapidly and efficiently as it is for the worker to find work without delay. The necessity of organized markets is recognized in every other field of economic activity, but we have thus far taken only timid and halting steps in the organization of the labor market. The peddling method is still, even in our 'efficient' industrial system, the prevalent method of selling labor. Thus a purely business transaction is carried on in a most unbusiness-like, not to say medieval manner."

Public Employment Bureaus, Charles B. Barnes, 5 American Labor Legislation Review, p. 195:

"Unemployment is no longer intermittent in this country; it has come to be a chronic condition which needs to be dealt with in a regular and systematic manner. The first step in properly dealing with this situation is the establishing of a series of coöperating public employment bureaus."

The Unemployed in Philadelphia, Department of Public Works (1915), p. 113.

What is done for the Unemployed in European Countries, U. S. Bureau of Labor Bulletin No. 76, pp. 741–934; The British System of Labor Exchanges, U. S. Bureau of Labor Statistics, No. 206.

[1] Washington State Employment Agency Referendum, by W. M. Leiserson, 33 Survey, 87 (October 24, 1914):

"Any one who knows the employment agency business and every

preliminary to the establishment of a constructive policy for dealing with the subject of unemployment.[1]

It is facts and considerations like these which may have led the people of Washington to prohibit the collection by employment agencies of fees from applicants for work. And weight should be given to the fact that the statute has been held constitutional by the Supreme Court of Washington and by the Federal District Court (three judges sitting)—courts presumably familiar with the local conditions and needs.

In so far as protection of the applicant is a specific pur-

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one who has tried earnestly to regulate private agencies will testify to the futility of regulation.

"But the inherent justice of the proposed Washington act can be shown in a better way. Ask the employment agent to whom he rendered the service and he will answer 'to employer and to employe.'

"'Then why don't you charge the employer?'

"'It is impossible. If we depended upon employers for our fees, we would have to go out of business. They simply will not pay.'

"Every time this question is put to employment agents the answer is the same: 'We charge the worker because we can get the fee from him and we cannot get it from the employer.'

"This is the downright wrong against which Washington initiative No. 8 is directed."

[1] General Discussion on Unemployment, 5 American Labor Legislation Review, p. 451; T. S. McMahon, Univ. of Washington.

"The people of the state of Washington are not indifferent to the problem of unemployment nor do they show any tendency to offer charitable panaceas as a permanent remedy. They are trying to work out some constructive policy, and as a preliminary step have made it illegal for employment offices to charge fees for jobs.

"A bill will be presented to the next legislature for the establishment of a network of public employment offices all over the state. This will make possible the complete organization of the labor market, which we hope is the first step toward the organization of industry itself.

"The aggressive attitude of the leaders among the workers has impressed upon the mind of the people the fact that the problem will have to be met in another way than by providing food and clothing for a period of distress such as we are passing through at the present time.

"I believe that this attitude on the part of the working people, which

pose of the statute—a precedent was furnished by the Act of Congress, December 21, 1898, 30 Stat. 755, 763 (considered in *Patterson* v. *Bark Eudora*, 190 U. S. 169) which provides, among other things:

"If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offence be liable to a penalty of not more than one hundred dollars."

In so far as the statute may be regarded as a step in the effort to overcome industrial maladjustment and unemployment by shifting to the employer the payment of fees, if any, the action taken may be likened to that embodied in the Washington Workmen's Compensation Law (sustained in *Mountain Timber Co.* v. *Washington*, 243 U. S. 219) whereby the financial burden of industrial accidents is required to be borne by the employers.

As was said in *Holden* v. *Hardy*, 169 U. S. 366, 387:

" . . . in view of the fact that from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and, particularly to the new relations between employers and employés as they arise."

In my opinion, the judgment of the District Court should be affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE CLARKE concur in this dissent.

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is characteristically western, will do more towards the solution of this problem than perhaps we, who discuss it in a theoretical way, can accomplish. They do have some plan of action, and some definite program. Either we shall have to work out some program of ultimate solution of unemployment, or we will have to accept the solution they are offering us. The one they are offering us is socialism."

AMERICAN EXPRESS COMPANY ET AL. *v.* STATE OF SOUTH DAKOTA EX REL. CALDWELL, AS ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 902. Argued April 13, 1917.—Decided June 11, 1917.

When the Interstate Commerce Commission finds that interstate rates are unduly discriminatory as compared with competitive intrastate rates and orders that the discrimination be abated, a further finding that the interstate rates are not unreasonable implies an authority to the carrier to maintain them and to raise the competitive intrastate rates to their level.

But findings that such discrimination exists and that the interstate rates are reasonable do not necessarily imply a finding that the intrastate rates are unreasonable; both may be reasonable and yet produce discrimination, which is a relative matter.

An order of the Interstate Commerce Commission directing carriers to desist from discriminating against interstate commerce by charging lower rates for local competitive intrastate traffic, may properly leave to the carriers discretion to determine whether the discrimination shall be removed by lowering the interstate rates, or by raising the intrastate rates, or by doing both.

Where the rates which a carrier seeks to alter, in avoiding the discrimination condemned by the Commission, are intrastate rates which have been fixed by state authority, the Commission's order will justify the carrier only in so far as the order makes definite the territory or places to which it applies.

In cases where the dominant federal authority is exerted to affect intrastate rates, it is desirable that the orders of the Commission should be so definite as to the rates and territory to be affected as to preclude misapprehension.

The territorial scope of the order of the Commission here involved is ascertained (the order being on its face somewhat indefinite) by referring from the order to the report accompanying and made part of it, and thence to the maps of the railroads over which the report states the appellant express companies operate.

A state law (Laws South Dakota 1911, c. 207, § 10, as amended by Laws, 1913, c. 304) providing that no advance of intrastate rates may be made except after 30 days' notice filed with a board of railroad commissioners, and published, can not properly apply to changes in intrastate rates which a carrier seeks to make in obedience to an order of the Interstate Commerce Commission, to abate discrimination against interstate traffic.

A suit by a State to enjoin carriers from advancing intrastate rates without first complying with state regulations will not be treated as a suit, beyond the jurisdiction of the state court, "to enforce, set aside, annul, or suspend in whole or in part" an order of the Interstate Commerce Commission (see Commerce Court Act, c. 309, 36 Stat. 539), where the Commission's order covers the proposed advances in part only, is not mentioned in the bill and is not relied on in the answer as justifying them all.

38 S. Dak. —, modified and affirmed.

THE case is stated in the opinion.

Mr. C. O. Bailey and *Mr. Branch P. Kerfoot,* with whom *Mr. T. B. Harrison, Mr. J. H. Voorhees* and *Mr. C. W. Stockton* were on the brief, for plaintiffs in error.

Mr. Oliver E. Sweet, with whom *Mr. Clarence C. Caldwell,* Attorney General of the State of South Dakota, *Mr. P. W. Dougherty* and *Mr. Byron S. Payne* were on the brief, for defendants in error.

Mr. Joseph W. Folk and *Mr. Charles W. Needham,* by leave of court, filed a brief as *amici curiæ* on behalf of the Interstate Commerce Commission.

Mr. John Barton Payne, Mr. R. B. Scott and *Mr. A. P. Humburg,* by leave of court, filed a brief as *amici curiæ* on behalf of the Illinois Central Railroad Co. *et al.*

MR. JUSTICE BRANDEIS delivered the opinion of the court.

In 1912 the Interstate Commerce Commission entered upon a comprehensive investigation of express rates,

practices, accounts and revenues. Its report [1] resulted in the establishment, on February 1, 1914, throughout the United States, of the so-called uniform zone and block system of rates in interstate transportation and the prompt adoption, in forty States, of the same system in intrastate transportation.[2] South Dakota did not adopt the national system. It adheres to a schedule of maximum express charges, known as Distance Tariff No. 2, which was promulgated by its Board of Railroad Commissioners in 1911, and which, on weighted average, is about forty per cent. lower than the zone and block system. Shippers of Sioux City, Iowa, complained that the differences between these interstate and intrastate scales of rates resulted in unjust discrimination against them to the advantage of their South Dakota competitors. Proceedings to secure relief were brought by them before the Interstate Commerce Commission; and on May 23, 1916, its report and order were filed. *Traffic Bureau of the Sioux City Commercial Club* v. *American Express Company*, 39 I. C. C. 703.

This order,[3] couched in general terms, prohibited charg-

[1] *In the Matter of Express Rates, Practices, Accounts and Revenues*, 24 I. C. C. 380; 28 I. C. C. 132. The order was modified in some respects in 1915; 35 I. C. C. 3.

[2] 28 Ann. Rep. of Interstate Commerce Com., p. 26.

[3] "This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"*It is ordered*, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 15, 1916, and thereafter to abstain, from publishing, demanding, or collecting higher rates for the transportation of shipments by express between Sioux City, Iowa, and points in the state of South Dakota, than are contemporaneously published, demanded, or collected for transportation

ing after August 15, 1916 (later extended to September 15, 1916) "higher rates for the transportation of shipments by express between Sioux City, Iowa, and points in the State of South Dakota, than are contemporaneously . . . demanded . . . for transportation under substantially similar circumstances and conditions for substantially equal distances between Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton, South Dakota, on the one hand, and said points in the State of South Dakota on the other, which said relation of rates has been found by the Commission to be unjustly discriminatory."

The order made "the report containing its findings of fact and conclusions thereon" a part thereof; and the report makes clear that the order applied only to competitive territory, and that this is the southeastern section of South Dakota. The report also declared "that the South Dakota rates are too low to be made the measure of interstate rates between Sioux City and South Dakota points;" that the existing interstate rates "have not been shown to be unreasonable"; that no reason has been presented for modifying them; and that the Commission is "under no doubt as to how the unjust discrimination found to exist should be corrected"; but the report did not expressly state that the intrastate rates should be raised, nor did it enumerate the competitive points in South Dakota to which the rate adjustment should apply.

In July, 1916, the express companies conferred informally with the Board of Railroad Commissioners about introducing in South Dakota complete intrastate tariffs corresponding with the zone and block system scale, and also about introducing special tariffs on that basis covering

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under substantially similar circumstances and conditions for substantially equal distances between Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton, S. Dak., on the one hand, and said points in the state of South Dakota, on the other, which said relation of rates has been found by the Commission to be unjustly discriminatory."

rates between the cities of Sioux Falls, Mitchell, Aberdeen, Watertown and Yankton and *all* other points in the State. On August 5 the Board issued an order for a general investigation of express rates; and set for hearing on December 4, 1916, that investigation as well as the applications to put into effect these special or general tariffs. In an opinion then filed, it said:

"The rates which shall be put into effect to remove the discrimination found by the Interstate Commerce Commission to exist in favor of jobbers at Aberdeen, Watertown, Sioux Falls, Mitchell and Yankton, and against Sioux City and its jobbers, have not yet been determined. As these rates are to apply on intrastate traffic and between stations and over lines wholly within this State, this commission [Board] is the proper tribunal to fix these rates. To permit the putting into effect of two systems of rates, one from the cities named and another from all other cities in the State, would create an intolerable situation."

On August 25, the express companies formally presented to the Board the special tariffs, to become effective September 15. And on September 12, the Board formally refused to allow the same to be filed, and rejected them, among other reasons, because the "schedules have not been printed and published, and thirty days' notice of the time when the said proposed classifications, tariffs, tables and schedules shall go into effect has not been given to the Board of Railroad Commissioners of the State of South Dakota, and to the public, as required by the provisions of Section 10 of Chapter 207 of the Laws of 1911."

On the same day the Attorney General of South Dakota and the Board of Railroad Commissioners brought an original proceeding in the Supreme Court of the State against the American Express Company and Wells Fargo & Company to enjoin them from putting into effect the special tariffs covering *all* their rates within the State to

and from the five cities named; and a restraining order was issued. The defendants complied with the restraining order; but filed an answer in which they set up the order of the Interstate Commerce Commission, and alleged that about August 15 they published certain express rate tables, but that "all rates for the carriage of express matter intrastate throughout the State of South Dakota were left the same as provided in the South Dakota Express Distance Tariff No. 2, Exhibit A hereto, excepting the rates to and from the cities of Sioux Falls, Aberdeen, Watertown, Mitchell and Yankton, and other South Dakota points; that to the business between said cities . . . and other South Dakota points there were applied the rates prescribed by the Interstate Commerce Commission, as hereinbefore set forth, for interstate traffic between points within and points without the State of South Dakota; that excepting for the application of the Interstate Commerce Commission rates to traffic to and from said cities . . . no changes were made in the express tariffs throughout the State of South Dakota, as the same had previously existed under the provisions of the South Dakota Distance Tariff No. 2. . . ."

There was in the answer no explicit allegation that no change in rates had been made except as required by the Commission's order.[1]

[1] The answer also alleged that shippers and organizations representing the merchants of the five South Dakota cities had brought suit against these and other express companies in the District Court of the United States for the Northern District of Iowa to enjoin the enforcement of the order of the Interstate Commerce Commission and the putting into effect of the special tariffs above referred to; that on filing the bill an order of notice issued; that the United States and the Interstate Commerce Commission appeared specially to object to the jurisdiction of the court; and that on August 28, three judges sitting, an order was entered as follows: "the plaintiffs with leave of court offer their evidence in support of the application for a temporary writ of injunction and the court finds that upon the showing made the plain-

The plaintiffs demurred to the answer upon the ground that it did not state facts sufficient to constitute a defense to the suit. The demurrer was sustained and defendants having elected to stand on their answer, a perpetual injunction was granted on December 5, which enjoined the express companies from putting into effect the special tariffs presented on August 25, "or any of the rates, fares or charges specified in said tables between the cities of Aberdeen, Mitchell, Sioux Falls, Watertown or Yankton in the State of South Dakota and other stations of said express companies in said State . . . or . . . charges greater . . . than the maximum rates . . . of . . . Distance Tariff No. 2 . . . unless or until a schedule of express rates shall have first been submitted to the Board of Railroad Commissioners of the State of South Dakota and have been regularly approved and allowed by said board in conformity to the laws of the State of South Dakota." [1]

A petition for writ of error to this court was allowed December 11, 1916. The record was filed here January 27, 1917, and included in it is the opinion of the Supreme Court of South Dakota filed in the cause January 20, 1917. The reasons there given for holding that the order of the Interstate Commerce Commission is no justification for disregarding the order of the Board of Railroad Commissioners of South Dakota embody in substance the argument made here on behalf of the State's officials.

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tiffs would not be entitled to a temporary writ of injunction and therefore declines to pass on the plea to the jurisdiction. . . ." See also *Brown Drug Co.* v. *United States*, 235 Fed. Rep. 603.

[1] On December 5, 1916, the defendants had also applied for dissolution of the restraining order, alleging, among other things, that the United States had instituted suit against them in the District Court of the United States for the Southern District of New York to recover the penalties prescribed by Congress, to wit, $5,000 a day for failure to comply with the order of the Interstate Commerce Commission; and that they were liable to further suits.

1. *The nature of the Interstate Commerce Commission's order.*

In its specific direction the order merely prohibits charging higher rates to and from Sioux City than to and from the five South Dakota cities. It could be complied with (a) by reducing the interstate rates to the South Dakota scale or (b) by raising the South Dakota rates to the interstate scale or (c) by reducing one and raising the other until equality is reached in an intermediate scale. The report (which is made a part of the order) contains, among other things, a finding that the interstate rate which was prescribed by the Commission was not shown to be unreasonable. This finding gives implied authority to the express companies both to maintain their interstate rates and to raise, to their level, the intrastate rates involved. *The Shreveport Case* (*Houston, East & West Texas Ry. Co.* v. *United States*), 234 U. S. 342. For, if the interstate rates are maintained, the discrimination can be removed *only* by raising the intrastate rates.

But the finding that discrimination exists and that the interstate rates are reasonable does not necessarily imply a finding that the intrastate rates are unreasonable. Both rates may lie within the zone of reasonableness and yet involve unjust discrimination. *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 277. Proceedings to remove unjust discrimination are aimed directly only at the *relation of rates.* If in such a proceeding an unreasonable rate is uncovered and that rate made reasonable, it is done as a means to the end of removing discrimination. The correction is an incident merely.

2. *The power of the Interstate Commerce Commission.*

The Supreme Court of South Dakota declares:

"If the purported order of the Commission does, in any respect, regulate intrastate commerce, it is to that extent

void owing to the Commission's want of jurisdiction over the subject-matter."

That court denies not only the intent of Congress to confer upon the Commission authority to remove an existing discrimination against interstate commerce by directing a change of an intrastate rate prescribed by state authority; but denies also the power of Congress under the Constitution to confer such power upon the Commission or to exercise it directly. The existence of such power and authority should not have been questioned since the decision of this court in the *Shreveport Case.*

It is also urged, that even if the Commission had power, under the circumstances, to order a change of the intrastate rates, the order in question was invalid, because the Commission instead of specifically directing the change undertook to give to the carrier a discretion as to how it should be done and as to the territory to which it should apply. The order properly left to the carriers discretion to determine *how* the discrimination should be removed; that is, whether by lowering the interstate rates or by raising the intrastate rates or by doing both. In its general form the order is identical with that under consideration in the *Shreveport Case.* Where a proceeding to remove unjust discrimination presents solely the question whether the carrier has improperly exercised its authority to initiate rates, the Commission may legally order, in general terms, the removal of the discrimination shown, leaving upon the carrier the burden of determining also the points to and from which rates must be changed, in order to effect a removal of the discrimination. But where, as here, there is a conflict between the federal and the state authorities, the Commission's order cannot serve as a justification for disregarding a regulation or order issued under state authority, unless, and except so far as, it is definite as to the territory or points to which it applies. For the power of the Commission is dominant

only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic. Still, *certum est quod certum reddi potest.* Whether the order here involved is definite, presents a question of construction which will be considered later.

3. *The requirements of the state law.*

The South Dakota statute (1911, c. 207, § 10, as amended 1913, c. 304) provides that no advance in intrastate rates may be made except after thirty days' notice to the Board of Railroad Commissioners by filing of schedules, and to the public by publication and posting in every office of the carrier in the State. The special tariff here in question, which was presented to the Board informally at conferences in July, was not formally offered for filing until August 25. It was, by its terms, to take effect September 15; and notice to the public was not made as provided in the statute. But these provisions cannot be held to apply to changes in intrastate rates over which the Board has no control. The proper conduct of business would suggest the giving of some notice (as was done by the express companies in the instant case); but a valid order of the Commission is, when applicable, a legal justification for disregarding a conflicting regulation of the state law—because the federal authority is dominant.

4. *The scope of the order.*

If the general words of the order are read alone, they might perhaps be understood as applying to rates between the five named South Dakota cities and *all* other "points" in South Dakota. But the order explicitly makes the report which is filed therewith a part thereof; and the order itself also qualifies the general words used, by the clause: "which said relation of rates has been found by the Commission to be unjustly discriminatory." The report makes it thus perfectly clear that the order applies only to the "points" in competitive territory or,

as the Supreme Court expresses it, those "commercially tributary" both to the five cities and to Sioux City. That territory, as the report also shows, is the southeastern part of South Dakota; and as to this alone, the discrimination was found to exist. The express companies were not warranted by anything in the order in extending the special tariffs of rates, to and from the five cities to include "points" in every part of the State. As to all rate advances other than those in the competitive territory, their action was unauthorized.

It is urged on behalf of the state officials that the order does not show with the necessary precision to what "points" it applies; and that if not wholly void for indefiniteness, it at least cannot serve as a justification for failure to observe the regulations and orders imposed by authority of the State. In cases of this nature, where the dominant federal authority is exerted to affect intrastate rates, it is desirable that the orders of the Interstate Commerce Commission should be so definite as to the rates and territory to be affected as to preclude misapprehension. If an order is believed to lack definiteness an application should be made to the Commission for further specifications. But the order although less explicit than desirable is, when read in connection with the railroad map, not lacking in the requisite definiteness. As the order is limited to the relation of rates to and from Sioux City and to and from the five South Dakota cities "under substantially similar circumstances and conditions and for substantially equal distances," and the report states that the American Express Company operates "over the lines of the Chicago and Northwestern Railway Company and the Chicago, St. Paul, Minneapolis and Omaha Railway Company," and that the Wells Fargo & Company operates "over the Chicago, Milwaukee and St. Paul Railway Company," it furnishes the necessary data for adjusting the rates in controversy.

5. *The jurisdiction of the state court.*

It is urged that the Supreme Court of South Dakota erroneously assumed jurisdiction, because this proceeding is an attack upon an order of the Interstate Commerce Commission; that by the Act of Congress (36 Stat. 539, 540, 543) exclusive power "to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission" was vested in the Commerce Court; and that by the Act of October 22, 1913, abolishing that court (38 Stat. 219), the exclusive power was transferred to the several District Courts. If this were a proceeding professedly "to enjoin, set aside, annul, or suspend" an order of the Commission "in whole or in part," a state court would obviously have no jurisdiction. The bill does not purport to attack, nor does it even refer to, any such order. It alleges only that the express companies propose "increases and advances" in charges for intrastate transportation, by introducing "existing interstate rates." It is the answer which sets up the order of the Commission as a justification; and plaintiffs deny that it is such. Whether or not the state court has jurisdiction cannot, of course, depend upon the professed purpose of the proceeding nor upon the mere form of pleading. An order may be as effectively annulled by misconstruction as by avowedly setting it aside. But we have no occasion to determine in the instant case, under what circumstances and to what extent, the effect of orders of the Commission may be questioned in state courts. The answer does not allege that *all* the intrastate rates to and from the five cities which have been advanced were advanced in compliance with the order of the Commission. It alleges merely that the rates applied were those prescribed "for interstate traffic between points within and points without the State of South Dakota";[1] and it is clear that the

[1] The claim that the express companies attempted to make *only* those changes which were required to comply with the order of the Commis-

special tariffs here in question include advances of rates between the five cities and many "points" in the State to which the Commission's order did not apply. It could not, therefore, afford a justification for putting into effect those intrastate rates without first making the publication required by the state law and securing the approval of the State Board. These rates the Supreme Court of South Dakota had jurisdiction to enjoin, and the decree must be affirmed to that extent. It is also clear that the decree of the Supreme Court, in so far as it enjoined the express companies from advancing *any* intrastate rate to and from the five cities until the same shall have been approved by the South Dakota Board of Railroad Commissioners, was erroneous. So far as it extends to rates in the competitive territory as to which discrimination was found to exist, it must be modified and the injunction dissolved. With this modification the decree of the state court is affirmed and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MCKENNA dissents.

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sion was first explicitly made in the petition for writ of error to this court. There was, however, in the motion filed December 5, to dissolve the restraining order, a general allegation that the express companies "were ordered to put into effect the rates restrained" by the state court.

WASHINGTON RAILWAY & ELECTRIC COMPANY *v.* SCALA, ADMINISTRATRIX OF SCALA.

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

No. 826. Argued May 8, 1917.—Decided June 11, 1917.

The court has jurisdiction by writ of error to review this judgment of the Court of Appeals of the District of Columbia in a case arising under the Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65, as amended April 5, 1910, 36 Stat. 291.

Defendant was incorporated as an ordinary railway company (as distinguished from a street railway company), with full powers of eminent domain, and owned a line of electric railway built largely on a private right of way from a terminus in the District of Columbia to a terminus in Maryland, which it operated as a common carrier of passengers for hire between those termini. *Held* that it came within the Federal Employers' Liability Act.

If the declaration alleges that the injuries charged to defendant's negligence caused plaintiff's intestate to "suffer intense pain," an amendment at trial adding that deceased endured "conscious pain and suffering" is but an elaboration of the existing statement, and is not open to the objection that it introduces a new cause of action barred by the two year limitation of the Federal Employers' Liability Act.

Maintaining a trolley pole closer to the track than others on the line, and so close that a conductor can not safely discharge his duties, affords ample ground for a finding of negligence by the jury.

45 App. D. C. 484, affirmed.

THE case is stated in the opinion.

Mr. John S. Barbour, for plaintiff in error, in support of the jurisdiction, contended that the various sections of the Employers' Liability Act of 1908, with the amendments of 1910, were meant to constitute a single law operative throughout the Union, as is apparent upon their perusal.

Section 2 cannot be considered and administered alone any more than can § 1. The other sections which coordinate with both are general in their nature and operation, cannot be construed finally by one authority for the District of Columbia and by another for the country at large, and are not the result of the exercise of the power of Congress to govern the District but come from its power over interstate commerce. The construction of the other sections is involved in this case. Furthermore, plaintiff's cause of action was based on § 1 as shown by the allegations of the surviving counts of the declaration and by the position assumed by her counsel in the court below. Even if § 2, taken by itself, could be treated as a local law, the remaining sections are nevertheless parts of a general law. *American Security & Trust Co.* v. *District of Columbia*, 224 U. S. 491; *Washington, Alexandria & Mt. Vernon Ry. Co.* v. *Downey*, 236 U. S. 190; *McGowan* v. *Parish*, 228 U. S. 312.

It must be remembered that, in the *Downey Case*, while the liability sustained rested purely upon the plenary local power of Congress, the act was held applicable to the case of an employee engaged in interstate commerce because, as a local statute, it governed in the absence of legislation of a general character governing the subject.

Appellant as a matter of law was not to be held a common carrier by railroad within the meaning of § 1 of the Act of 1908. Its charter (29 Stat. 246), which was in evidence, expressly forbids it from operating steam cars, locomotives, or passenger or other cars for steam railways. Other evidence also showed that it was chartered as a street railway company only and did business only as such. It carried no freight.

The rule of construction is that, unless from the context a different meaning appears, the term "common carrier" applies only to carriers of property and not to carriers of persons merely. *New York Central & Hudson River*

R. R. Co. v. *Shirley*, 120 N. Y. Supp. 192; *Brewer* v. *Railway Company*, 45 Hun, 595; *Central Railroad of Georgia* v. *Lippman*, 110 Georgia, 665; Bouvier; Hutchison on Carriers, § 47; Greenleaf on Evidence, vol. 2, § 211.

Assuming that a suburban street railway company operated by electricity and carrying passengers only is a common carrier, still it is not a "railroad" within the meaning of the act. *McLeod* v. *Chicago &c. Ry. Co.*, 125 Iowa, 270; *Fallon* v. *West End Street Ry. Co.*, 171 Massachusetts, 249; *Lundquist* v. *Duluth Street Ry. Co.*, 65 Minnesota, 387; *Funk* v. *St. Paul Street Ry. Co.*, 61 Minnesota, 435; *Sams* v. *St. Louis & Merrimac R. R. Co.*, 174 Missouri, 53; *Godfrey* v. *St. Louis Tourist Co.*, 107 Missouri, 193; *Johnson* v. *Metropolitan Street Ry. Co.*, 104 Mo. App. 588; *Riley* v. *Galveston City Ry. Co.*, 13 Tex. Civ. App. 247; *Norfolk Traction Co.* v. *Ellington*, 108 Virginia, 245. See *Omaha & Council Bluffs Street Ry. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324; *Hughes* v. *Indiana Traction Co.* (Indiana), 105 N. E. Rep. 537.

Omaha & Council Bluffs St. Ry. Co. v. *Interstate Commerce Commission*, makes plain that the facts that a street railway does a suburban as well as an urban business, is operated by electricity instead of horse power and operates in part over a private right of way, do not give it the character of a "railroad" within these acts. *United States* v. *Baltimore and Ohio S. W. Ry. Co.*, 226 U. S. 14; *Kansas City &c. Ry. Co.* v. *McAdow*, 240 U. S. 51; *Spokane &c. Ry. Co.* v. *United States*, 241 U. S. 344, and *Same* v. *Campbell*, *id.* 497, all had to do with roads operating between cities, and carrying both passengers and freight after the manner of steam railroads, and competing with them—unlike the road of the plaintiff in error.

At most the question of the character of appellant was one for the jury and not for peremptory instruction.

The trial court erred in allowing a new cause of action to be introduced by amendment after the evidence had

all been taken and the witnesses discharged, especially one which was already barred by the limitation of the statute under which such cause of action was permitted to survive. The right of action for the conscious pain and suffering of the deceased based wholly on the Act of 1908, as amended in 1910, was not counted on nor damages claimed under it in the declaration. The distinction between such a cause and the cause relied on prior to the amendment is clearly shown in *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Craft*, 237 U. S. 648; *Garrett* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 308; *Gt. Northern Ry. Co.* v. *Capital Trust Co.*, 242 U. S. 144. Under the declaration as originally drawn there was but a single cause of action asserted, namely, the action for pecuniary loss and damage resulting to the parents by reason of the untimely death of their son. The pleading could not justify a recovery under his surviving right of action. See *Hurst* v. *Detroit City Railway*, 84 Michigan, 539. It is contrary to the settled law to permit a cause of action which has been barred by limitation, and which is not even defectively pleaded, to be revived by an amendment relating back to the beginning of the action. 25 Cyc. 1308, 31 *id.* 413; *Nelson* v. *First Natl. Bank*, 139 Alabama, 578; *Mohr* v. *Lemle*, 69 Alabama, 180; *Whalen* v. *Gordon*, 95 Fed. Rep. 305; *Schulze* v. *Fox*, 53 Maryland, 37.

Seaboard Air Line Ry. v. *Renn*, 241 U. S. 290; *Illinois Surety Co.* v. *Peeler*, 240 U. S. 214, and *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570, are to be distinguished as cases in which the amendments merely extended or amplified statements of causes of action already set up.

The plaintiff in error did not waive its right to plead the statute of limitations to the amended declaration by its failure to object to the first amendment. The court below disposed of this objection in its opinion, citing *Union*

Pacific Ry. Co. v. *Wyler*, 158 U. S. 285, in addition to which, see *Atlantic Coast Line Ry.* v. *Burnett*, 239 U. S. 199, 201, holding that where a statutory right of action of this kind is given, to be asserted within a stated period, a plea of the limitation is unnecessary and the bar may be claimed under the general issue.

Counsel also contended that there was a dearth of evidence of conscious pain and suffering; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Craft*, 237 U. S. 648; that the amendment failed to assert a claim for pain and suffering in sufficient form; that allowance of the amendment took defendant by surprise and that evidence should have been taken on defendant's plea of the statute of limitations to the amended declaration. They also made the points that there was no negligence on the part of the plaintiff; that, if there was, it was not the proximate cause and decedent assumed the risk; and that the trial judge erred in the instructions concerning some of these matters.

Mr. Daniel W. O'Donoghue, with whom *Mr. Arthur A. Alexander* was on the briefs, for the defendant in error, moved to dismiss the writ of error upon the ground that, as applied to this case, the Employers' Liability Act of 1908, as amended in 1910, should be regarded as a local act and not such a general law of the United States as when construed affords jurisdiction to this court to review a final judgment of the Court of Appeals of the District of Columbia, under Jud. Code, § 250, par. 6. *American Security & Tr. Co.* v. *District of Columbia*, 224 U. S. 491. It was conceded in both courts below that the death of the employee occurred about a mile out in the country westward from that part of the City of Washington which is known as Georgetown, but within the limits of the District of Columbia. Whenever the injury occurs within the District the case is governed by § 2 of the Act of 1908. The same reasoning which induced the court in *Washing-*

ton, Alexandria & Mt. Vernon Ry. Co. v. *Downey*, 236 U. S. 190, to hold that the Employers' Liability Act of 1906, as applied to the District, was local, holds good in respect of the Act of 1908. See *El Paso & Northeastern Ry. Co.* v. *Gutierrez*, 215 U. S. 87. The fact that the general provision defining the application of the Act of 1908 is in one section (§ 1), while that declaring liability in the District and the Territories is placed in a separate section (§ 2), makes the intention to regulate locally even clearer than it was in the Act of 1906, where both aspects were fused in one section.

The injury having occurred in the District, the fact that it was also in the course of commerce between the District and the State of Maryland does not bring the carrier within § 1, because, as said in the *Downey Case*, *supra*, the test whether the statute is general or local depends on the source of the legislative power exerted, that is, whether it comes from the purely local power to govern the District or the power over interstate commerce, and whether in its general operation it was intended as a local law. See *Gutierrez Case*, *supra*, p. 97.

If this court has jurisdiction by writ of error, the anomalous situation results that judgments of the Court of Appeals of the District in these cases may be reviewed here as of right, while the jurisdiction to review such judgments when rendered by the Circuit Courts of Appeal is cut off by the Act of September 6, 1916, 39 Stat. 726.

The correct view is that § 1 of the Act of 1908 applies to interstate commerce to or from the District only when the injury occurs outside of the District. This is shown by the fact that § 2 does not employ the language of § 1, "in such commerce," but expressly provides that the carrier shall be liable to any employee "suffering injury . . . in any of said jurisdictions."

When the case is governed by the local statute, namely, § 2 of the act, then necessarily §§ 3 to 9 are ancillary to and

become part of the local statute. In local cases, all sections apply, except § 1; in an interstate case, where the injury occurs outside of the District, all sections except § 2 apply.

If the court should hold that the plaintiff in error is not a "common carrier by railroad" within the meaning of the Act of 1908, the case should be disposed of, not by reversal, but by dismissing the writ of error because the action then would be governed by the Employers' Liability Act of 1906. See *Employers' Liability Cases*, 207 U. S. 497, and *El Paso & Northeastern Ry. Co.* v. *Gutierrez, supra.* The Act of 1908 expressly provides that the Act of 1906 shall not be thereby repealed, and under *Washington, Alexandria & Mt. Vernon Ry. Co.* v. *Downey, supra*, the judgment in a case based on the earlier act would not be reviewable here.

MR. JUSTICE CLARKE delivered the opinion of the court.

This case is before us on writ of error to the Court of Appeals of the District of Columbia, and we shall refer to the parties as they appeared in the trial court, the defendant in error as plaintiff and the plaintiff in error as defendant.

On July 8, 1913, the plaintiff's decedent was a conductor in the employ of the defendant, a common carrier of passengers by an electric railroad, with termini as hereinafter described, and when standing or moving along the "running or stepping board" of an open summer car, in the evening after dark, his body in some manner struck against one of the poles supporting the overhead wires and he was so injured that he died within an hour.

The negligence charged in the third and fourth counts of the declaration on which the case was tried is the placing of the poles so close to the track that the decedent did not have a reasonably safe place in which to discharge

the duties required of him, and the allegations of these counts bring the case within the Federal Employers' Liability Act, approved April 22, 1908, 35 Stat. 65, as amended April 5, 1910, 36 Stat. 291.

A motion by the defendant in error to dismiss the writ of error for want of jurisdiction and a petition filed by the plaintiff in error for a writ of certiorari, both of which were postponed to the hearing on the merits, are denied.

Coming to the merits of the case we are confronted with eighteen claims of error, which, however, resolve themselves into but three of substance sufficient to call for attention, viz:

(1) That the defendant in error at the time of the accident was not a "common carrier by railroad" within the meaning of the Federal Employers' Liability Act of April 22, 1908.

(2) That the trial court erred in permitting the plaintiff to amend her declaration on the trial, after all the testimony had been introduced, and at a time more than two years after the accident had occurred, by inserting a claim for "conscious pain and suffering" of the deceased.

This amendment, it is claimed, in effect allowed a recovery on a second and new cause of action after it was barred by the two years limitation of the act.

(3) That the court erred in submitting the case to the jury for the reason that no substantial evidence of negligence was introduced on the trial.

Four acts of Congress, the first providing for the incorporation of the defendant company and the other three amending the first, were introduced in evidence on the theory that they were private acts and otherwise would not be before this court.

With these acts and the evidence and admissions shown in the record before us, it is clear that the defendant was incorporated as, and at the time of the accident complained of was, a railway company, not a street railway

company; that it had full powers of eminent domain; that at the time of the accident complained of it owned and operated a line of electric railway extending from a terminus within the District of Columbia to a terminus at Cabin John Creek, in the State of Maryland, a large part of the line being constructed on a private right of way, and that it was at that time a common carrier of passengers for hire between its termini.

It is argued that under the decision in *Omaha & Council Bluffs Street Ry. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, the railway of the defendant was a street railroad and that therefore the defendant was not a "common carrier by railroad" within the terms of the Act of 1908 as amended. That case dealt with a purely street railway in the streets of two cities, and the decision was that it was not a "railroad" such as was intended to be placed under the jurisdiction of the Interstate Commerce Commission by the Interstate Commerce Act of 1887. The case is of negligible value in determining either the construction of the act we are considering in this case, or the classification of the defendant, which clearly enough is a suburban railroad common carrier of passengers within the scope of the Federal Employers' Liability Act, as is sufficiently decided by *United States* v. *Baltimore & Ohio Southwestern Ry. Co.*, 226 U. S. 14; *Kansas City Western Ry. Co.* v. *McAdow*, 240 U. S. 51; *Spokane & Inland Empire R. R. Co.* v. *United States*, 241 U. S. 344, and *Spokane & Inland Empire R. R. Co.* v. *Campbell*, 241 U. S. 497.

This first claim of error of the defendant must be denied.

Seven days before the case came on for trial, the court granted leave to the plaintiff, no objection being noted, to amend the fourth count of her declaration by adding the allegation that the injuries received by the deceased caused him to "suffer intense pain." After all of the evidence had been introduced on the trial, the

court, immediately before charging the jury, permitted the plaintiff to further amend the third and fourth counts of her declaration by adding to each the allegation that the negligence of the defendant resulted in "conscious pain and suffering" to the deceased. To the allowing of this last amendment the defendant objected, and the objection being overruled excepted, and it thereupon answered the declaration as thus amended pleading "not guilty and the statute of limitations of two years."

The death of plaintiff's decedent occurred on July 8, 1913. This amendment was allowed on October 29, 1915, and it is urged that the effect of it was to allow the plaintiff to recover upon a claim that the deceased endured "conscious pain and suffering," which would not have been allowed without the amendment, and that such claim was barred by the provision of the Employers' Liability Act, that no action shall be maintained under it unless commenced within two years from the time the cause of action accrued. Before this last amendment the third and fourth counts of the declaration stated a case of negligence plainly within the terms of the Employers' Liability Act and claimed damages for the death of deceased from injuries which the prior amendment alleged caused him to "suffer intense pain." Under these two counts as they then stood, testimony was admitted, without objection, tending to prove that the deceased suffered pain during the comparatively short interval between the time he was injured and when he lapsed into the period of unconsciousness which preceded his death.

As we have seen, the fourth count, before the amendment objected to, alleged that the injuries received caused the deceased to suffer "intense pain" and the added allegation is that the injuries caused him "conscious pain and suffering." The difference between the two, if there is any difference at all, is too elusive for application in the practical administration of justice, and the claim that

this amendment added a new cause of action to the declaration is too fanciful for discussion. At most it was a slight elaboration of a probably sufficiently claimed element of damage, and the allowance of the amendment was well within the authority and the effect of *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570; *Illinois Surety Co.* v. *Peeler*, 240 U. S. 214, and *Seaboard Air Line Ry.* v. *Renn*, 241 U. S. 290.

A word will suffice for the claim remaining. The trolley pole against which plaintiff's decedent struck was shown to be considerably closer to the track than the other poles on the line and it is sufficient to say that the trial and appellate courts both found that the maintaining of such pole so close to the track that a conductor could not safely discharge the duties required of him, constituted evidence of negligence sufficient to justify submitting the case to the jury and with this conclusion we cordially agree.

The record shows that the case was submitted to the jury in a comprehensive charge sufficiently favorable to the defendant and the judgment of the Court of Appeals of the District of Columbia is

Affirmed.

THE CHIEF JUSTICE did not take part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

October Term, 1916.

Order.—It is ordered that General Order in Bankruptcy No. XXXII be amended so as to read as follows: Opposition to discharge or composition: A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within 10 days thereafter, unless the time shall be shortened or enlarged by special order of the judge.

Promulgated June 4, 1917.

DECISIONS PER CURIAM FROM MAY 1, 1917, TO JUNE 11, 1917, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 897. H. N. JOHNSON ET AL., APPELLANTS, *v.* WILLIAM G. MCADOO, SECRETARY OF THE UNITED STATES TREASURY DEPARTMENT. Appeal from the Court of Appeals of the District of Columbia. Motion to affirm submitted April 30, 1917. Decided May 7, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Belknap* v. *Schild,* 161 U. S. 10; *Postal Supply Co.* v. *Bruce,* 194 U. S. 601; *Goldberg* v. *Daniels,* 231 U. S. 218; *Louisiana* v. *McAdoo,* 234 U. S. 627. *Mr. Cornelius J. Jones* for appellants. *The Solicitor General* for appellee.

No. 860. JOSEPH FRIEDMAN, PLAINTIFF IN ERROR, *v.* UNITED STATES. In error to the United States Circuit Court of Appeals for the First Circuit. Motion to dismiss submitted April 30, 1917. Decided May 7, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *MacFadden* v. *United States,* 213 U. S. 288. *Mr. William H. Taylor* for plaintiff in error. *The Solicitor General* for the United States.

No. 253. HIDEKUNI IWATA, APPELLANT, *v.* CHARLES T. CORNELL, AS IMMIGRATION INSPECTOR IN CHARGE. Appeal from the District Court of the United States for the Southern District of California. Submitted May 3, 1917. Decided May 21, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of (1) *Bugajewitz* v. *Adams,*

228 U. S. 585, 590, 591; (2) *Zakonaite* v. *Wolf*, 226 U. S. 272; *Lewis* v. *Frick*, 223 U. S. 291; (3) *United States* v. *Juy Toy*, 198 U. S. 253; *Chin Yow* v. *United States*, 208 U. S. 8; *Tang Tun* v. *Edsell*, 223 U. S. 673; *Low Wah Suey* v. *Backus*, 225 U. S. 460. *Mr. Lewis H. Smith* for appellant. *The Solicitor General* for appellee.

Nos. 878 and 879. PHILADELPHIA & READING RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* UNITED STATES. In error to the District Court of the United States for the Eastern District of Pennsylvania. Motion to dismiss submitted May 7, 1917. Decided May 21, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *McLish* v. *Roff*, 141 U. S. 661, 665; *Covington* v. *First National Bank*, 185 U. S. 270, 277; *Heike* v. *United States*, 217 U. S. 423. *Mr. William Clarke Mason* and *Mr. Charles Heebner* for plaintiff in error. *The Solicitor General* for the United States.

No. 178. EMMA TAYLOR, ADMINISTRATRIX OF FRANK TAYLOR, DECEASED, AND JOHN P. KIRBY, PLAINTIFFS IN ERROR, *v.* DRAINAGE DISTRICT NUMBER FIFTY-SIX OF EMMET COUNTY, IOWA, ET AL. In error to the Supreme Court of the State of Iowa. Submitted April 19, 1917. Decided May 21, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Huling* v. *Kaw Valley Railway Improvement Co.*, 130 U. S. 559; *Winona & St. Paul Land Co.* v. *Minnesota*, 159 U. S. 540; *Leigh* v. *Green*, 193 U. S. 79; *Ballard* v. *Hunter*, 204 U. S. 241, 261, 262; *American Land Co.* v. *Zeiss*, 219 U. S. 47. *Mr. Edgar A. Morling* for plaintiffs in error. *Mr. Hugh H. Obear* for defendants in error.

Nos. 832, 833, and 834. Mateo Fajardo Cardona, Plaintiff in Error, *v.* People of Porto Rico. In error to the Supreme Court of Porto Rico. Motion to dismiss or affirm submitted May 7, 1917. Decided May 21, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *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. Willis Sweet* for plaintiff in error. *Mr. S. T. Ansell* for defendant in error.

No. 250. State of Nebraska ex rel. Henry C. Bittenbender and Ada M. Bittenbender, Plaintiffs in Error, *v.* Excise Board of the City of Lincoln, Nebraska. In error to the Supreme Court of the State of Nebraska. Submitted May 1, 1917. Decided May 21, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Eustis* v. *Bolles*, 150 U. S. 361; *Leathe* v. *Thomas*, 207 U. S. 93; *Mellon Co.* v. *McCafferty*, 239 U. S. 134; (2) *Jones* v. *Montague*, 194 U. S. 147; *Richardson* v. *McChesney*, 218 U. S. 487; *Stearns* v. *Wood*, 236 U. S. 75. *Mrs. Ada M. Bittenbender* for plaintiffs in error. *Mr. C. Petrus Peterson* and *Mr. George W. Berge* for defendant in error.

No. 266. Grand Rapids & Indiana Railway Company, Plaintiff in Error, *v.* United States. In error to the United States Circuit Court of Appeals for the Sixth Circuit. Submitted May 4, 1917. Decided May 21, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Hollander* v. *Fechheimer*, 162 U. S. 326; *California National Bank* v. *Stateler*, 171 U. S. 447; *Martinez* v. *International Banking Corporation*, 220 U. S.

214, 222–223. *Mr. James H. Campbell* and *Mr. Elvert M. Davis* for plaintiff in error. *Mr. Assistant Attorney General Underwood* and *Mr. S. Milton Simpson* for the United States.

No. 849. PRAIRIE OIL & GAS COMPANY, SENES W. ANTHONY, AND CHARLES ANTHONY, PLAINTIFFS IN ERROR, *v.* ANNIE CARTER. In error to the Supreme Court of the State of Oklahoma. Motion to dismiss submitted May 7, 1917. Decided May 21, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237, Judicial Code, as amended by the Act of Congress of September 6, 1916, c. 448, 39 Stat. 726. (Petition for a writ of certiorari denied, March 12, 1917.) *Mr. Joseph W. Bailey* and *Mr. George S. Ramsey* for plaintiffs in error. *Mr. S. W. Hayes* for defendant in error.

No. 372. GEORGE SCHWEDE *v.* ZENITH STEAMSHIP CO. On certificate from and writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. Argued October 17, 18, 1916. Reargued January 10, 11, 1917. Decided May 21, 1917. *Per Curiam.* Judgment of the District Court of the United States for the Northern District of Ohio affirmed with costs by an equally divided court and cause remanded to the said District Court. (Mr. Justice Day took no part in the consideration or decision of this case.) *Mr. R. B. Newcomb* and *Mr. Frank M. Cobb* for Schwede. *Mr. Luther Day* for Zenith Steamship Company.

No. 29. Original. *Ex parte:* IN THE MATTER OF BERNIE J. BERNHARD, PETITIONER. Submitted May 21, 1917. Decided June 4, 1917. *Per Curiam.* Rule discharged and

petition dismissed upon the authority of § 6 of the Act of Congress of July 30, 1894, 28 Stat. 160; § 3, Rule VIII of the Court of Appeals of the District of Columbia. *Mr. Charles B. Gillson* for petitioner.

No. 658. LASER GRAIN COMPANY, PLAINTIFF IN ERROR, *v.* UNITED STATES OF AMERICA. In error to the District Court of the United States for the Eastern District of Missouri. Motion to require plaintiff in error to elect, etc., or to dismiss, submitted May 21, 1917. Decided June 4, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Hannis Distilling Co.* v. *Baltimore*, 216 U. S. 285; *Hendricks* v. *United States*, 223 U. S. 178, 184. See *In re Palliser*, 136 U. S. 257, 265–268; *Horner* v. *United States*, 143 U. S. 207, 214; *Benson* v. *Henkel*, 198 U. S. 1, 15; *United States* v. *Thayer*, 209 U. S. 39, 44; *Hyde* v. *United States*, 225 U. S. 347, 361. *Mr. John S. Leahy*, *Mr. Irvin V. Barth* and *Mr. Walter H. Saunders* for plaintiff in error. *The Solicitor General* for the United States.

No. 184. ALBERT PICK & COMPANY, PLAINTIFF IN ERROR, *v.* FRANK C. JORDAN, SECRETARY OF STATE OF THE STATE OF CALIFORNIA. In error to the Supreme Court of the State of California. Submitted April 17, 1917. Decided June 4, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Kansas City, &c. Railway Co.* v. *Kansas*, 240 U. S. 227. *Mr. W. I. Brobeck* for plaintiff in error. *Mr. U. S. Webb* and *Mr. Raymond Benjamin* for defendant in error.

No. 601. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY, PLAINTIFF IN ERROR, *v.* WILLIAM INGRAM.

In error to the Supreme Court of the State of Arkansas. Motion to dismiss or affirm or place on the summary docket submitted May 21, 1917. Decided June 4, 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. Troy Pace* for plaintiff in error. *Mr. J. H. Ralston* and *Mr. William E. Richardson* for defendant in error.

No. —. Original. *Ex parte:* IN THE MATTER OF CORNELIA G. GOODRICH ET AL., PETITIONERS. Submitted May 21, 1917. Decided June 4, 1917. Motion for leave to file petition for writ of prohibition denied. *Mr. Hannis Taylor* and *Mr. William D. Gordon* for petitioners.

No. —. Original. *Ex parte:* IN THE MATTER OF J. S. KILGORE, SR., AND L. K. HUNTER, PETITIONERS. Submitted May 21, 1917. Decided June 4, 1917. Motion for leave to file petition for writ of mandamus denied. *Mr. W. E. Breese* for petitioners.

No. 657. JOSEPH HENRY BASH, ET AL., PLAINTIFFS IN ERROR, *v.* WILLIAM HOWALD. In error to the Supreme Court of the State of Oklahoma. Motion to dismiss submitted June 4, 1917. Decided June 11, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 105; *Consolidated Turnpike* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Parker* v. *McLain*, 237 U. S. 469; *Stewart* v. *Kansas*

City, 239 U. S. 14; *In re Neagle*, 135 U. S. 55; *In re Delgado*, 140 U. S. 586, 588. *Mr. P. C. Simons* for plaintiffs in error. *Mr. J. B. Ferguson* for defendant in error.

Nos. 1035, 1036, 1037, and 1038. WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR, *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY. In error to the Supreme Court of the State of Alabama. Motions to dismiss or affirm and petitions for writs of certiorari submitted June 4, 1917. Decided June 11, 1917. *Per Curiam.* Judgments affirmed with costs, upon the authority of *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Western Union Telegraph Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239; *Western Union Telegraph Co.* v. *Pennsylvania R. R. Co.*, 195 U. S. 540; *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160; *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300. Petitions for writs of certiorari denied. *Mr. Rush Taggart, Mr. Ray Rushton, Mr. William M. Williams* and *Mr. Forney Johnston* for plaintiff in error. *Mr. Henry L. Stone* and *Mr. E. Perry Thomas* for defendant in error.

No. 1122. CAROLINA, CLINCHFIELD & OHIO RAILWAY, PLAINTIFF IN ERROR, *v.* GEORGE W. STROUP. In error to the United States Circuit Court of Appeals for the Sixth Circuit. Motion to dismiss or affirm submitted June 4, 1917. Decided June 11, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 3 of the Act of Congress of September 6, 1916, c. 448, 39 Stat. 726, 727. *Mr. John W. Price* for plaintiff in error. *Mr. Robert Burrow* and *Mr. Isaac Harr* for defendant in error.

No. 1029. OMAHA BAUM IRON STORE CO., FORMERLY OMAHA IRON STORE CO., APPELLANT, *v.* MOLINE PLOW COMPANY. Appeal from the District Court of the United States for the District of Nebraska. Motion to dismiss submitted June 4, 1917. Decided June 11, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31, 37; *Brown* v. *Alton Water Co.*, 222 U. S. 325; *Metropolitan Water Co.* v. *Kaw Valley District*, 223 U. S. 519; *Union Trust Co.* v. *Westhus*, 228 U. S. 519; *Shapiro* v. *United States*, 235 U. S. 412. *Mr. Otto Raymond Barnett* for appellant. *Mr. Thomas A. Banning* and *Mr. Samuel W. Banning* for appellee.

No. 1102. P. C. O'BRIEN, COUNTY TREASURER OF CUYAHOGA COUNTY, APPELLANT, *v.* JOHN D. ROCKEFELLER. Appeal from the United States Circuit of Appeals for the Sixth Circuit. Motion to dismiss and petition for writ of certiorari submitted June 4, 1917. Decided June 11, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Weir* v. *Rountree*, 216 U. S. 607; *Bagley* v. *General Fire Extinguisher Co.*, 212 U. S. 477; *Merriam Co.* v. *Syndicate Publishing Co.*, 237 U. S. 618; *Norton* v. *Whiteside*, 239 U. S. 144, 146–147; (2) *Arbuckle* v. *Blackburn*, 191 U. S. 405. Petition for writ of certiorari denied. *Mr. Samuel Doefler* and *Mr. Thomas S. Dunlap* for appellant. *Mr. A. E. Clevenger* and *Mr. W. B. Sanders* for appellee.

No. ——. Original. *Ex parte:* IN THE MATTER OF DONN M. ROBERTS, PETITIONER; and

No. ——. Original. *Ex parte:* IN THE MATTER OF

DENNIS SHEA. Submitted June 4, 1917. Decided June 11, 1917. *Per Curiam.* Motions for leave to file petitions for writs of habeas corpus denied on the authority of *United States* v. *Mosley*, 238 U. S. 383. *Mr. Frans E. Lindquist* for petitioners.

No. 786. EMPIRE MILL COMPANY, PLAINTIFF IN ERROR, *v.* BLACKWELL LUMBER COMPANY. In error to the Supreme Court of the State of Idaho. Motion to dismiss or affirm or modify supersedeas submitted June 4, 1917. Decided June 11, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Luxton* v. *North River Bridge Co.*, 147 U. S. 337; *Southern Railway Co.* v. *Postal Telegraph-Cable Co.*, 179 U. S. 641; *Grays Harbor Logging Co.* v. *Coats-Fordney Logging Co.*, 243 U. S. 251. *Mr. Charles W. Beale* for plaintiff in error. *Mr. John P. Gray* for defendant in error.

No. ——. Original. *Ex parte:* IN THE MATTER OF AVASTA HUGHES, PETITIONER. Submitted June 4, 1917. Decided June 11, 1917. Motion for leave to file petition for writs of prohibition and mandamus denied. *Mr. Benjamin Patterson* for petitioner.

No. 20. October Term, 1911. SIDNEY HENRY ET AL. *v.* A. B. DICK COMPANY. Submitted May 21, 1917. Decided June 11, 1917. Motion for leave to file bill of review in the District Court of the United States for the Southern District of New York granted. *Mr. Hans von Briesen* and *Mr. Arthur von Briesen* for Margaret Henry, petitioner.

DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI, FROM MAY 1, 1917, TO JUNE 11, 1917.

No. 520. OHIO C. BARBER, PETITIONER, *v.* COLUMBIA CHEMICAL COMPANY. May 7, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles E. Smoyer* for petitioner. *Mr. W. T. Holliday* for respondent.

No. 1033. SUPREME LODGE OF THE WORLD, LOYAL ORDER OF MOOSE, PETITIONER, *v.* THOMAS P. KENNEY, AS ADMINISTRATOR, ETC. May 7, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Alabama denied. *Mr. E. J. Henning* for petitioner. No appearance for respondent.

No. 1077. N. J. M. SHIMER, PETITIONER, *v.* SABINE W. WISTER. May 7, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. J. S. Freeman* for petitioner. *Mr. Thomas Stokes* and *Mr. George Wharton Pepper* for respondent.

Nos. 1080, 1081, 1082, and 1083. OCEAN STEAMSHIP COMPANY, LIMITED, PETITIONER, *v.* UNITED STATES STEEL PRODUCTS COMPANY. May 7, 1917. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles S. Haight* for petitioner. *Mr. J. Parker Kirlin* for respondent.

No. 1087. EDWARD N. MAULL ET AL., PETITIONERS, *v.* L. B. SKINNER MANUFACTURING COMPANY. May 7, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. F. M. Durrance* and *Mr. George C. Bedell* for petitioners. *Mr. T. Hart Anderson* for respondent.

No. 1093. JOHN KENNEY, PETITIONER, *v.* LABAN MILES ET AL. May 21, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma granted. *Mr. Charles J. Kappler* for petitioner. *Mr. Charles H. Merillat* and *Mr. H. P. White* for respondents.

No. 1103. EMMANUEL J. DOYLE, COLLECTOR OF INTERNAL REVENUE, PETITIONER, *v.* MITCHELL BROTHERS COMPANY. May 21, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *The Solicitor General* for petitioner. *Mr. Mark Norris* for respondent.

No. 1055. INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, PETITIONER, *v.* SOUTHERN PACIFIC COMPANY. May 21, 1917. Petition for writ 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. 1034. W. C. BASS ET AL., PETITIONERS, *v.* MRS. M. A. GEIGER. May 21, 1917. Petition for a writ of cer-

tiorari to the Supreme Court of the State of Florida denied. *Mr. George Palmer Garrett* for petitioners. No appearance for respondent.

No. 1088. NICHOLAS F. BRADY ET AL., AS EXECUTORS, ETC., PETITIONERS, *v.* CHARLES W. ANDERSON, LATE COLLECTOR OF INTERNAL REVENUE, ETC. May 21, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. John M. Perry* for petitioners. *The Solicitor General* for respondent.

No. 1096. SOUTHERN RAILWAY COMPANY, PETITIONER, *v.* VIRGINIA McGUIN, ADMINISTRATRIX, ETC. May 21, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. R. Walton Moore* for petitioner. *Mr. Leo P. Harlow* for respondent.

No. 1105. WILSON D. WING, PETITIONER, *v.* CHARLES DILLINGHAM, RECEIVER, ETC., ET AL. May 21, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Henry C. Coke* and *Mr. Weldon Bailey* for petitioner. *Mr. Thomas M. Kennerly* for respondents.

No. 1107. J. M. SHELTON ET AL., PETITIONERS, *v.* GAS SECURITIES COMPANY. May 21, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Irving B.*

Melville for petitioners. *Mr. Platt Rogers* and *Mr. James G. Rogers* for respondent.

No. 1111. CHIN HING, PETITIONER, *v.* HENRY M. WHITE, AS COMMISSIONER OF IMMIGRATION, ETC. May 21, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles R. Pierce* for petitioner. *The Solicitor General* for respondent.

No. 1126. J. KNOX GREER, PETITIONER, *v.* UNITED STATES. June 4, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. James C. Denton* and *Mr. Frank Lee* for petitioner. *The Solicitor General* for the United States.

No. 1086. RALPH K. BLAIR AND THOMAS ADDIS, PETITIONERS, *v.* UNITED STATES. June 4, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. J. J. Dunne, Mr. Allen G. Wright, Mr. T. E. K. Cormac* and *Mr. F. R. Coudert* for petitioners. *The Solicitor General* for the United States.

No. 1097. MAINE NORTHWESTERN DEVELOPMENT COMPANY, PETITIONER, *v.* NORTHWESTERN COMMERCIAL COMPANY. June 4, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William H. Gorham* for petitioner. *Mr. W. H. Bogle* and *Mr. Carroll B. Graves* for respondent.

No. 1098. H. A. A. SMITH, PETITIONER, *v.* GOVERNMENT OF THE CANAL ZONE EX REL. WILLIAM C. MACINTYRE. June 4, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. H. Ralston*, *Mr. William E. Richardson* and *Mr. Frank Feuille* for petitioner. No appearance for respondent.

No. 1115. UNION PACIFIC RAILROAD COMPANY, PETITIONER, *v.* ERBA J. PHILLIPS, AS ADMINISTRATRIX, ETC. June 4, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Nebraska denied. *Mr. Alfred G. Ellick* and *Mr. Nelson H. Loomis* for petitioner. *Mr. John J. Halligan* and *Mr. C. Petrus Peterson* for respondent.

No. 1124. WILLIAM P. ELLISON, INC., PETITIONER, *v.* MARSHALL S. HAGAR, AS TRUSTEE, ETC. June 4, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Jacob J. Lesser* for petitioner. *Mr. Oscar W. Jeffery* for respondent.

No. 1135. DAISY B. JAMES, PETITIONER, *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY. June 4, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Alexander Simpson* for petitioner. No appearance for respondent.

No. 1139. CITY OF RICHMOND, PETITIONER, *v.* ELIZABETH W. BIRD ET AL. June 11, 1917. Petition for a

writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *Mr. George Wayne Anderson* for petitioner. No appearance for respondents.

No. 820. JOSEPH FREEDMAN, PETITIONER, *v.* UNITED STATES. June 11, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. William H. Taylor* for petitioner. *The Solicitor General* for the United States.

No. 1062. W. P. TUCKER, PETITIONER, *v.* CRAWFORDSVILLE STATE BANK. June 11, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. C. Devant* for petitioner. *Mr. Peter O. Knight* for respondent.

No. 1110. INDIAN LAND & TRUST COMPANY ET AL., PETITIONERS, *v.* ROBERT L. OWEN. June 11, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Lewis C. Lawson* for petitioners. *Mr. W. W. Noffsinger* for respondent.

No. 1113. HARRIET L. BIGGS, PETITIONER, *v.* GEORGE E. MORRIS ET AL. June 11, 1917. Petition for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied. *Mr. Donald H. McLean* for petitioner. *Mr. Benjamin F. Edsall* for respondents.

No. 1114. CRANE COMPANY, PETITIONER, *v.* FIDELITY TRUST COMPANY, TRUSTEE, ETC. June 11, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles W. Fulton* for petitioner. *Mr. Randolph W. Childs* for respondent.

No. 1123. CALEB B. RIGGS ET AL., PETITIONERS, *v.* JOHN J. GILLESPIE. June 11, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Charles E. Hogg* for petitioners. No appearance for respondent.

No. 1128. ILLINOIS CENTRAL RAILROAD COMPANY, PETITIONER, *v.* UNITED STATES. June 11, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Blewett Lee* and *Mr. W. S. Horton* for petitioner. *The Solicitor General* for the United States.

No. 1129. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, PETITIONER, *v.* ROBERT H. MADDEN. June 11, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William S. Jenney* for petitioner. *Mr. Clayton R. Lusk* for respondent.

No. 1131. MAX JAFFE ET AL., PETITIONERS, *v.* J. A. E. PYLE, AS TRUSTEE, ETC. June 11, 1917. Petition for a

writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George T. Hogg* for petitioners. No appearance for respondent.

No. 1132. STANDARD GAS LIGHT COMPANY OF THE CITY OF NEW YORK, PETITIONER, *v.* R. G. PACKARD COMPANY. June 11, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. John A. Garver* for petitioner. *Mr. Mark Ash* for respondent.

No. 1133. JOHN FREDERICK WALLACH ET AL., PETITIONERS, *v.* CORNELIUS K. G. BILLINGS. June 11, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied. *Mr. Jacob Newman, Mr. C. H. Poppenhusen* and *Mr. Henry L. Stern* for petitioners. *Mr. Jesse J. Ricks* and *Mr. J. F. Meagher* for respondent.

No. 1136. FELT & TARRANT MANUFACTURING COMPANY, PETITIONER, *v.* BURROUGHS ADDING MACHINE COMPANY. June 11, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Henry Love Clarke* for petitioner. *Mr. Edward W. Rector* and *Mr. Robert H. Parkinson* for respondent.

No. 1141. FRANK WELCH, PETITIONER, *v.* G. W. ELLIS ET AL. June 11, 1917. Petition for a writ of certiorari

to the Supreme Court of the State of Oklahoma denied. *Mr. William P. Thompson* for petitioner. No appearance for respondents.

No. 1143. W. H. LYON, PETITIONER, *v.* JOHN P. BLEEG, TRUSTEE, ETC. June 11, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Thomas Sterling*, *Mr. Park Davis* and *Mr. C. C. Caldwell* for petitioner. *Mr. C. O. Bailey* and *Mr. J. H. Voorhees* for respondent.

No. 1146. M. F. WITTE, PETITIONER, *v.* W. A. SHELTON, AS UNITED STATES MARSHAL, ETC. June 11, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Paul A. Ewert*, *Mr. Norman R. Haskell* and *Mr. Henry C. Lewis* for petitioner. *The Solicitor General* for respondent.

No. 1147. C. H. TIEDEMANN, PETITIONER, *v.* W. A. SHELTON, AS UNITED STATES MARSHAL, ETC. June 11, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Norman R. Haskell*, *Mr. Ely McAdams* and *Mr. Henry C. Lewis* for petitioner. *The Solicitor General* for respondent.

No. 1149. THE AEOLIAN COMPANY, PETITIONER, *v.* VICTOR TALKING MACHINE COMPANY. June 11, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr.*

Arthur C. Rounds and *Mr. George D. Beattys* for petitioner. *Mr. Thomas E. French* and *Mr. Samuel H. Richards* for respondent.

No. 1151. JOSEPH E. WISE ET AL., PETITIONERS, *v.* CORNELIUS C. WATTS ET AL. June 11, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Selim M. Franklin, Mr. G. H. Brevillier* and *Mr. James W. Vroom* for petitioners. *Mr. Joseph W. Bailey* and *Mr. Weldon Bailey* for respondents.

No. 1153. THE BARRETT COMPANY, ETC., ET AL., PETITIONERS, *v.* THOMAS EWING, COMMISSIONER OF PATENTS. June 11, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. W. H. Swenerton* and *Mr. T. D. Merwin* for petitioners. No brief filed for respondent.

No. 1154. SAMUEL M. KINTNER ET AL., RECEIVERS, ETC., PETITIONERS, *v.* ATLANTIC COMMUNICATION COMPANY ET AL. June 11, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederick W. Winter* for petitioners. *Mr. Harry E. Knight, Mr. Harrison F. Lyman* and *Mr. Frederick P. Fish* for respondents.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM MAY 1, 1917, TO JUNE 11, 1917.

No. 255. H. H. HALE, PLAINTIFF IN ERROR, *v.* E. W. RECORD. In error to the Supreme Court of the State of Oklahoma. May 1, 1917. Dismissed with costs, pursuant to the 10th Rule. *Mr. Watson E. Coleman* and *Mr. Frederick S. Stitt* for plaintiff in error. No appearance for defendant in error.

No. 263. MOSES D. BEER, PLAINTIFF IN ERROR, *v.* AMERICAN EXPRESS COMPANY. In error to the Supreme Court of the State of Mississippi. May 2, 1917. Dismissed with costs, on motion of *Mr. Levi Cooke* in behalf of counsel for the plaintiff in error. *Mr. Lawrence Maxwell* and *Mr. Joseph S. Graydon* for plaintiff in error. No appearance for defendant in error.

No. 265. DOMASO APURADO ET AL., PLAINTIFFS IN ERROR AND APPELLANTS, *v.* ENSEBIA BROCE ET AL. In error to and appeal from the Supreme Court of the Philippine Islands. May 2, 1917. Dismissed with costs, pursuant to the 10th Rule. *Mr. C. L. Bouvé* and *Mr. William E. Richardson* for plaintiffs in error and appellants. *Mr. C. W. O'Brien* for defendants in error and appellees.

No. 268. FRANCIS C. WELCH ET AL., TRUSTEES, ETC., PLAINTIFFS IN ERROR, *v.* CITY OF BOSTON. In error to

the Superior Court of the State of Massachusetts. May 2, 1917. Dismissed with costs, pursuant to the 10th Rule. *Mr. Barton Corneau* for plaintiffs in error. No appearance for defendant in error.

No. 270. UNITED STATES, APPELLANT, *v.* BOARD OF COUNTY COMMISSIONERS OF OSAGE COUNTY, OKLAHOMA, ET AL. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. May 3, 1917. Dismissed, on motion of counsel for the appellant. *The Attorney General* for the United States. No appearance for defendants in error.

No. 1112. RALPH H. CAMERON, APPELLANT, *v.* THOMAS F. WEEDIN, REGISTER OF THE UNITED STATES LAND OFFICE, PHOENIX, ARIZONA, ET AL. Appeal from the District Court of the United States for the District of Arizona. May 7, 1917. Docketed and dismissed with costs, on motion of *Mr. Assistant to the Attorney General Todd* in behalf of *Mr. Solicitor General Davis* for the appellees. No one opposing.

No. 1008. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* LILLIAN WILLIVER, ADMINISTRATRIX, ETC. In error to the Court of Errors and Appeals of the State of New Jersey. May 8, 1917. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Frederick B. Scott* for plaintiff in error. No appearance for defendant in error.

No. 21. Original. *Ex parte:* IN THE MATTER OF BERNARD B. SELLING ET AL., A SPECIAL COMMITTEE, ETC., PETITIONERS. May 21, 1917. Case stricken from the docket, on motion of *Mr. Solicitor General Davis* in behalf of counsel for petitioners. *The Solicitor General, Mr. Bernard B. Selling, Mr. Henry M. Campbell, Mr. Otto Kirchner, Mr. Clarence A. Lightner* and *Mr. Sidney T. Miller* for petitioners. *Mr. Thomas A. E. Weadock* and *Mr. Harrison Geer* for respondent.

No. 526. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* EDGAR E. HODGE, A MINOR, ETC. In error to the Supreme Court of the State of Oklahoma. June 4, 1917. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. W. F. Evans* for plaintiff in error. No appearance for defendant in error.

No. 568. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, APPELLANT, *v.* W. H. MCLAUGHLIN ET AL., CONSTITUTING THE BOARD OF COMMISSIONERS OF ROAD IMPROVEMENT DISTRICT NO. 5, ETC. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. June 4, 1917. Dismissed per stipulation. *Mr. Edward A. Haid* and *Mr. William T. Wooldridge* for appellant. *Mr. W. E. Hemingway, Mr. G. B. Rose, Mr. J. F. Loughborough* and *Mr. V. M. Miles* for appellees.

No. 937. UNITED STATES OF AMERICA *ex relatione* ANTY REYNOLDS, PLAINTIFF IN ERROR, *v.* FRANKLIN K. LANE, SECRETARY OF THE INTERIOR. In error to the Court of

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4. Section 11 (k) of the Act of Dec. 23, 1913, establishing the Federal Reserve Board, in authorizing board to permit national banks, when not in contravention of state or local law, to act as trustees, executors, administrators, or registrars of stocks and bonds under rules and regulations to be prescribed by board, is not objectionable as conferring legislative power, or otherwise obnoxious to Constitution. *Id.*

VII. **Fifth Amendment; Self-Incrimination; Presence at View; Due Process.**

1. Fifth Amendment does not relieve witness from answering merely on his own declaration or judgment that an answer might incriminate him; whether he must answer is determinable by the trial court in the exercise of sound discretion; and unless there is reasonable ground, as distinct from remote or speculative possibility, to apprehend that direct answer may prove dangerous to witness, answer should be compelled. *Mason* v. *United States* 362

2. In absence of manifest error, ruling of trial judge upon witness' objection that an answer may incriminate him, will not be reversed by this court. *Id.*

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3. View of scene of murder, by trial judge, does not deprive the accused of constitutional right, carried to him by the Philippine Code, to " meet the witnesses face to face," where view is conducted in presence and with consent of his counsel, and no testimony is taken, and no improper remarks are addressed to judge. *Valdez* v. *United States* 432

4. Right of accused to be present during inspection may be waived by his counsel; but, even when right not waived, his absence will not warrant reversal if no prejudice resulted. *Id.*

5. Appearance in answer to citation issued upon a libel *in personam* does not empower the court to introduce new claims of new claimants without service on the defendant. *Ex parte Indiana Transp. Co.* 456

6. In view of power reserved to add to, alter, amend or repeal the act granting land to the Atlantic and Pacific Railroad Company (July 27, 1866), and of grantee's failure to comply with conditions as to construction, Congress could lay upon grantee cost of surveying lands granted and require payment thereof as a condition to issuance of patents, as was in fact done, in respect of said company, by the general provision in Act of July 31, 1876. *Santa Fe Pac. R. R.* v. *Lane* 492

VIII. **Sixth Amendment.**

Confronting witnesses; view in absence of accused. See VII, *supra.*

IX. **Eleventh Amendment; Suing State Officers.**

1. A suit to restrain state officials from enforcing a state statute in violation of constitutional rights is not a suit against the State, and this whether the unconstitutionality inheres in the statute or is present only in the manner of executing it. *Greene* v. *Louis. & Interurban R. R.* 499
Louis. & Nash. R. R. v. *Greene* 522
Illinois Cent. R. R. v. *Greene* 555

X. **Fourteenth Amendment.**

(1) *General.*

1. Where relief which might be granted under Amendment is same as that allowable under state constitution and

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laws, question whether Amendment is violated need not be passed upon. *Greene* v. *Louis. & Interurban R. R.* 499
Louis. & Nash. R. R. v. *Greene*. 522

(2) *Notice and Opportunity for Hearing.*

2. The claim that a money judgment by a state court violates due process for want of jurisdiction over defendant's person is not sustainable if jurisdiction was questioned by him by plea in abatement and by proceedings in state courts of review, and sustained after fair hearings before judgment became finally effective. *Chicago Life Ins. Co.* v. *Cherry* ... 25

3. A judgment rendered in such circumstances, being sued upon in courts of another State, was sustained upon ground that matter of personal jurisdiction could not be reopened. *Held* that no violation of due process was involved, since original judgment satisfied due process and reason assigned for upholding it, if erroneous, amounted only to a mistake concerning law of the State in which judgment was rendered. *Id.*

4. Violation of due process for state supreme court to reverse case and render judgment absolute against party who succeeded in trial court, upon proposition of fact which was ruled to be immaterial at the trial and concerning which he had therefore no occasion and no proper opportunity to introduce his evidence. *Saunders* v. *Shaw* 317

(3) *Regulation of Rates and Public Service.*

5. One who uses his property in supplying large community with water thereby clothes such property with public interest and subjects business to public regulation. *Van Dyke* v. *Geary* 39

6. Fact that service is limited to part of a town does not prevent water system from being public utility. *Id.*

7. State regulation forbidding railroad to charge more for longer intrastate haul than shorter one for same class of freight over any portion of line within State, and which allows shipper absolute right to recover overcharges collected in violation, is consistent with Amendment. *Missouri Pac. Ry.* v. *McGrew Coal Co.* 191

8. State law requiring street car company to carry city detectives free when in the discharge of duty, *held* not an arbi-

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trary or unreasonable exercise of police power. *Sutton* v. *New Jersey* ... 258

9. Attempt by state commission to exercise power of regulation in such arbitrary and unreasonable manner as to prevent railroad from obtaining fair return upon its property invested in the public service is void under Amendment. *Miss. R. R. Comm.* v. *Mobile & Ohio R. R.* ... 388

10. Reasonableness of requiring carrier to operate specified trains cannot be made to depend upon relation of money return to " out-of-pocket " cost, i. e., immediate outlay for wages and fuel, involved in their operation. *Id.*

11. Where state commission directs railroad to restore various trains, by separate orders, but proceeding is based on one citation and treated as entirety, action of the commission will be tested as a whole, and if unreasonable, generally, its reasonableness as to some part of the required service may not be determined. *Id.*

12. In determining whether rates are confiscatory, calculation is based on fair value of property used in public service; therefore, when railroad which was originally constructed and owned by two is operated by one of them under arrangement whereby his interest will end and become vested in the other at expiration of a term of years, original investment of operating owner should not be charged in annual instalments against annual operating revenue, in determining whether rates fixed are remunerative. *Darnell* v. *Edwards* ... 564

13. Strong presumption in favor of rates fixed by an experienced administrative body after a full hearing. *Id.*

14. For tests of value of property used for public and adequacy of rates imposed. See **Carriers**, 7–14.

15. Where several street railway lines, built under distinct franchises, are owned and operated as one system, public regulation concerning car service and fares will not be held confiscatory because of its financial results to the line immediately affected, if system as a whole remains profitable; and clearly under such circumstances through service between the several lines may be required for single fare. *Puget Sound Traction Co.* v. *Reynolds* ... 574

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(4) *Abolishing Private Business.*

16. A law forbidding employment agents from receiving fees from the workers for whom they find places in effect destroys their occupation as agents for workers, and cannot be sustained upon ground that fees may be charged against employers. *Adams* v. *Tanner*. 590

17. The Washington Employment Agency Law, as construed by supreme court of State, is contrary to Amendment. *Id.*

(5) *Reserved Power over Corporations.*

18. A state law requiring a street car company to carry city detectives free while in the discharge of duty is a valid exercise of a reserved power to amend the company's charter. *Sutton* v. *New Jersey*. 258

19. In granting an irrigation district privilege of obtaining lands for canals, etc., by condemnation, State may impose absolute duty to bridge canals for benefit of adjacent landowners, whether canal in question was acquired by condemnation or not. *Farmers Irrig. Dist.* v. *O'Shea*. 325

(6) *Taxation.*

20. State may not tax tangible assets of foreign corporation which are not within her borders. *Louis. & Nash. R. R.* v. *Greene* 522

21. Although fact that property is part of a system and has its uses only in connection with other parts may be considered by State in taxing that portion of the system which is within her borders, yet idea of organic unity must not be made means of unlawfully taxing property without State belonging to persons domiciled elsewhere. *Illinois Cent. R. R.* v. *Greene* 555

(7) *Equal Protection of the Laws.*

22. State law laying duty upon all owners of irrigation canals to construct bridges over them for benefit of abutting lands does not violate this clause in not embracing canals devoted to other uses. *Farmers Irrig. Dist.* v. *O'Shea*. 325

XI. **Who may question Constitutionality of Statutes.**

1. When constitutional question, asserted as basis for juris-

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diction of this court on direct appeal from District Court, is pleaded as resulting from execution of fraudulent scheme, the question ought not to be considered (*semble*), if charge of fraud fails. *Wall* v. *Parrot Silver Co* 407

2. By claiming the benefits of state laws the right to question their constitutionality may be waived. *Id.*

XII. **Adopting State Construction and Findings.** See also **Jurisdiction,** VII, VIII.

1. In absence of authoritative decision of supreme court of State to contrary, a contemporaneous construction of state constitution by an act of the legislature which is reasonable in itself and designed to accomplish obvious purpose of the constitutional provision in question should be followed by this court. *Van Dyke* v. *Geary* 39

2. The court is not called upon to consider state statutes passed for enforcement of provision in state constitution, when the latter as construed and applied in the case by state supreme court is self-executing and covers judgment in question. *Missouri Pac. Ry.* v. *McGrew Coal Co.* 191

3. Strong presumption in favor of rates fixed by experienced administrative body after full hearing. *Darnell* v. *Edwards* 564

CONSTRUCTION. See **Statutes; Franchise; Contracts; Time.**

Of contracts for transportation. See **Interstate Commerce Acts,** II.

Following state constructions and rulings. See **Jurisdiction,** VII, VIII.

CONTRACTS. See **Constitutional Law,** IV; **Franchise.**

Liability for interest. See **Sureties,** 3–5.

For transportation. See **Admiralty; Interstate Commerce Acts,** II.

Of guaranty. See **Bonds.**

Agreements of labor unions. See **Anti-Trust Act; Equity,** 21.

Claims for labor and material under bonds accompanying federal construction contract. See **Sureties.**

1. The fact that townsite lots were purchased from owner of water system, which supplies water to its residents though

CONTRACTS—*Continued.* PAGE

not to the public generally, with oral understanding that water could be secured for use on the lots, has no tendency to support claim that the system furnishes water only to particular individuals in pursuance of private contracts and is hence devoted exclusively to private use. *Van Dyke* v. *Geary*. 39

2. Agreement between applicant for preliminary homestead entry and his mother that he would make the entry, pay rent while it was being completed, and deed the land to her upon issuance of patent, is void under § 24 of Act of May 2, 1890. *Doepel* v. *Jones*. 305

3. Where, to secure right of way with immediate permission to proceed with construction work, railroad company's agent agreed in writing, subject to ratification by company, that it would later execute stipulation touching its rights and conduct in a forest reservation, *held*, that company's action in proceeding with the work with knowledge of manner in which permission had been obtained, and its acceptance of benefits, amounted to an implied ratification of agent's agreement. *Chicago, Mil. & St. P. Ry.* v. *United States*. . . 351

4. S, while conducting his business under supervision of creditors' committee, contracted with United States to do certain work, and gave bond with surety to secure claims for labor and materials. After part performance, he and the creditors formed corporation, which, without consent of the United States or surety, took over his business and thereafter continued to perform contract. *Held*, that in view of R. S., § 3737, the transfer could not effect assignment of contract, but amounted at most to subletting. *Illinois Surety Co.* v. *John Davis Co*. 376

See **Sureties.**

CONTRIBUTORY NEGLIGENCE. See **Employers' Liability Act; Instructions to Jury.**

CONVEYANCES. See **Contracts; Indians; Public Lands.**

CORPORATIONS:

Reserved power of State over. See **Constitutional Law,** X, (5).

Foreign, suits against. See **Jurisdiction,** I, (2).

CORPORATIONS—*Continued.* PAGE

National banks, exercising private functions, under Reserve Bank Act. See **National Banks.** Quo Warranto to. *Id.* Regulation of rates and service. See **Carriers; Interstate Commerce Acts; Water Rates.**

Same as to street railways. See **Franchise.**

Interstate carrier's liability for personal injuries. See **Employers' Liability Act.**

Insurance companies, reserves of in Pennsylvania, with relation to federal excise tax. See **Corporation Tax Act.**

Taxing capital stock and franchise in Kentucky. See **Taxation.**

Railroad land grants and rights of way over national forests. See **Public Lands,** (1), (2).

Stockholder's suit, on behalf of corporation, based on Sherman Act. See **Stockholders,** 1.

Guaranty of corporate bonds and merger in judgment obtained by trustee. See **Judgments,** 7, 8.

Arizona Public Service Corporation Act, authorizing Corporation Commission to regulate rates of water systems owned by individuals. See **Arizona.**

CORPORATION TAX ACT:

A fire and marine insurance company in Pennsylvania not required to maintain reserve against unpaid losses by law of that State, and, therefore, amounts added by it to such a reserve may not be deducted in determining the company's taxable net income under Federal Corporation Excise Tax Act of 1909. *McCoach* v. *Insurance Co. of North America* .. 585

COURT OF PRIVATE LAND CLAIMS. See **Public Lands,** (4).

COURTS. See **Constitutional Law; Equity; Jurisdiction;** cross references under **Procedure.**

CRIMINAL LAW:

1. Compelling witness in criminal case to answer, where objected that an answer might incriminate him. See *Mason* v. *United States*..... 362

2. Testimony of accomplice who turns State's evidence in murder case not to be disregarded because of his base char-

CRIMINAL LAW—*Continued.* PAGE

acter or his retractions and reiteration of charge, but must be accorded such weight as is due it when judged by circumstances, his character, etc. *Valdez* v. *United States* 432

3. View of scene of murder by trial judge in absence of accused consistent with constitutional right to " meet the witnesses face to face," where his counsel consent and are present, no testimony is taken, and no improper remarks addressed to judge. *Id.*

4. Right of accused to be present during inspection may be waived by his counsel; but, even if not waived, his absence will not warrant reversal if no prejudice resulted. *Id.*

DAMAGES. See **Interstate Commerce Acts, II.**

1. When bill of lading provides that damages shall be computed on basis of value of goods at place and time of shipment, difference between that value and value when delivered at new destination, to which they have been diverted under bill of lading by consent of parties, is a proper measure of damages suffered in transit. *Gulf &c. Ry.* v. *Texas Packing Co.* 31

2. Shipper discharges his duty to carrier when he sells damaged goods at new destination for best price obtainable. *Id.*

3. Where printed contract specified minimum or primary valuations with corresponding rates, and contained blanks for insertion of valuations by shipper if he desired to avail himself of alternative rates, and the blanks were left unfilled at execution but rate inserted and charged was according to primary valuations, *held* that these were the valuations adopted and that carrier's liability was so limited. *American Express Co.* v. *U. S. Horse Shoe Co.* 58

4. Finding a verdict and judgment excessive, Circuit Court of Appeals gave party who had recovered them option to submit to reversal or obtain affirmance by remitting part of judgment. The party having acted on the latter alternative, *held*, that his cross writ of error complaining of the reduction must be dismissed. *Woodworth* v. *Chesbrough.* 79

5. Damages assessed against railroad, *held* justified by stipulation touching railroad's rights and conduct in a forest reservation, which it agreed to execute, and sustained by

DAMAGES—*Continued.* PAGE
concurring decisions of courts below. *Chicago, Mil. & St. P. Ry.* v. *United States* 351

6. Damages arising from restraints of permanent injunction, afterwards reversed, are not recoverable on temporary injunction bonds, particularly where decree of permanent injunction expressly released further liability on the bonds. *St. Louis, I. Mt. & So. Ry.* v. *McKnight*. 368

7. Rule 15, District Court for Eastern District of Arkansas, relates merely to damages recoverable on bonds accompanying restraining orders or temporary injunctions. *Id.*

8. Where claims are all liquidated and amounts are not disputed, but only liability under bond, the surety, which has not elected to pay into court, is chargeable with interest from commencement of suit upon the aggregate of the claims allowed as reduced to the penal amount of the bond. *Illinois Surety Co.* v. *John Davis Co*. 376

DAWES COMMISSION. See **Indians,** 1–6.

DECREES. See **Judgments.**

DEED. See **Indians,** 5–7; **Public Lands,** 14.

DELEGATION OF LEGISLATIVE POWER. See **Constitutional Law,** VI, 4.

DEMURRER. See **Jurisdiction,** I, (3).

DESCENT AND DISTRIBUTION. See **Indians,** 5; **Public Lands,** 15–16.

DETECTIVES:
State may require street car company to carry city detectives free when in discharge of duty. *Sutton* v. *New Jersey* 258

DISCHARGE:
Of liability of surety. See **Sureties.**
Amendment of General Order in Bankruptcy No. XXXII, concerning opposition to discharge or composition. 641

DISCRIMINATION: PAGE

Between interstate and intrastate rates. See **Interstate Commerce Acts,** I.

In valuation of railroad's property for purposes of state taxation. See **Taxation.**

DISTRICT COURTS. See references under **Construction.**

DISTRICT OF COLUMBIA COURTS. See **Jurisdiction,** III, (6); VI.

DOCUMENTS. See references under **Construction.**

DOING BUSINESS:

As to whether foreign corporation is doing business within a State, and validity of service of process. See **Jurisdiction,** I, (2).

DRAINAGE. See **Taxation,** 1.

EASEMENTS:

Rights of way over National Forests. See **Public Lands,** 9–11.

ELECTION:

1. State compensation law putting interstate carriers and employees to election between its provisions and Federal Employers' Liability Act, invalid. *Erie R. R.* v. *Winfield* .. 170

2. Appellee having elected in Circuit Court of Appeals to remit part of verdict and judgment held to be excessive, his cross writ of error complaining of reduction must be dismissed. *Woodworth* v. *Chesbrough*. 79

EMINENT DOMAIN:

1. Existence of petitioning corporation, right to condemn, inability to agree on compensation, and necessity for appropriation, matters of local law. *Cuyahoga Power Co.* v. *Northern Realty Co*..... 300

2. In granting irrigation district privilege of obtaining lands for canals by condemnation, State may impose duty to build bridges, without compensation, for access between adjacent lands intersected by canals, including those acquired by purchase. *Farmers Irrig. Dist.* v. *O'Shea*. 325

3. Nebraska Rev. Stats. 1913, § 3438, imposes this duty. *Id.*

EMPLOYERS' LIABILITY ACT: PAGE

(1) *State Regulations in Conflict With.*

1. Obligations of interstate railroad carriers to employees injured in interstate commerce are regulated both inclusively and exclusively by Federal Employers' Liability Act; no room for state regulation, even in respect of injuries occurring without fault, as to which federal act provides no remedy. *New York Cent. R. R.* v. *Winfield*. 147
Erie R. R. v. *Winfield* 170
New York Cent. R. R. v. *Tonsellito*. 360

2. Award under New York Workmen's Compensation Act for injuries, not attributable to negligence, sustained by a railroad employee engaged in interstate commerce, *held* void. *New York Cent. R. R.* v. *Winfield*. 147

3. State cannot interfere with federal act either by putting carriers and employees to election between its provisions and those of a state compensation law or by imputing such election through statutory presumption. *Erie R. R.* v. *Winfield* 170

(2) *Interstate Commerce Vel Non. Maritime Cases.*

4. In leaving the yard after his day's work in switching interstate and intrastate commerce, employee is engaged in interstate commerce. *Erie R. R.* v. *Winfield* 170

5. Employee not engaged in interstate commerce when placing cars of carrier, containing its supply coal, upon unloading trestle within its yards and when interstate movement occurred as long as 17 days previously and the cars, with the coal, in the meantime, have remained upon sidings and switches in yards. *Lehigh Valley R. R.* v. *Barlow*. 183

6. Act applies only where injury occurs in railroad operations or their adjuncts; cannot be extended to interstate maritime transportation merely because vessel is owned and operated by interstate carrier by railroad. *Southern Pacific Co.* v. *Jensen* 205

7. "Boats" in the act refers to vessels which are but part of railroad's extension or equipment as understood and applied in common practice. *Id.*

8. Question whether employee was engaged in interstate commerce not discussed by this court where there was ade-

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quate evidence upon it for submission to the jury, no evident, material error in charge, where both courts below sustained judgment, and no special circumstances exist. *New York Cent. R. R.* v. *Tonsellito*. 360

9. Employee injured while helping to raise wrecked car to rescue fellow employee and, coincidently, to clear a track for interstate commerce, is engaged in interstate commerce. *Southern Ry.* v. *Puckett*. 571

10. Employee engaged in interstate commerce when called aside by event which led to injury not within act. *Id.*

11. Defendant, incorporated as an ordinary railway company (as distinguished from a street railway company), operating a suburban electric railway largely on private right of way between District of Columbia and Maryland, as common carrier of passengers, *held* within act. *Washington Ry. & Elec. Co.* v. *Scala*. 630

(3) *Negligence; Assumption of Risk; Fellow Servants.*

State regulation where injury occurs without fault. See (1), *supra.*

Instructions on assumption of risk and contributory negligence. See *Erie R. R.* v. *Purucker*. 320

12. Where brakeman was thrown from moving train as result of couplers opening, *held* that, in view of the Safety Appliance Act, negligence might be inferred from mere opening of couplers. *Minn. & St. Louis R. R.* v. *Gotschall*. . 66

13. Employee does not assume risk attributable to negligence of co-employees until aware of it, unless so obvious that ordinarily prudent person would appreciate it. *Erie R. R.* v. *Purucker* 320

14. Whether railroad was negligent, whether employee assumed risk, and whether he was a mere volunteer, not discussed by this court where there was adequate evidence for submission to jury, no evident, material error in charge, where both state courts below have sustained judgment, and no special circumstances exist. *New York Cent. R. R.* v. *Tonsellito* 360

15. Finding no reason for disturbing the finding of both state courts as to defendant's negligence, and no exceptional

EMPLOYERS' LIABILITY ACT—*Continued.* PAGE

circumstances, this court merely announces conclusion. *Southern Ry.* v. *Puckett*. 571

16. Maintaining trolley pole closer to the track than others on the line, and so close that conductor cannot safely discharge duties, ample ground for finding of negligence by jury. *Washington Ry. & Elec. Co.* v. *Scala* 630

(4) *Diverse Citizenship and Removal.*

17. Case under act cannot be removed to District Court upon ground of diverse citizenship. *Southern Ry.* v. *Puckett.* 571

(5) *Parent's Right of Action.*

18. Father, who by state law is entitled to son's earnings during minority, may recover damages for son's death. *Minn. & St. Louis R. R.* v. *Gotschall*. 66

19. Act does not give father right of action for expenses and loss of services in addition to son's right of action. *New York Cent. R. R.* v. *Tonsellito* 360

(6) *Jurisdiction of this Court.*

20. Claim that Act should have governed will not give jurisdiction under § 237, Jud. Code, where action originally based upon state statutes, and Act not set up in answer or otherwise called to trial court's attention, and where state supreme court under state practice declined to pass upon claim because not presented to trial court. *Missouri Pac. Ry.* v. *Taber* 200

21. This court may review by writ of error judgment of Court of Appeals of District of Columbia in case arising under the Act of 1908, as amended. *Washington Ry. & Elec. Co.* v. *Scala*. 630

(7) *Pleading and Limitations.*

22. If declaration alleges that injuries caused decedent to "suffer intense pain," amendment at trial, that he endured "conscious pain and suffering," does not introduce new cause of action barred by 2 year limitation of the Act. *Washington Ry. & Elec. Co.* v. *Scala* 630

EMPLOYMENT AGENCIES:

Washington law, forbidding business of securing work for

EMPLOYMENT AGENCIES—*Continued.* PAGE
unemployed in return for fees, *held* invalid under Fourteenth Amendment. *Adams* v. *Tanner* 590

ENCLOSURES:
Act against unlawful. See **Public Lands,** (4).

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** X, (7).

EQUITY:
Equitable estoppel. See **Sureties,** 6.
Claim of trust under land patent. See **Public Lands,** 15, 16.
Jurisdiction in patent cases. See *Ewing* v. *Fowler Car Co* .. 1
Stockholder's remedy—Sherman Act. See *United Copper Co.* v. *Amalgamated Copper Co.* 261
Testing adequacy of rates fixed by State. See **Carriers; Water Rates.**
Jurisdiction of state courts respecting orders of Interstate Commerce Commission. See **Jurisdiction,** V, (4).

1. *Injunction and damages. Multifariousness.* Suit by United States to enjoin construction and operation of railroad through national forest, in default of execution and filing of stipulation promised to Secretary of Interior, and for damages for timber cut and injuries resulting from such construction and operation, is cognizable in equity, and bill praying such relief not multifarious. *Chicago, Mil. & St. P. Ry.* v. *United States* 351

2. *Injunction in rate cases. Rights after reversal. Multiplicity of suits.* Where carrier, by reason of injunctions against state officials and shippers and travelers as a class, collects rates in excess of those fixed by law, and final decree is reversed by this court and mandate issued to dismiss bill, right of person, who did not appear, to sue for excess paid during restraint revives, and bill to restrain such persons from suing in state court for their overpayments is not maintainable as bill to prevent multiplicity of suits, in absence of common controverted question of fact or law. *St. Louis, I. Mt. & So. Ry.* v. *McKnight* 368

3. *Id. Damages under injunction bonds. Ancillary jurisdiction.* On the lack of power of District Court to assess dam-

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ages sustained because of temporary and permanent injunctions, for purpose of fixing liability on temporary injunction bonds, after its final decree has been reversed with directions to dismiss bill, and the want of basis in a reference to that end to support ancillary suit to enjoin persons so damaged from asserting rights in state court. *Id.*

4. *Id.* Rule 15 of District Court for Eastern District of Arkansas relates merely to damages recoverable on bonds accompanying restraining orders or temporary injunctions. *Id.*

5. *Id.* Damages arising from restraints of permanent injunction, afterwards reversed, not recoverable on temporary injunction bonds, particularly where the decree of permanent injunction expressly released further liability on the bonds. *Id.*

6. *Injunction in rate cases. Dismissal without prejudice.* In absence of a fair test of rates challenged as confiscatory, and in presence of some doubt of their adequacy, dismissal of bill should not be absolute, but without prejudice, in case they should prove confiscatory when fully and fairly tested. *Darnell* v. *Edwards*. 564
Cf. *Van Dyke* v. *Geary*. 39

7. *Injunction. Against Interstate Commerce Commission.* District Court may not enjoin Interstate Commerce Commission from proceeding with hearing on claim of reparation for failure to furnish coal cars. *United States* v. *Illinois Cent. R. R.* 82
See **Jurisdiction,** V, (4).

8. *Injunction. Trade secrets.* During taking of proofs in suit to enjoin former employee from using or disclosing secret processes, defendant may be enjoined from disclosing them to experts or other witnesses (counsel excepted), but trial judge in his discretion may reveal them to such persons, at such times, and under such precautions as he deems necessary in progress of cause. *Du Pont Powder Co.* v. *Masland* 100

9. *Injunction. In tax cases; state and local. Cloud on title. Multiplicity of suits.* Federal courts have jurisdiction to enjoin unlawful state tax proceedings, which cloud plaintiff's

EQUITY—*Continued.* PAGE

title and threaten irreparable injury and multiplicity of suits; this applies to state as well as local taxes. *Greene* v. *Louis. & Interurban R. R.* 499
Louis. & Nash. R. R. v. *Greene*..... 522
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10. *Id. Inadequate legal remedy.* Section 162, Ky. Stats., does not afford adequate remedy against discriminatory assessments for both state and local taxes. *Id.*

11. *Id. Multiplicity of suits.* When bill seeks relief as to state and local taxes based on same assessment, and adequate legal remedy exists as to former class only, equity will retain and dispose of entire case, doing justice completely and avoiding multiplicity of suits. *Greene* v. *Louis. & Interurban R. R.*..... 499

12. *Id. Inadequate legal remedy.* A railroad whose intangible property is assessed by Board of Valuation and Assessment, and which is subjected to discrimination through undervaluation of other property by county assessors, is not afforded adequate remedy through §§ 4115–4120, 4123, Ky. Stats., providing for readjustment of the latter class of assessments through the County Board of Supervisors. *Id.*

13. *Id. Drainage tax. Disproof of benefit.* In suit to enjoin collection of drainage tax defendant is entitled to be heard on question of benefit. *Saunders* v. *Shaw*..... 317

14. *Injunction against Secretary of Interior. Cloud on title; inadequate legal remedy.* Demand by Secretary of Interior based on erroneous construction of Act of June 25, 1910, that railroad company deposit entire cost of surveying certain townships, consisting in part only of lands granted it by United States, so beclouds large areas of other unsurveyed land covered by its grant and threatens such embarrassment, particularly through forfeiture proceedings for which the act provides, that equity has jurisdiction to enjoin the Secretary from enforcing the demand. *Santa Fe Pac. R. R.* v. *Lane*..... 492

15. *Id.* To test validity of such demand grantee not obliged to await and defend forfeiture proceedings under the act. *Id.*

16. *Id. Tender.* Tender by grantee of one-half amount demanded for surveying townships in question *held* adequate. *Id.*

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17. *Cloud on title. Pleading.* In suit to remove a particular cloud from plaintiff's title, facts showing title and existence and invalidity of instrument or record sought to be eliminated as a cloud are essential parts of plaintiff's cause of action and must be alleged in bill. *Hopkins* v. *Walker* 486

18. *Id.* The rule is the same in respect of suits to remove clouds under § 6115, Montana Codes of 1907, as distinguished from suits to quiet title under § 6870. *Id.*

19. *Id. Location certificates.* Recorded certificates of location are the first muniment of the locator's paper title and, when verified, are, in Montana, made *prima facie* evidence of all facts properly recited in them; and so, when apparently valid but actually, under the mining laws, invalid, they may becloud the title injuriously. *Id.*

20. *Injunction. Sherman Act.* Private party cannot maintain suit for injunction under § 4 of Sherman Act. *Paine Lumber Co.* v. *Neal* 459

21. *Id. Labor unions. New York laws.* An agreement among labor unions *held* not to make a case for injunction under laws of New York in a private suit. *Id.*

22. *Supplemental bill. Effect of, unanswered.* Supplemental bill, filed, after hearing and decision, by permission of the court but apparently disregarded, not to be taken as confessed by defendant for want of answer, when no rule to answer was made upon him and his failure to do so is not explained by record; nor, in silence of record, is error to be imputed to trial court for not paying heed to material allegations thus presented. *Louis. & Nash. R. R.* v. *Greene* .. 522

23. *New parties.* Generally speaking, authority to make new parties, especially after decree, rests in sound discretion of trial court, which, except for abuse, will not be reviewed either directly, or indirectly by mandamus. *Louisiana* v. *Jack* 397

24. *New parties on appeal. Local law inapplicable.* To review a judgment by appeal or error, one must be a party or privy, and Art. 571, La. Code of Practice, apparently authorizing third persons who allege that they are aggrieved by judgment to appeal from it, can have no application to equity suit in federal courts. *Id.*

EQUITY—*Continued.* PAGE

25. *Substitution in this court.* Whether or not in an action by stockholders to enforce right of corporation this court may substitute as plaintiffs persons appointed receivers while writ of error is pending, mooted; but motion *held* without merit on the facts. *United Copper Co.* v. *Amalgamated Copper Co.* 261

ESTOPPEL. See **Jurisdiction,** III, (7), (b); **Sureties,** 6.

Where connecting carrier, sued for personal injuries by person traveling on drover's pass, set up release of liability for negligence contained in contract of carriage issued by, and in accordance with tariffs of, initial carrier, under Carmack Amendment, it was estopped from claiming that under its own tariff issuance of such passes was unlawful. *Norfolk Southern R. R.* v. *Chatman* 276

EVIDENCE. See **Judicial Notice; Presumptions,** and references under **Construction.**

Computing time. See **Time.**

Of interstate commerce and negligence. See **Employers' Liability Act,** (2).

Testimony of accomplice; view of place of crime. See **Criminal Law.**

Enjoining disclosures to experts. See **Trade Secrets.**

1. Objection to evidence as hearsay must be taken when evidence is introduced. *Rowland* v. *St. Louis & S. F. R. R.* 106

2. While case involving validity of rates fixed by State was in trial court, railroad, for the purpose of allocating expenses to intrastate and interstate traffic, caused reports to be made by employees of all relevant facts in accordance with prescribed formulae. *Held* that returns of employees, having been made in the course of their business, were not hearsay, and that the 2 months of investigation afforded basis for argument as to constant conditions. *Id.*

3. Proof comprising a body of official admissions and direct and circumstantial evidence from unimpeached public and private sources, and which fully sustains finding that great mass of property in Kentucky, embracing all tangible property except railroad property and distilled spirits—during a period of years—was systematically and notoriously as-

EVIDENCE—*Continued.* PAGE
sessed at not exceeding 60 per cent. of its fair cash value, *held* not overcome by general presumptions arising from duty of assessors to assess at fair cash value, or by numerous stereotyped affidavits of former assessors asseverating their obedience thereunto. *Louis. & Nash. R. R.* v. *Greene*. 522
Illinois Cent. R. R. v. *Greene*. 555

EXECUTIVE OFFICERS. See **Mandamus; Public Lands,** 20, 21.

EXPERT WITNESSES. See **Trade Secrets.**

EXPRESS COMPANIES. See **Interstate Commerce Acts,** I, 2–6.

FEDERAL EMPLOYERS' LIABILITY ACT. See **Employers' Liability Act.**

FEDERAL RESERVE BOARD. See **Constitutional Law,** VI; **National Banks.**

FEES. See **Public Lands,** 20, 21.

FELLOW SERVANT DOCTRINE. See **Employers' Liability Act,** (3).

FOREST RESERVES. See **Public Lands,** (2).

FRANCHISE. See **Constitutional Law,** X, (5); **Corporations; Taxation.**

1. State law requiring street car companies to carry city detectives free while in discharge of duty is valid exercise of a reserved power to amend company's charter. *Sutton* v. *New Jersey*. 258

2. Ordinances granting street railway franchises, with the right to make regulations not conflicting with laws of State, mean the laws as they shall from time to time exist. *Puget Sound Traction Co.* v. *Reynolds* 574

3. Municipality cannot, by contract with street railway, foreclose exercise of police power by State respecting rates

FRANCHISE—*Continued.* PAGE

and transfer privileges, unless clearly authorized by supreme legislative power. *Id.*

4. Under Washington Constitution, contract provisions in franchises conferred by municipalities may be set aside by legislature; and Public Utilities Act supersedes conflicting ordinances or charter provisions of city. *Id.*

5. Where several street railway lines, built under distinct franchises, are owned and operated as one system, a public regulation concerning car service and fares will not be adjudged confiscatory because of its financial results to the line immediately affected, if system as a whole remains profitable; and through service for a single fare may be required. *Id.*

FRAUD. See **Trade Secrets.**

1. Under R. S., § 5239, national bank directors are liable for damages sustained by individual in consequence of violations of National Bank Act. *Chesbrough* v. *Woodworth* 72

2. Allegations of fraud *held* not sustained. *Wall* v. *Parrot Silver Co.* 407

3. Generally speaking, when fraud is alleged and denied, the party making the charge will be confined to that issue. *Id.*

4. When constitutional question, asserted as basis for jurisdiction of this court on direct appeal from the District Court, is pleaded as resulting from execution of a fraudulent scheme, the question ought not to be considered (*semble*), if charge of fraud fails. *Id.*

GOOD FAITH:

In possession of public land. See **Public Lands,** (4).

GUARANTY. See **Bonds.**

HEARSAY. See **Evidence.**

HOMESTEADS. See **Public Lands,** (3).

HOURS OF SERVICE ACT:

1. Act remedial and requires carrier to do all reasonably

HOURS OF SERVICE ACT—*Continued.* PAGE

within its power to confine service within limits stated. *Atchison, T. & S. F. Ry.* v. *United States* 336

2. Proviso in § 3 relieves carrier only in cases where excessive service necessary for causes mentioned in proviso. *Id.*

3. If train crew unavoidably is unable to take train to terminal of their normal run without serving beyond time limit, excessive service must be avoided by substituting fresh crew whenever carrier, in exercise of all reasonable diligence, can do so. *Id.*

INDIANS:

1. Acting under enrollment provisions of Curtis Act and Creek Agreement of 1901, the Dawes Commission was a *quasi*-judicial tribunal, and enrollments made by it and approved by Secretary of Interior are presumptively correct; in absence of fraud, mistake or arbitrary action they are conclusive. *United States* v. *Wildcat*. 111

2. Whether a person alleged to be a member of the Creek Nation was living on April 1, 1899, is question going to his right to be enrolled under § 28 of Agreement of 1901, which Dawes Commission was competent to decide; it is not a jurisdictional question, and an incorrect determination of it does not necessarily render enrollment void. *Id.*

3. Commission was authorized to presume that a person enrolled as member of tribe on tribal rolls of 1895 was living on April 1, 1899, in absence of proof of his death before that date or of circumstances indicating that he died before Commission acted. *Id.*

4. Attempt of the Secretary of Interior to set aside enrollment of deceased Creek Indian by striking name from rolls without notice to heirs, *ultra vires* and void. *Id.*

5. When Creek citizen dies after April 1, 1899, and allotment is afterwards made, and deeds issued, in his name, title is vested in his heirs by § 28 of Agreement of 1901. *Id.*

6. Under § 3 of that Agreement, permissible for Dawes Commission to enroll tribal citizens and make them allotments when they failed to make selections for themselves. *Id.*

INDIANS—*Continued.* PAGE

7. Order of Secretary of Interior, approving Indian agent's recommendation that restrictions on alienation be removed from Indian's allotment, was made on March 26, "to be effective thirty days from date." *Held* that approval became effective on thirtieth day after its date, i. e., on April 25th, and enabled allottee to make valid conveyance on that day. *Lanham* v. *McKeel* 582

INFANTS. See **Employers' Liability Act,** (5).

INFRINGEMENT. See **Patents for Inventions.**

INJUNCTION. See **Equity.**

INSTRUCTIONS TO JURY:

1. Request to charge must give jury accurate understanding of law with reference to phase of case to which applicable. *Erie R. R.* v. *Purucker* 320

2. For requests to charge on assumption of risk held defective and more appropriate for contributory negligence. *Id.*

INSURANCE COMPANIES:

Reserves in Pennsylvania and subjection to federal excise tax. See **Corporation Tax Act.**

INTEREST. See **Sureties,** 3–5.

INTERFERENCE. See **Patents for Inventions.**

INTERSTATE COMMERCE. See **Employers' Liability Act; Interstate Commerce Acts; Hours of Service Act; Safety Appliance Act; Workmen's Compensation Laws.**

As to what constitutes interstate transportation. See **Constitutional Law,** III.

As to paramount authority of Congress over subjects of interstate commerce. *Id.*

INTERSTATE COMMERCE ACTS:

State regulation; relations to interstate commerce. See **Carriers,** 1–6.

I. **Powers of and Proceedings before Commission.** See also 14–16, *Infra.*

INTERSTATE COMMERCE ACTS—*Continued.* PAGE

1. Order of Commission assigning cause for hearing upon an issue of reparation for failure to furnish coal cars, not an order in sense of § 1, Commerce Court Act; and District Court cannot enjoin Commission from proceeding with such hearing. *United States* v. *Illinois Cent. R. R.*..... 82

2. Order of Commission directing carriers to desist from discriminating against interstate commerce by charging lower rates for local competitive intrastate traffic, may properly leave to carriers discretion to determine whether discrimination shall be removed by lowering the interstate rates, or by raising intrastate rates, or by doing both. *American Express Co.* v. *Caldwell*..... 617

3. Where rates which carrier seeks to alter, in avoiding discrimination condemned by Commission, are intrastate rates which have been fixed by state authority, Commission's order will justify carrier only in so far as order defines the territory or places to which it applies. *Id.*

4. In cases where federal authority is exerted to affect intrastate rates, desirable that orders of Commission should be so definite as to rates and territory to be affected as to preclude misapprehension. *Id.*

5. State law providing that no advance of intrastate rates may be made except after 30 days' notice filed with a board of railroad commissioners, and published, inapplicable to changes in intrastate rates which carrier seeks to make in obedience to order of Interstate Commerce Commission, to abate discrimination against interstate traffic. *Id.*

6. Commission having found interstate rates unduly discriminatory as compared with competitive intrastate rates and ordered abatement, its further finding that interstate rates are not unreasonable impliedly authorizes carrier to maintain them and raise such intrastate rates accordingly. *Id.*

II. **Duties, Rights and Liabilities of Carriers and Shippers.**

1. *Carmack Amendment and bill of lading.* By request of shipper and by action of carriers in dealing with freight accordingly, a shipment governed by Carmack Amendment may be diverted from original destination and original bills

INTERSTATE COMMERCE ACTS—*Continued.* PAGE

of lading continued in force as applicable to new destination. *Gulf &c. Ry.* v. *Texas Packing Co.* 31

See **Damages**, 1–2.

2. *Id.* Under Amendment, initial carrier not entitled to recover over against connecting carrier which did not contribute to damage. *Id.*

3. *Id.* Original bill of lading governs entire transportation, and new conditions cannot be introduced by connecting carrier through a second bill. *Missouri, Kans. & Tex. Ry.* v. *Ward* 383

4. *Id.* Acceptance of second bill of lading governing part of transportation and containing new terms as to notice of damage does not bind shipper. *Id.*

5. *Livestock contracts. Limited liability. Rates.* Where printed contract for interstate transportation specified minimum or primary valuations for livestock with corresponding tariff rates, and left blanks for insertion of shipper's valuation if he desired to avail himself of alternative rates, and blanks were left unfilled at execution but rate charged and inserted in contract was according to primary valuations, *held* that these were valuations adopted and carrier's liability was so limited. *American Express Co.* v. *U. S. Horse Shoe Co.* 58

6. *Id. Failure to post rates. Shipper's failure to read contract.* Failure to post rates duly made out and filed with Commission does not affect their validity or duty of shipper to take notice of them; nor may he avoid contract by neglecting to read it. *Id.*

7. *Id. Construction of schedules.* A clause in merchandise rate schedules that rates there must not be applied to livestock shipments, construed as intended to leave provisions of livestock schedule concerning rates and valuations for independent interpretation uninfluenced by provisions in the merchandise schedules. *Id.*

8. *Id. Written notice of damage.* Stipulation in limited liability contract for carriage of livestock, pursuant to provisions duly published and filed with Interstate Commerce Commission, conditioning connecting carrier's liability upon written notice to its agent within 5 days from

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removal of stock from cars, held reasonable and valid. *Erie R. R.* v. *Stone*. 332

9. *Id. Limiting liability in consideration of reduced rates.* Right to limit carrier's liability for damage, in consideration of optional reduced rates in accordance with schedules and form of contract duly published and filed with Commission, well settled. *Id.*

10. *Id.* Such provisions for notice of claim and limited liability bind the parties until changed by Commission. *Id.* Cf. *Missouri, Kans. & Tex. Ry.* v. *Ward* 383

11. *Liability for personal injury to caretaker of livestock.* As applied to caretakers of livestock, § 1 of Hepburn Act of 1906 uses term " free pass " as meaning not gratuitous pass but one issued for consideration constituting caretaker passenger for hire; under doctrine of *Railroad Co.* v. *Lockwood* stipulation that carrier shall not be liable for personal injuries sustained by such caretakers through its negligence is void. *Norfolk Southern R. R.* v. *Chatman*. 276

12. *Id. Estoppel.* Where connecting carrier, sued for personal injuries in such case, based its defense on a release of liability for negligence contained in contract of carriage issued by, and in accordance with tariffs of, initial carrier, under the Carmack Amendment, it was estopped from claiming that under its own tariff issuance of such passes was unlawful. *Id.*

13. *Id. Construction of tariff.* Provision in tariff that free or reduced transportation shall not be issued to caretakers and that they shall pay full fare returning, implies such transportation will be allowed to destination. *Id.*

14. *Id. Separation of rates for caretaker and livestock.* When connecting interstate carriers, in accordance with tariffs of initial carrier duly filed and published, contract to carry livestock and caretaker for specified rate in money, the carriage *quoad* caretaker is a carriage for money, part of the total rate; and fact that the part attributable to caretaker is not separately stated in a passenger tariff does not render contract to carry him invalid under the Act to Regulate Commerce. *Id.*

15. *Id.* Separation of rate, in such case, is administrative

INTERSTATE COMMERCE ACTS—*Continued.* PAGE
matter affecting form of tariffs committed to Commission by § 6, as amended, concerning which courts will not interfere in advance of application to Commission. *Id.*

16. *Presumption as to filing of rates.* In trial of action upon contract for interstate transportation, plaintiff is entitled to presumption that carrier filed with Interstate Commerce Commission such rates as were requisite to sustain the contract, the pleadings being silent on the subject. *Nevada-California-Oregon Ry.* v. *Burrus*. 103

17. *State long and short haul provision consistent with Interstate Commerce Acts.* A state provision, as to intrastate traffic, which forbids greater charge for short than for long hauls and allows shipper right to recover overcharges, is consistent with Fourteenth Amendment, the Commerce Clause, and the Interstate Commerce Acts. *Missouri Pac. Ry.* v. *McGrew Coal Co.*. 191

INTERSTATE COMMERCE COMMISSION. See **Interstate Commerce Acts.**

IRRIGATION CANALS. See **Waters.**

JUDGMENTS. See **Jurisdiction.**
Effect of decree of Court of Private Land Claims on color of title and good faith of claim based on Mexican Grant. See **Public Lands,** (4).

1. Jurisdiction of state court in action on judgment of sister State to examine jurisdictional basis of judgment where rendered. *Chicago Life Ins. Co.* v. *Cherry* 25

2. A money judgment by a state court does not violate due process for want of jurisdiction over defendant's person where jurisdiction was questioned in trial and appellate courts and sustained after fair hearings before judgment became finally effective. *Id.*

3. Where such judgment was sued on in another State and sustained on ground that question of personal jurisdiction could not be reopened, *held* that original judgment satisfied due process and reason assigned for upholding it, if erroneous, amounted only to mistake concerning law of State in which judgment was rendered. *Id.*

JUDGMENTS—*Continued.* PAGE

4. A state decision upholding a judgment of another State raises no question in this court under the full faith and credit clause. *Id.*

5. Where judgment and verdict found excessive by Circuit Court of Appeals and it gave party recovering it option of submitting to reversal or obtaining affirmance by remitting part of judgment, the party, having acted on the latter alternative, his cross writ of error complaining of reduction must be dismissed. *Woodworth* v. *Chesbrough*. 79

6. Decree against plaintiff in patent infringement suit affirmed by Court of Appeals held *res judicata* as to another suit pending before Court of Appeals for another circuit, where subject-matter and relief prayed were the same in both suits and privity of the parties defendant established. *Hart Steel Co.* v. *Railroad Supply Co.* 294

7. A deficiency judgment obtained by trustee for bondholders against guarantor of bonds *held* to merge individual bondholders' rights of action; trustee necessary plaintiff in suit to enforce judgment as lien upon property of debtor sold under a mortgage. *Hamer* v. *New York Rys. Co.* 266

8. Where a decree of foreclosure and sale makes no reservation respecting liens or similar rights of action touching the property sold, subsequent suit to enforce a lien which was not adjudicated in the foreclosure proceeding because then not mature is independent of the foreclosure proceeding and does not afford jurisdiction to District Court as an ancillary suit. *Id.*

See **Parties**, 6.

9. Where decree commanded railroad company unconditionally to execute a stipulation, which it agreed to make in order to secure right of way through forest reservation, *held* that question whether it should not have provided in alternative for ousting company if it did not execute stipulation within a time certain, not being raised by appellant company, could not be raised by the government (appellee) in absence of cross appeal. *Chicago, Mil. & St. P. Ry.* v. *United States* 351

JUDICIAL NOTICE:

An order of Interstate Commerce Commission, being indefinite as to its territorial scope, court referred to accom-

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panying report and thence to maps of railroads therein identified. *American Express Co.* v. *Caldwell* 617

JURISDICTION:

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Inquiry into basis of sister state judgment. See **Judgments,** 1.
Mandamus against Commissioner of Patents. See **Mandamus,** 1–2.
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Enjoining Secretary of the Interior. See **Equity,** 14–16.
Of Dawes Commission. See **Indians,** 3–6.
Of Secretary of the Interior. See *id.*
Equitable jurisdiction. See **Equity.**

I. Jurisdiction over the Person.

(1) *New Parties not Served.*

1. Appearance in answer to citation issued upon libel *in personam* does not empower court to introduce new claims of new claimants without service on defendant. *Ex parte Indiana Transp. Co.* 456

(2) *Foreign Corporations.*

2. Provision by corporation for payment of bonds and coupons in a foreign State is not such doing business as renders it liable there to suit on bonds. *Toledo Rys. & Lt. Co.* v. *Hill* 49

3. Mortgaging corporation's property to trustee in foreign State, to secure bonds, not a translation of its property to that State rendering corporation liable there to suit on bonds. *Id.*

4. Carrying and depositing materials excavated from federal reservation constitutes doing business in State at the locality outside the reservation where carriage and deposit occur, and corporation is subject to suit in such State if

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service is had there on its agent for the purpose. *Ohio River Contract Co.* v. *Gordon* 68

(3) *Attacking Jurisdiction.*

5. Motion to quash service is proper in federal court (though state procedure requires demurrer) to raise questions whether corporation is doing business and service made on its representative. *Meisukas* v. *Greenough Coal Co* 54

(4) *Waiving Objections.*

6. After motion to quash service overruled, answer to merits accompanied by reassertion of objection to jurisdiction not waiver. *Toledo Rys. & Lt. Co.* v. *Hill.* 49

7. Postponement of hearing and reservation of right of defendant to plead to merits and order of court *sua sponte* directing plaintiff to amend complaint do not constitute waiver. *Meisukas* v. *Greenough Coal Co* 54

8. Pleading to merits after objection to jurisdiction overruled does not waive objection. *Ex parte Indiana Transp. Co.* 456

9. Principles of waiver and appearance may not apply strictly in case where defendant is already in court and objection relates to introducing new complainants. *Id.*

II. **Jurisdiction of Federal Courts Generally.**

(1) *Admiralty and Maritime Jurisdiction.* See **Admiralty.**

(2) *To Enforce State Constitution and Laws Against Discriminatory Taxation, without Deciding Federal Question upon which Jurisdiction is Founded.*

1. Federal courts have jurisdiction to enjoin collection, etc., of state taxes resulting from general, systematic discriminations in assessments, where tax laws are constitutional but method of execution is not; and, jurisdiction being invoked on ground that discrimination violates Fourteenth Amendment, case may be decided and remedied upon application of state constitution and laws alone, without deciding federal question, if full relief be thus afforded; and this jurisdiction exists notwithstanding state courts hold themselves powerless to afford judicial remedy. *Greene* v. *Louis. & Interurban R. R.* 499
Louis. & Nash. R. R. v. *Greene* 522
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III. **Jurisdiction of this Court.**

(1) *Directing Writ of Error.*

1. Where supreme court of State refuses to review judgment of intermediate appellate court for want of jurisdiction, the writ from this court properly goes to such intermediate court. *Cuyahoga Power Co.* v. *Northern Realty Co.* 300

(2) *Parties and Substitution.*

2. Making new parties, especially after decree, rests in sound discretion of trial court. No review by appeal, error or mandamus except in case of abuse. *Louisiana* v. *Jack* . . 397

3. General rule that no person may review judgment by appeal or error who is not party or privy to the record. *Id.*

4. Art. 571, La. Code of Practice, purporting to authorize any persons to appeal who allege that they have been aggrieved by judgment, can have no application to equity suit in federal courts. *Id.*

5. In action by stockholders to enforce alleged right of corporation mooted whether court has jurisdiction to substitute certain receivers of the corporation, but *held* that in the circumstances application was without merit. *United Copper Co.* v. *Amalgamated Copper Co.* 261

(3) *Frivolous Contentions.*

6. Jurisdiction not supported by contention that States may not regulate rights and duties of employers and employees in interstate commerce, in absence of congressional legislation. *Valley S. S. Co.* v. *Wattawa.* 202

(4) *Judgments Reviewable and Scope of Review.* See II, (2), *supra;* III, (5), (6), *infra.*

7. *Semble,* that rule limiting inquiry to questions presented to court below is not confined to questions of procedure and not inflexible. *West* v. *Rutledge Timber Co.* 90

8. Where railroad commission by separate orders required restoration of several trains but orders were based on one citation and intended and treated by court below as one order, this court also treated it as a unity. *Miss. R. R. Comm.* v. *Mobile & Ohio R. R.* 388

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9. The court does not consider a question affecting both parties and suggested by the appellee in absence of any cross appeal, and of objection made by appellant. *Chica o, Mil. & St. P. Ry.* v. *United States* 351

10. Party who obtains favorable judgment in consideration of his remission of part of his recovery has no standing to maintain cross writ of error complaining of reduction when judgment is brought by his opponent to this court. *Woodworth* v. *Chesbrough*. 79

(5) *Over District Courts.*

11. In case governed by Jud. Code, § 266, where District Court's jurisdiction is invoked on constitutional questions, this court may review whole case on appeal from order denying preliminary injunction. *Van Dyke* v. *Geary* 39

12. Mandamus does not lie to control District Court upon jurisdictional question—as to its duty to remand case removed from court of another State—when other modes of reviewing its decision (writ of error or certiorari) are provided by statute; and inconvenience and expense to party do not alter rule. *Ex parte Park Sq. Automobile Station* 412

(6) *Over Court of Appeals of the District of Columbia.*

13. The court has jurisdiction by writ of error to review judgment of Court of Appeals of the District of Columbia in case arising under Federal Employers' Liability Act of 1908, as amended. *Washington Ry. & Elec. Co.* v. *Scala* 630

(7) *Over State Courts.*

(a) *Claim and Decision of Federal Question.* See VII, *infra.*

14. Claim of federal right must be made in accordance with state procedure. *Nevada-California-Oregon Ry.* v. *Burrus* 103

15. Must be called to state court's attention according to state method. *Missouri Pac. Ry.* v. *Taber*. 200
Valley S. S. Co. v. *Wattawa*. 202

16. Where state court's judgment may rest upon either federal or non-federal ground, federal basis must appear by that court's opinion or otherwise to afford jurisdiction to this court. *Cuyahoga Power Co.* v. *Northern Realty Co.* 300

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17. Where state supreme court dismisses judgment of intermediate court for want of jurisdiction upon ground that no question under state or federal constitutions arises, *semble*, this court may assume judgment had non-federal basis only if record or state court's opinion does not show. *Id.*

18. Claim that judgment of state supreme court violates Fourteenth Amendment not too late, though first made by assignment of errors presented to its Chief Justice when writ of error from this court was granted, if aggrieved party under no duty to anticipate state court's action before judgment rendered and was afforded no opportunity afterwards to present claim for its consideration. *Saunders* v. *Shaw* .. 317

(b) *Order of R mand Conclusive.*

19. Order of District Court remanding case to state court *held* conclusive, Jud. Code, § 28. *Yankaus* v. *Feltenstein* ... 127

20. Conduct of plaintiffs in respect of proceedings in state courts and District Court *held* not to have estopped them from contesting jurisdiction of latter after attempted removal, or to have waived their right to conclusive effect of order of remand. *Id.*

IV. **Jurisdiction of District Courts.**

As to personal jurisdiction. See I, *supra.*

In admiralty and maritime cases. See **Admiralty.**

To enforce state laws against discriminatory taxes. See II, (2), *supra.*

(1) *Federal Question.* See VII, *infra.*

1. Action under R. S., § 5239, against national bank director for damages sustained by individual in consequence of violations of National Bank Act, necessarily involves federal question. *Chesbrough* v. *Woodworth* 72

2. Case arises under laws of United States where appropriate statement of plaintiff's cause of action, unaided by anticipation or avoidance of defenses, discloses that it really and substantially involves controversy respecting the validity, construction or effect of a law of Congress. *Hopkins* v. *Walker* 486

3. In suit to remove cloud from plaintiff's title, facts showing that title and existence and invalidity of instrument or

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record sought to be eliminated as a cloud are essential parts of cause of action and must be alleged in bill. *Id.*

4. Rule is same in respect of suits to remove clouds under § 6115, Montana Codes, 1907, as distinguished from suits to quiet title under § 6870. *Id.*

See **Public Lands**, 18–19.

(2) *Removal and Remand.* See III, (5), 12, *supra.*

5. Conclusive effect of order of remand. *Yankaus* v. *Feltenstein* 127

6. Case arising under Federal Employers' Liability Act cannot be removed to District Court upon ground of diversity of citizenship. *Southern Ry.* v. *Puckett* 571

(3) *Parties and Diverse Citizenship.* See IV, (2), 6, *supra.*

7. Where judgment is held by trustee for benefit of all bondholders secured by his mortgage, he is necessary party to suit by majority of them to enforce judgment; and if he be made defendant without adequate cause, he must be realigned as plaintiff. *Hamer* v. *New York Rys. Co.* 266

(4) *Ancillary Suits.*

8. Where District Court's decree of foreclosure and sale makes no provision concerning money judgment outstanding against defendant, which District Court did not consider because defendant's liability under it was not absolute when claims were presented in the foreclosure proceedings, subsequent suit in that court to enforce the judgment as lien on the property foreclosed is not ancillary to the foreclosure proceedings. *Hamer* v. *New York Rys. Co.* 266

9. Reference made without authority by District Court after dismissal of bill pursuant to mandate of this court, for purpose of determining claims under an injunction bond, *held* not to afford basis for ancillary suit by railroad defendant to enjoin persons from asserting in state courts their right to regain excess rates collected by such company under protection of the injunction. *St. Louis, I. Mt. & So. Ry.* v. *McKnight* 368

(5) *After Mandate Dismissing Bill.*

10. As to absence of jurisdiction in District Court to determine claims under an injunction bond after reversal of

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its decree by this court and issuance of this court's mandate to dismiss bill. *Id.*

(6) *Enjoining Interstate Commerce Commission.*

11. Order of Commission assigning cause for hearing upon issue of reparation not an order in sense of § 1 of Commerce Court Act, and District Court has no jurisdiction to enjoin hearing. *United States* v. *Illinois Cent. R. R.* 82

V. **Jurisdiction of State Courts.**

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(1) *Duty to Hear.*

1. Violation of due process for state supreme court to reverse case and render judgment absolute against party who succeeded in trial court, upon a proposition of fact ruled to be immaterial at trial and concerning which he had therefore no opportunity to introduce evidence. *Saunders* v. *Shaw*..... 317

(2) *Personal Injuries in Federal Work on Federal Reservation.*

2. State court has jurisdiction of subject-matter of an action for personal injuries incurred in work under a federal contract performed on federal reservation, such action being transitory. *Ohio River Contract Co.* v. *Gordon*..... 68

(3) *Quo Warranto to National Bank.*

3. Under § 11 (k), Act of Dec. 23, 1913, establishing Federal Reserve Board, supreme court of State may entertain proceedings in nature of *quo warranto*, at instance of its attorney general, to test whether conduct of bank in acting as trustee, etc., is " in contravention of state or local law." *First Natl. Bank* v. *Union Trust Co.*..... 416

(4) *As to Orders of Interstate Commerce Commission.*

4. Suit by State to enjoin carriers from advancing intrastate rates without first complying with state regulations is not a suit, beyond the jurisdiction of state court, " to enforce, set aside, annul, or suspend in whole or in part " an order of Interstate Commerce Commission, where order covers the proposed advances in part only, is not mentioned in bill and is not relied on in answer as justifying them all. *American Express Co.* v. *Caldwell*..... 617

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1. Enjoining Secretary of the Interior. *Santa Fe Pac. R. R.* v. *Lane*. 492

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2. In absence of authoritative decision of supreme court of State to contrary, contemporaneous construction of state constitution by act of the legislature, which is reasonable in itself and designed to accomplish obvious purpose of constitutional provision in question, should be followed by this court. *Van Dyke* v. *Geary* 39

3. Persuasive force of construction given a state enactment by state attorneys general in its administration. *Louisiana* v. *Jack* 397

4. What documentary matter should be filed with declaration in action in state court upon sister state judgment, a local question. *Chicago Life Ins. Co.* v. *Cherry* 25

5. In controversy in state courts over right of one corporation to condemn lands of another, existence of petitioning corporation, right to condemn, inability to agree on compensation and necessity for appropriation are matters depending on local law. *Cuyahoga Power Co.* v. *Northern Realty Co*. 300

As to force given to construction of act of Congress by Land Department and adoption of it by Congress through later enactment. *Santa Fe Pac. R. R.* v. *Lane* 492
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2. Binding force of conclusions of state assessing board when free from fraud and based on fair hearing. See **Taxation.**

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1. Mandamus will not lie to compel Commissioner of Patents to declare interference where applicant for patent admits his invention was made subsequent to date upon which another application for same invention was filed, and

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concedes priority and utility of the other's invention by adopting his claims in an amended application. *Ewing* v. *Fowler Car Co* 1

2. Priority of invention is determinable by suit in equity between the parties, not by mandamus against Commissioner in attempt to control administrative discretion conferred upon him by R. S., § 4904. *Id.*

3. Mandamus lies where duty sought to be enforced is plain and nondiscretionary and situation exigent. *Lane* v. *Hoglund.* 174

4. Does not lie to control District Court upon jurisdictional question—as to its duty to remand a case removed from a court of another State—when other modes of reviewing its decision (writ of error or certiorari) are provided by statute; and inconvenience and expense to the party do not alter rule. *Ex parte Park Sq. Automobile Station.* 412

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1. Right of stockholder to sue on behalf of corporation, when it refuses to do so, for injury due to violations of Sherman Act; remedy in equity. May this court substitute receivers appointed after suit began? *United Copper Co.* v. *Amalgamated Copper Co.* 261

2. Where defendant in one case was a corporation manufacturing articles complained of in patent infringement suit, and in another a second corporation which was controlled by and acted as selling agent of the first, and subject-matter

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and relief prayed were same in both suits, *held* that there was such privity between defendants that judgment rendered by Court of Appeals in suit against first corporation was *res judicata* as to the other suit, then pending before Court of Appeals for another circuit. *Hart Steel Co.* v. *Railroad Supply Co* 294

3. Generally speaking, authority to make new parties, especially after decree, rests in sound discretion of trial court, which, except for abuse, will not be reviewed either directly, or indirectly by mandamus. *Louisiana* v. *Jack* 397

4. To review judgment by appeal or error, one must be party or privy, and Art. 571, La. Code of Practice, apparently authorizing third persons who allege that they are aggrieved by judgment to appeal from it, can have no application to equity suit in federal courts. *Id.*

5. As to lack of authority of court to introduce new claimants with new causes of action in a libel *in personam*, without service on defendant as to new libellants, and what amounts to proper objection to jurisdiction in such cases. See *Ex parte Indiana Transp. Co.* 456

6. Where majority bondholders sue to enforce judgment, obtained on bondholders' behalf by trustee under the mortgage, trustee is necessary party and must be aligned as plaintiff if not shown to be antagonistic. *Hamer* v. *New York Rys. Co.* 266

PASSENGERS:

1. Caretaker of livestock, traveling on a free or drover's pass, is a passenger for hire. *Norfolk Southern R. R.* v. *Chatman* 276

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PATENTS FOR INVENTIONS:

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1. When applicant for patent admits that invention was made subsequent to date on which another application for same invention was filed, and by amendment of application

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adopts prior applicant's claims, he concedes priority of other invention, its utility and sufficiency of claims. *Ewing* v. *Fowler Car Co* 1

2. In such case Commissioner of Patents cannot be required by mandamus to declare interference. *Id.*

3. Under R. S., § 4904, it is his duty to declare interference only when, in exercise of his judgment upon facts presented, he is of opinion that senior application will be interfered with by junior one. *Id.*

4. Judicial remedy for determining priority of invention is by suit in equity. *Id.*

5. Patents for improvements in railroad tie-plates examined and *held* invalid for want of novelty and invention. *Railroad Supply Co.* v. *Elyria Iron Co.* 285
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6. Improvements involved in these cases *held* to be no more than product of ordinary mechanical skill. *Id.*

7. Mere carrying forward of the original thought, a change only in form, proportions or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such invention as will sustain patent. *Id.*

8. Patents claiming merely improvements in devices already well exploited in prior art must be limited strictly to forms described in claims. *Id.*

9. Patentee presumed to have had all prior patents before him when he applied for patent. *Id.*

PERSONAL INJURY. See **Employers' Liability Act; Safety Appliance Act; Workmen's Compensation Laws.**

Jurisdiction of state court where injury sustained on federal reservation while plaintiff was working under contract with United States. *Ohio River Contract Co.* v. *Gordon* 68

Liability of carrier for personal injury to caretaker of live-stock. *Norfolk Southern R. R.* v. *Chatman* 276

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As to mode of attacking process. *Id.*, I.

1. What documentary matter should be filed with declaration in action in state court upon sister state judgment is a local question. *Chicago Life Ins. Co.* v. *Cherry* 25

2. A decree against plaintiff in patent infringement suit was affirmed by Court of Appeals while its appeal from a like decree in another suit involving the same controversy was pending unheard before Court of Appeals of another circuit. *Held* that motion for affirmance, seasonably made to latter court and supported by certified copies of record, etc., in the other case, establishing legal identity of the subject-matter and privity of parties, was a proper mode of interposing defense of *res judicata*. *Hart Steel Co.* v. *Railroad Supply Co.*. 294

PRESUMPTIONS. See **Evidence,** 3; **Taxation,** 8.

1. In trial of action upon contract for interstate transportation, plaintiff is entitled to presumption that carrier filed with Interstate Commerce Commission such rates as were requisite to sustain contract, pleadings being silent on the subject. *Nevada-California-Oregon Ry.* v. *Burrus* 103

2. Enrollments made by Dawes Commission and approved by Secretary of Interior, presumptively correct. *United States* v. *Wildcat* 111

3. In making enrollments Dawes Commission was authorized to presume that person enrolled as member on Creek tribal rolls of 1895 was living on April 1, 1899, in absence of proof of his death before that date or of circumstances indicating that he had died before Commission acted. *Id.*

4. Patentee presumed to have had all prior patents before him when he applied for patent. *Railroad Supply Co.* v. *Elyria Iron Co.* 285

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5. Strong presumption in favor of rates fixed by an experienced administrative body after a full hearing. *Darnell* v. *Edwards* 564

6. A state law, otherwise invalid, cannot be made effective through a statutory presumption that its provisions are accepted by interstate railroad carrier. *Erie R. R.* v. *Winfield* 170

7. Recorded certificates of mining location *prima facie* evidence of title in Montana. *Hopkins* v. *Walker* 486

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1. Rehearing. New contentions made too late; discretion of trial court. *Illinois Cent. R. R.* v. *Greene* 555

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PUBLIC LANDS. See **Damages**, 5; **Judgments**, 9.

As to powers of Tensas Basin Levee Board, Louisiana. See **Statutes**, II, 7–8.

(1) *Railroad Lands and Surveys.*

1. Act of Mar. 2, 1899, in providing for conveyance to United States by Northern Pacific R. R. Co. of lands within a national park in exchange for public lands to be selected elsewhere, *construed* as extending to that company's successor in title though no successor is named. *West* v. *Rutledge Timber Co.* 90

2. The company, recognized as such successor by Land Department both in making conveyance of the base lands and in enjoyment of right of lieu selection, is not to be denied that right upon the hypothesis that the Northern Pacific R. R. Co. had ceased to exist before date of act. *Id.*

3. Report by deputy surveyor that public lands were suit-

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able for grazing, if cleared, but more valuable for timber at the time, accepted and acted upon by Land Department as a description of lands as non-mineral, *held* classification as non-mineral at time of actual government survey for purposes of lieu selection, under Act of 1899, *supra*. *Id.*

4. Whether preliminary lieu selection of unsurveyed public land designates the tract " with a reasonable degree of certainty," under the Act of 1899, question of fact to be determined by circumstances of each case. Description in terms of future survey may be sufficient, if land can be located therefrom with aid of adjoining survey already made. *Id.*

5. In view of power reserved to amend, repeal, etc., act granting land to Atlantic & Pacific R. R. Co., and of grantee's failure to comply with conditions, Congress was empowered to lay upon it cost of surveying lands granted and require payment as condition to issuance of patents, as done by Act of July 31, 1876. *Santa Fe Pac. R. R.* v. *Lane* 492

6. Land Department's construction that Act of 1876 required grantee to pay only its proportional share for surveying townships was reasonable and impliedly approved and incorporated by Congress in Act of June 25, 1910, which changes grantee's obligation only by advancing time of payment. *Id.*

See **Equity**, 14–16.

(2) *National Forests and Railroad Rights of Way.*

7. Power of the President to establish forest reservations includes power to make temporary withdrawals. *Chicago, Mil. & St. P. Ry.* v. *United States*..... 351

8. Act of Secretary of Interior in directing a withdrawal is in law act of President. *Id.*

9. Forest lands, temporarily or permanently reserved, are " specially reserved from sale " and set apart for a public purpose, within the meaning of § 5 of the general railroad right of way act of Mar. 3, 1875, and not subject to its provisions. *Id.*

10. Under Act of Mar. 3, 1899, such right of way over temporary or permanent forest reservations may be obtained only after Secretary of Interior finds it consistent with public interest, and he, in exercise of broad discretion, may

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condition approval on prior filing of stipulation binding applicant, respecting use of privilege, prevention of fire, compensation for timber cut, etc. *Id.*

11. Where, for purpose of securing right of way under Act of 1899, with immediate permission to proceed with construction work, railroad company's agent agreed in writing, subject to ratification by company, that it would later execute a stipulation touching its rights and conduct in forest reservation, *held* that the company's action in proceeding with work with knowledge of manner in which permission had been obtained, and its acceptance of benefits, amounted to implied ratification of agent's agreement, binding company either to execute the required stipulation or to discontinue construction and operation of railroad within reservation. *Id.*

See **Damages, 5; Judgments, 9.**

(3) *Homestead Entries and Patents.*

12. Under § 7 of Act of Mar. 3, 1891, it is duty of Secretary of Interior to issue patent upon homestead entry when no contest or protest proceeding has been initiated and no order has been made, in his department, for purpose of challenging validity of entry, within 2 years from issuance of final receiver's receipt. *Lane* v. *Hoglund*..... 174

See **Mandamus, 3.**

13. Adverse report by deputy supervisor, challenging homestead entry within national forest for insufficiency of residence and cultivation, but merely filed in Land Office and not acted upon until after 2 year period had expired, is not a " pending contest or protest " within § 7 of the act. *Id.*

14. Preliminary homestead entry, made under agreement between applicant and his mother that he would make entry, pay rent while entry was being completed and deed land to her upon issuance of patent, is void under § 24, Act of May 2, 1890, and confers no rights upon applicant or his heirs. *Doepel* v. *Jones*..... 305

15. When Land Department provisionally cancels such an entry during entryman's lifetime, and, after his death, his widow has relinquished her rights therein and made new entry in her own right, the original entry affords no basis for entryman's heirs to contest her entry before Department on

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ground that her marriage was void, if they do not deny the illegal agreement or seek to have the original entry reinstated on its merits. *Id.*

16. The first entry, being a nullity, could beget no equity entitling heirs to affix a trust to the land when patented to the widow. *Id.*

(4) *Mexican Grant; Good Faith; Color of Title; "Fence Act."*

17. Where lands, allotted as part of a Mexican Community grant and for many years occupied, improved and claimed in good faith under color of such allotments and mesne conveyances, were excluded from grant by decree of Court of Private Land Claims determining its boundaries, continuance of such occupancy, with knowledge of decree, was not a trespass forbidden by the Act of Feb. 25, 1885, to prevent unlawful occupancy of public lands, but came within the exception thereof as an occupancy under claim and color of title made or acquired in good faith. *Smith* v. *Third Natl. Exchange Bank* 184

(5) *Mining Land; Certificates of Location.*

18. Substantial controversy respecting construction and effect of mining laws presented when plaintiff sets up title under placer patent, alleging *locus in quo* not known to contain lodes when patent was applied for and was so adjudged against strangers to suit who adversed application, and in which the defendants, notwithstanding such judgments, claim same ground under other lode locations made after patent and embracing claims 600 feet wide, while plaintiff contends 25 feet would be the maximum if ground remained subject to lode location. *Hopkins* v. *Walker*. 486

19. Recorded certificates of location are first muniment of locator's paper title and, when verified, are, in Montana, *prima facie* evidence of all facts properly recited in them; and so, when apparently valid but actually, under mining laws, invalid, they may becloud title injuriously. *Id.*

See **Equity**, 17–19.

(6) *As to Tenure and Fees of Surveyor General of Louisiana.*

20. Office of surveyor general in Louisiana abolished by Act of Mar. 4, 1909, 35 Stat. 945. *Lewis* v. *United States*... 134

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21. In view of R. S., § 1765, allowing federal officers only such additional compensation as is by law authorized and explicitly appropriated, surveyor general of Louisiana was not entitled to fees for furnishing copies of plats and transcripts of records, which the Act of Mar. 3, 1831, required him to collect but did not undertake to dispose of. *Id.*

PUBLIC OFFICERS. See **Mandamus; Public Lands,** 8, 20, 21.

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Lieu selections. See **Public Lands,** 1–5.

Duty to pay cost of surveying. *Id.*, 5–6.

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Transportation rates. See **Carriers; Interstate Commerce Acts.**

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Motion for affirmance, seasonably made to Circuit Court of Appeals, supported by certified copies of record in case de-

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cided in another circuit, establishing legal identity of subject-matter and privity of parties, *held* a proper means of interposing defense of res judicata. *Hart Steel Co.* v. *Railroad Supply Co.* 294

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2. A construction of a Louisiana statute agreeing with practical, contemporaneous construction placed upon it by two state attorneys general whose duties it affected, *held* persuasive evidence of its meaning. *Louisiana* v. *Jack*..... 397

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3. Committee reports referred to as corroborating construction of Act of June 25, 1910, as to payment by railroads of cost of surveying granted lands. *Santa Fe Pac. R. R.* v. *Lane* ... 492

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3. *Section 1765, R. S.* Surveyor General of Louisiana not entitled to fees for furnishing copies of plats and transcripts of records, which Act of Mar. 3, 1831, required him to collect but did not undertake to dispose of. *Id.*

4. *Arizona Public Service Corporation Act. R. S. 1913, Tit. 9, c. XI.* Permits Corporation Commission to regulate privately owned water systems and not in conflict with state constitution, as applied to individuals as well as corporations. *Van Dyke* v. *Geary* ... 39

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6. *Kentucky Statutes and Constitution,* concerning taxation of corporate franchises, construed and applied. *Greene* v. *Louis. & Interurban R. R.* ... 499
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7. *Louisiana.* Decision in *State* v. *Tensas Delta Land Co.,* 126 La. 59, that State not entitled to intervene in suit brought by Tensas Basin Levee Board for recovery of lands sold by latter, *held* conclusive on this court, in absence of later state decision or statute. *Louisiana* v. *Jack* ... 397

8. *Id. Act of Aug. 19, 1910.* Did not divest Levee Board of authority over suits to recover land and confer it on attor-

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ney general, but merely authorized latter, at request of governor, to represent board in litigation. *Id.*

9. *Id. Art. 571, La. Code of Practice,* authorizing third parties who allege they are aggrieved by judgment to appeal from it, inapplicable to equity suit in federal courts. *Id.*

10. *Missouri "long and short haul" regulation. Held* consistent with Federal Constitution and Interstate Commerce Acts. *Missouri Pac. Ry.* v. *McGrew Coal Co* 191

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19. *Washington Public Utilities Act.* State constitution permits contract provisions in franchises conferred by municipalities to be set aside by legislature; and act therefore supersedes conflicting ordinances or charter provisions of city. *Puget Sound Traction Co.* v. *Reynolds*..... 574

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1. Principles governing right of stockholder to sue on behalf of corporation with special reference to cause of action based on Sherman Act. See *United Copper Co.* v. *Amalgamated Copper Co.*..... 261

2. Complaint in stockholders' suit that corporate property was sold for inadequate price by oppressive majority. See *Wall* v. *Parrot Silver Co*..... 407

STREET RAILROADS. See **Constitutional Law,** X, 8, 15, 18; **Franchise.**

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SUBSTITUTION:

In this court. See **Jurisdiction,** III, (2).

SURETIES:

Damages under injunction bonds. See **Equity,** 3–5.

1. Purpose of Act of Feb. 24, 1905, is to provide security for claims of persons who furnish labor or material on public works of United States; the act, and bonds under it, are to be construed liberally to effectuate this purpose; and release of sureties through mere technicalities not to be encouraged. *Illinois Surety Co.* v. *John Davis Co*..... 376

2. Arrangement of contractor in nature of assignment to a corporation, but not technically such, not changing actual management of work or prejudicing surety, does not discharge latter from past or future liability. *Id.*

3. Questions of liability to pay interest under bond to secure payment for labor and materials, furnished under construction contract with United States, are determinable by law

SURETIES—*Continued.* PAGE

of State in which contract and bond were made and to be performed. *Id.*

4. Under Illinois law liability of surety on bond is extended beyond penalty by way of interest from date when liability on bond accrued. *Id.*

5. Where claims are all liquidated and amounts not disputed, but only liability under bond, surety, which has not elected to pay into court, is chargeable with interest, from commencement of suit, upon aggregate of claims allowed as reduced to penal amount of bond. *Id.*

6. Acts of creditors upon which surety neither acted nor relied, which did not affect it and are not inconsistent with resort to security of bond, afford no basis for equitable estoppel in favor of surety. *Id.*

7. Renting of plant of cars, track and equipment used in construction work for United States is furnishing of materials within Act of Feb. 24, 1905; and rent reserved, together with loading and freight expenses incident to bringing the plant to and from place of use, are liabilities covered by contractor's bond. *Id.*

SURVEYS. See **Public Lands**, 3–6; 20–21.

TAXATION. See **Constitutional Law**, X, (6); **Corporation Tax Act; Evidence**, 3.

1. Where permanent injunction granted against collection of drainage tax on ground that plaintiff's lands cannot be benefited by improvements, defendant cannot, under Fourteenth Amendment, be denied opportunity to introduce evidence on question of benefit. *Saunders* v. *Shaw* 317

2. Nonresident cannot be subjected to state occupation or privilege tax when his only business in State is obtaining orders for goods shipped from without and delivering them to his customers within the State, goods gaining no local status. *Western Oil Refg. Co.* v. *Lipscomb*. 346
As to what amounts to continuous interstate transportation. *Id.*

3. For constructions of constitutional and statutory provisions of Kentucky governing assessment and taxation of

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railroad " capital stock " (tangible and intangible property), and " franchises " (intangible property), within the State, and mode of making deductions and allowances and securing the equality of taxation required by the state constitution. See *Greene* v. *Louis. & Interurban R. R.* 499
Louis. & Nash. R. R. v. *Greene* 522
Illinois Cent. R. R. v. *Greene* 555

4. The courts of the United States, their jurisdiction being properly invoked, may afford relief against discriminatory state taxation, contravening state constitution, when discrimination results from divergent action of different assessing boards whose assessments are not subject to any process of equalization established by State, and where diverse results are outcome, not of express agreement, but of intentional, systematic and persistent undervaluation by one body of officials, presumably known to and ignored by the other body, so that, in effect, the two bodies act in concert. *Id.*

See **Jurisdiction,** II, (2).

5. Principal if not sole reason for adopting " fair cash value " as the standard for valuations is as convenient means of securing equal taxation, and, since, when the standard is systematically departed from in respect of certain classes of property, its observance in respect of others (tax rate being uniform) would serve to frustrate its very object, it follows that, in such cases, duty to assess at full value is not supreme but yields to duty to avoid discrimination. *Id.*

6. Findings of an assessing board, such as the Kentucky Board of Valuation and Assessment, made after notice and hearing, are *quasi*-judicial, and unless affected by fraud or by adoption of erroneous principle bind the courts. *Id.*

7. Party attacking tax assessment not to be held in default for omission to introduce evidence on matters which were not deemed material by taxing authority or in litigation until found so by judge in his decision. *Louis. & Nash. R. R.* v. *Greene* 522

8. It being shown that valuation made by taxing board was result of following method substantially erroneous because not in accordance with governing statute, it is error for

TAXATION—*Continued.* PAGE

court to presume that like valuation would have been reached by following correct method. *Id.*

9. Although fact that property is part of system and has its uses only in connection with other parts of system may be considered by State in taxing that portion of system which is within her borders, yet idea of organic unity must not be made means of unlawfully taxing property without State belonging to persons domiciled elsewhere. *Illinois Cent. R. R.* v. *Greene* 555

10. It being contended that in valuing upon a mileage basis that portion of plaintiff's railroad system which was taxable in Kentucky Board did not make due allowance for excess value per mile due to costly terminals in other States, *held* that, in the absence of contrary proof, Board must be presumed to have made such allowance. *Id.*

TENDER. See **Equity,** 14–16.

TIME:

An order of Secretary of Interior made on March 26th, "to be effective thirty days from date," becomes effective on the thirtieth day after its date, i. e., on April 25th. *Lanham* v. *McKeel* 582

TRADE-MARKS. See **Trade Secrets.**

TRADE SECRETS:

1. Extent to which former employee, in suit to protect trade secrets, may be enjoined from disclosing them to experts or other witnesses in making his defense. *Du Pont Powder Co.* v. *Masland* 100

2. Nature of property in trade-marks and trade secrets. *Id.*

TRESPASS:

On public lands. See **Public Lands,** (4).

TRUSTEE:

Judgment secured by, merges guaranty of mortgage bonds. See **Judgments,** 7, 8.

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Jurisdiction of state court over action where personal injury was sustained on federal reservation while plaintiff engaged on work which defendant was performing under contract with the United States. See **Jurisdiction,** V, (2).

Claims for labor and materials under bonds accompanying federal construction contracts. See **Sureties.**

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WAR:

Effect on liability of carrier under contract of ocean carriage. See **Admiralty.**

WATER RATES:

1. Regulation by the Arizona Corporation Commission of privately owned water systems, as provided in Public Service Corporation Act, not prohibited by state constitution. *Van Dyke* v. *Geary* 39

2. One who uses his property in supplying large community with water thereby clothes it with public interest and subjects business to public regulation. *Id.*

3. Where purpose of system is to supply water to residents of a particular townsite, though not to public generally, fact that lots of townsite were originally purchased from owner of water system with oral understanding that water could be secured from that system for use on lots has no tendency to support claim that system supplies particular individuals only in pursuance of private contracts and is hence devoted exclusively to private use. *Id.*

4. Fact that service is limited to part of town does not prevent water system from being public utility. *Id.*

5. Water rates fixed by state commission upon basis of net annual return of 10% of value of property employed, allowing annual depreciation of 3½%, *held* not confiscatory, valuation and estimate of operating expenses being made by commission and concurred in by District Court after careful inquiry by both, evidence presented to this court being conflicting, and District Court having protected complainant by permitting renewal of application for injunction after one year if the rates appeared too low. *Id.*

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Under Nebraska laws, corporate owners of irrigation canals are required to build bridges to afford access between abutting lands intersected by canals. *Farmers Irrig. Dist.* v. *O'Shea*. 325

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2. That accidents arising in maritime employments cannot be remedied under workmen's compensation laws but fall within admiralty and maritime jurisdiction. See *Southern Pacific Co.* v. *Jensen* 205

Clyde S. S. Co. v. *Walker*. 255

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